

**THE NEXUS BETWEEN TWO-THIRDS GENDER RULE AND EQUALITY OF
COUNTIES: A CASE STUDY OF KENYA'S SENATE**



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DECLARATION

I, **EBOSO CHRISTABEL MIDEVA**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualification.

Signature..... Date.....

EBOSO CHRISTABEL MIDEVA.

This research project paper has been presented for examination with my authority as the university supervisor.

DR. NKATHA KABIRA

Signature..... Date.....

DEDICATION

To the Parliament and the People of Kenya:

Substance is permanent but form is evanescent

The law our servant and needn't be subservient

May you lay down the law and avoid the mumble

The fumble befuddle 'cause we need no muddle

To my late mother Christine, who always taught me courage:

One of the many things I took for my age

Always inspiring encouraging and never giving up

May your legacy overflow as one receiving from the tap.

To the man of my youth, Katiwa Titus,

You made it look better than I imagined all the while,

I'll do you but this one favor of letting you be,

For I have known that love is a part of the walk.

To all that made the Exodus fruitful:

Never did a lone man bring back spoils of victory from a strong enemy, however valiant he was,

Every step taken towards the desired objective, you were always there,

Together we pointed towards Canaan at the lands yonder; I pay my unreserved tribute to you.

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ABBREVIATIONS AND ACRONYMS

ACPHR	African Charter on Human and People's Rights
AG	Attorney General
CEDAW	The International Convention on the Elimination of All Forms of Discrimination Against Women
CIC	Commission for the Implementation of the Constitution
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
EA	East Africa
FIDA	Federation of Women Lawyers, Kenya
IBEA	Imperial British East Africa
ICCPR	International Covenant on Civil and Political Rights
IPPG	Inter-Party Parliamentary Group
LegCo	Legislative Council of Kenya
LNC	Local Native Councils
MCA	Member of County Assembly
MDGs	Millennium Development Goals
MP	Member of Parliament
NARC	National Alliance Rainbow Coalition
NGEC	The National Gender and Equality Commission
SC	Supreme Court
UDHR	Universal Declaration on Human Rights
UN	United Nations
KLR	Kenya Law Reports

DEFINITION OF TERMS

- Affirmative Action** Policy or legislative measures that correct previous and existing gender imbalances in different facets of public life or administration.
- Discrimination** Unequal or biased treatment or exclusion from representation and participation in elective or appointive bodies on the basis of sex, gender, age, nationality, among other ground. This study places emphasis on gender as a basis for discrimination.
- Dualism:** A legal system where the country obtains parliamentary approval and domesticates international treaties through legislation before the adoption of international law into domestic law.
- Equality of counties** The attribute created by devolution where counties have equal rights under devolved governance. As a result, each county forms a single voting bloc when senators are voting on devolution and matters pertaining to counties.
- Gender Parity** Equal and proportional representation of women and men.
- Gender Quotas** Instruments designed to promote gender-balanced representation through allocation of a defined percentage or number of seats that are to be filled by women.
- Gendered** Preference for men to women. Gender biases that are premised on the view that men are superior to women leading to gendered laws where institutions such as Parliament largely use men's experiences to make laws for everyone.
- Head of delegation** In this study, it refers to an institutional mechanism where an elected senator votes on behalf of other senators from his or her county in matters pertaining to county legislations and devolution.

Monism A country or legal system where international law or treaties are part of the domestic law and are applicable in judicial decision.

Two-thirds gender principle: A constitutional quota designed to correct gender imbalances in representation and participation by ensuring that not more than two-thirds of the members of an elective or appointive body are of the same gender.

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ABSTRACT

The Constitution of Kenya 2010 provides for the two-thirds gender principle but fails to clarify the implementation of the same in the Senate leading to potential compatibility issues with the constitutionalised doctrine of equality of counties. This study uses a grounded approach to examine the scope of implementation of the two-thirds gender principle in the Senate. Chapters one and two of this project introduce this study and traces the history of the two-thirds gender rule respectively. In analysing the nexus between the two-thirds gender principle and equality of counties, particular attention is paid to Senate practices as seen in the standing orders that guide voting. Under Senate's Standing Orders, nominated female members cannot vote on county matters. At the same time, the head of delegation concept where a county delegation comprises of both elected and nominated senators from a county limits the substantive participation of women in the Senate. The nominated senators, of whom the majority is women cannot, therefore, vote based on the notion that their vote is with the head of the county delegation. One of the main findings is that current Senate practices as seen in the Standing orders on house voting have negated the realisation and implementation of the two-thirds gender principle. The integrated approach to the nexus between two-thirds gender principle and equality of counties relies on a feminist framework to overcome the procedural issues that affect the realisation and operation of the two-thirds gender principle in the Senate of Kenya.

CHAPTER ONE

INTRODUCTION

1.0 Background

2018 marks eight years after the Republic of Kenya promulgated a new constitutional dispensation that ushered in a democratic era characterized by equitable gender representation in the electoral space. In 2013 and 2017, Kenyans went into the polls to elect leaders under the devolved system of governance which promised a higher proportion of gender representation.¹ While the 11th Parliament did not feature an elected female Senator,² the 12th Parliament features a number of elected female senators.³ Nonetheless, the current number of female senators in the Senate does not meet the two-thirds gender principle.⁴

By providing for the gender principle⁵; Article 27 (8) proceeds on the rebuttable presumption that all genders are subject to political underrepresentation. However, sequential analysis of Kenya's political representation demonstrates that women have been largely underrepresented in the competitive electoral processes as well as in elective bodies.⁶ As a result, the constitutional provision for positive discrimination through nominations and women representative seats is a measure to increase female political participation.

¹ Douglas Kivoi and Steven Nduvi, 'Kenya's election 2017: Unique concerns for a unique country' (2017). Available at <https://www.brookings.edu/blog/africa-in-focus/2017/08/04/kenyas-election-2017-unique-concerns-for-a-unique-country/>

² Wanjiku Kabira & Kameri Mbote, 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise' In C Odote & L Musumba, *Balancing the Scales of Electoral Justice; Resolving Disputes from the 2013 Election in Kenya & Emerging Jurisprudence*, Rome: International Law Development Organization, 2016, 179.

³ NDI and Federation of Women Lawyers - Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*.

⁴ Under Article 98(1) of the Constitution of Kenya, the Senate ought to have 68 senators. Although more than two-third of the membership should not be of similar gender, the Senate only has nineteen women of whom only three are elected senators.

⁵ Government of Kenya, *Constitution of Kenya 2010*, Government Printer.

⁶ Maria Nzomo, 'Women in Kenya's Politics Leadership: The Struggle for Participation in Governance through Affirmative Action' Heinrich Boll Stiftung, 2011, 16.

The structural exclusion of women from political leadership is traceable to the colonial epoch. The rise of women such as Wangu wa Makeri and Mekatilili wa Menza marked the increase of female leadership, albeit, in lesser roles.⁷ The absence of women proceeded up to the times leading to the grant of independence as seen in the LegCo.⁸ Also, women were visibly missing in the Lancaster talks.⁹

Unlike various constitutional dispensations, the Constitution of Kenya 2010 entrenches equitable representation of different demographic units.¹⁰ By providing for gender quotas, the Constitution departs from its predecessor constitutions in that the gender quotas should be construed as provisions for compulsory women's representation.¹¹ The requirement for equitable gender representation cements Kenya's move to meet its international obligations under various conventions.¹² The CEDAW Convention requires state parties to outlaw discrimination against women. Additionally, it allows states to adopt special measures to correct underrepresentation and promote gender equality.¹³ The obligation on states to adopt remedial measures to promote gender equality forms the rationale for the two-thirds gender rule (herein gender principle or gender rule) in Kenya.¹⁴ Therefore, the enshrinement of gender quotas in the Constitution supports inclusive politics through gender-conscious processes.

⁷ Mary Wanyoike, Makers of Kenyan history, *Wangu wa Makeri* p31
<https://books.google.co.ke/books?id=FiYkjrKOsDAC&pg=PA23&lpg=PA23&dq=wangu+wa+makeri+history&source=bl&ots=h-BQsYo-f8&sig=5goODj6XBBwjg8Nt2Fzvt9CrPs&hl=en&sa=X&redir_esc=y#v=onepage&q=wangu%20wa%20makeri%20history&f=false> last accessed on 22 July 2016

⁸ Charles Hornsby, *Kenya: A History Since Independence*. (I.B. Tauris & Co. Ltd: 2012)

⁹ Ibid.

¹⁰ These groups include youths, women, and people living with disabilities.

¹¹ Constitution of Kenya 2010, Article 27(8)

¹² *The Convention on the Political Rights of Women*, New York: United Nations, 1953

¹³ The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), enacted in 1979

¹⁴ Article 27 (8), Constitution of Kenya.

1.1 Problem Statement

Although on the face of it, the Kenyan Senate appears to have complied with the 2/3 gender rule, nevertheless, in reality, it has failed to recognize the voting rights of nominated senators, the bulk of whom are women. The nominated senators have little or no say, essentially defeating the role of women in key decision-making process in Kenya. This study will address the implementation of gender quotas from a Kenyan perspective and suggest apt approaches to promoting gender equity in the face of equality of counties.

1.2 Research Questions

The specific research questions are:

1. What is the history of women representation in Kenya?
2. What is the adequacy of Kenya's regulatory framework on the actualisation of the two-thirds gender rule in the Senate?
3. What issues need to be addressed to achieve gender parity in the Senate in the face of the equality of counties?

1.3 The Study Objectives

This study interrogates the place of women in Kenya's legal system. The specific objectives are:

1. To highlight the historical timeline of the place of women in Kenya's legal system
2. To study the extent to which the Kenyan Senate has fulfilled the third gender rule requirement pertaining to the representation of women.
3. To study and address issues associated with the relationship between the equality of counties and the equitable representation of women in the Senate.

1.4 Hypothesis

This study flows on the premise that there is an inadequate legislative framework to operationalise the gender rule in Kenya's Senate without affecting the equality of the counties.

As per the Senate's Standing Orders,¹⁵ decision-making process on matters affecting counties is a preserve of the 47 elected senators and as such;

- a. All senators who were registered as voters in a particular county collectively constitute a single delegation.
- b. The County delegation comprises of both elected & nominated senators with the elected senators being the head of the delegation.
- c. Each county has a single vote which is to be cast on behalf of the county by the head of the delegation.
- d. The head of delegation determines the decision.
- e. The elected senator is the head of the delegation.
- f. Nominated senators, who majority are women, cannot vote because the vote is exercised by the county delegation's head.

Even where the head of the delegation is absent, the power to appoint another head of delegation to represent the absent elected senator is a preserve of the elected senator. This affects the effective political participation of female members. Thus, the following hypothesis is under test:

If the two-thirds gender rule is to be implemented in the Senate, the implementation must be such that it balances constitutional gender representation quotas in the Senate and constitutional principle of equality of counties.

¹⁵ Section 78 of The Senate standing Orders *as adopted by the Senate on 14th June, 2017 pursuant to Article 124 of the Constitution and Standing Order 248 and 249 of the Senate Standing Orders and amended on 14th December, 2017 and 9th August, 2018.*

1.5 Theoretical Framework

A theoretical framework is critical in the investigation of concepts and analysis of research findings. This research project embraces an integrated approach that employs two theories namely African feminism and critical mass theory. These theories are selected because they enhance a grounded analysis of the place of women in Kenya's Senate.

1.5.1 African Feminism

All strands of feminism argue that patriarchal institutions militate against the substantive participation of women in legal and social processes.¹⁶ Radical feminists posit that there has been but one official voice, that of the dominant male.¹⁷ The woman's experience has been that of suppression, exclusion, and silencing.¹⁸ The central theme of radical feminism is sex rather than gender.¹⁹ Societal and patriarchal structures drive women to economic and social dependency. Liberalism rests on equality and individualism.²⁰ People are equal; they all have the same rights and are free to enjoy the same opportunities in life. Liberal feminists place great emphasis on personal and political autonomy.²¹ Cultural feminists recognize that there are gender differences among the sexes. They champion for an equal society that creates opportunities in the legal, political and social arenas despite the unique variant attributes of women.²² These strands are not applicable to this study because they do not fully capture the lived experiences of African

¹⁶ P Smith, Four themes in feminist legal theory: Difference, dominance, domesticity, and denial. In *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (2005) 90-104.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Drucilla Cornell, Sexual difference, the feminine, and equivalency: A critique of MacKinnon's toward a feminist theory of the state. (1991)

²⁰ R Abbey, 'Back toward a comprehensive liberalism? Justice as fairness, gender, and families' (2007) *Political Theory* 35, 5-28.

²¹ Martha Nussbaum, 'The future of feminist liberalism'. (2013) *The American Philosophical Association Centennial Series*.

²² Natalie Stoljar, Different Women. Gender and the Realism-Nominalism Debate, 27-46. In *Feminist metaphysics* (Dordrecht Springer 2011)

women. The Kenyan society is still very patriarchal hence the need for feminist reasoning that acknowledges the unique experiences of African women.

Proponents of African feminism such as Maria Nzomo and Akihire²³ aver that African feminism politically empowers African women within the heterogeneous and largely patriarchal African society.²⁴ Feminism is concerned with the empowerment of women through enhancing their capacity and removing barriers that affect full enjoyment of their rights.²⁵ While western feminism challenges homogenous discrimination, African feminism is concerned with the struggle against intersectional and compounded forms of discrimination that exclude women from political processes.²⁶ Thus, African feminism uses a framework of intersectional discrimination to understand and challenge sociological and political forces that promote gender inequalities.

Patricia McFadden observes that African feminism suffers from conceptual challenges in that there exist various strands of African feminism.²⁷ The multiplicity of conceptual definitions compounds the comprehension of African feminism thus leading to its exclusion from mainstream feminist ideologies. This study leverages on African feminism as conceptualized by Ahikire²⁸ to argue that legislative gender quotas enhance political representation of women. The third gender principle is an embodiment of the triumph of feminism over engendered institutions that traditionally excluded women from competitive electoral politics.²⁹ Thus, the struggles of

²³ J. Ahikire, 'African Feminism in context: Reflections on the legitimate battle, victories and Reversals' (2014) 19 African Gender Institute.

²⁴ Patricia McFadden, 'Contemporary African Feminism: Conceptual Challenges and Transformational Prospects'.

²⁵ Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo, Norwegian University Press, 1987)

²⁶ J. Ahikire, 'African Feminism in context: Reflections on the legitimate battle, victories and Reversals' (2014) 19 African Gender Institute.

²⁷ Patricia McFadden, 'Contemporary African Feminism: Conceptual Challenges and Transformational Prospects'.

²⁸ J. Ahikire, 'African Feminism in context: Reflections on the legitimate battle, victories and Reversals' (2014) 19 African Gender Institute.

²⁹ Ibid.

African feminism inform the discussion on the gains that women have made culminating in the two third gender principle. Overall, African feminism guides the historical study of the gender principle in Kenya, and challenges of achieving substantive gender representation and gender parity in the Senate against the face of the equality of counties.

1.5.2 Critical Mass Theory

The critical mass theory as advanced by Childs and Mon Krook argues a case for the implementation of legislative gender quotas to promote female participation in the political processes.³⁰ One of the underlying presumptions of the theory is that Parliament is a critical institution and that there are a few women sitting in Parliament.³¹ Thus, it is important to use tokenism in the form of affirmative action³² because of the patriarchal nature of electoral politics that militate against the ingress of women in critical political positions. Additionally, the theory argues that increased mass of women in critical positions promotes pro-women legislations and policies.

The theory has attracted criticism from Kanter for entrenching gender stereotypes. Kanter argues that the token nature of gender quotas causes the dominant male class to further stereotype and subjugate women on the ground that equals do not receive preferential treatment.³³ Second, women who hold power due to quotas are often subjected to performance pressure in that their fellow women require them to perform better than their male counterparts.³⁴ The differential assessment of male and female politicians in critical positions underlie the view that women

³⁰ Sarah Childs and Mona Krook, 'Critical Mass Theory and Women's Political Representation' (2008) Political Studies.

³¹ Ibid.

³² Sarah Childs and Mona Lena Krook. 'Analysing women's substantive representation: From critical mass to critical actors.' (2009) 44 Government and Opposition.

³³ Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books: 1993)

³⁴ Mona Krook. 'Empowerment versus backlash: gender quotas and critical mass theory.' (2015) *Politics, Groups, and Identities* 3, 184-188.

legislators are more likely to compete with fellow legislators rather than collaborating to enhance the welfare of women. Critical mass theory is essential in this study in making a case for the need of increasing the number of female legislators because they promote substantive legislation that empowers women.

1.6 Literature Review

The literature review identifies relevant studies that enhance an understanding of gender equality and equitable representation. The review groups the relevant literature under various headings for paragraphing purposes. Overall, the review of the literature indicates that Kenya has made significant strides towards the realisation of equitable gender representation in elective politics. Also, the section discusses issues of compliance with the constitutional gender rule thus forming the basis of examining non-compliance in the Senate.

1.6.1 Books

Bentzon, Hellum,³⁵ and Stewart offer illuminating discussion on the need for evidence-based research on women. In problematising conventional scholarship on women, the three argue that the construction of the legal position of the African women requires a grounded approach that integrates empirical experiences of women with general theoretical assumptions.³⁶ The book notes that the blanket application of mainstream theoretical frameworks is detrimental to women in that it produces normative regulatory and legislative framework that do not promote substantial empowerment of women.³⁷ In other words, grounded theory in law advocates for a multidisciplinary approach that takes into consideration the historical experiences of women

³⁵ AW Bentzon, Ann Hellum and JE Stewart, *Pursuing grounded theory in law: South-North experiences in developing women's law*, Mond Books, 1998

³⁶ Ibid.

³⁷ Ibid.

when formulating policies and laws to remedy exclusionary practices. The book contributes to this study by facilitating the recognition of social and political factors that affect the compliance with the third gender rule principle, thereby facilitating the formulation of responsive proposals in the implementation of the third gender rule.

Looking at the interplay between gender advocacy and legal reforms, Aili Tripp³⁸ draws on a cross-national study of African countries to investigate the impact of feminist activism on legislative reforms. The study indicates that women have been at the forefront of egalitarian reforms. In this book, Aili Tripp and her two co-authors observe that there has been a reciprocal relationship between women's movements and constitutional developments in Africa. Succinctly put, the historical oppression of women has inspired women to press for a wider space in national processes of governance and administration. At the same time, reforms on laws pertaining to women socioeconomic and political rights inspire lobbying for gender equality. Autonomous women movements like Maendeleo ya Wanawake provided space for political expression and advocacy for gender equity.³⁹ Besides examining the historical context of women movements, the book focuses on legislative changes and measures to enhance gender equality in African politics. For instance, gender quotas have enhanced female representation with Rwanda offering intangible lesson⁴⁰s on gender equality in electoral politics.⁴¹ However, the descriptive study does not offer empirical approaches on boosting the critical mass of female leaders. Nonetheless, the study acknowledges the need for further research around the implementation of constitutional changes that empower women. This project fills this informational gap by

³⁸ Aili Tripp, Isabel Casimiro, Joy Kwesiga, and Alice Mungwa. *African Women's Movements: Transforming Political Landscapes*. (New York: Cambridge University Press: 2009).

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

proposing the involvement of civil society and women movements in implementation of the two-thirds gender principle.

Leading scholar and feminist thought-leader Wanjiku Mukabi Kabira argues that the 2010 constitutional regime presents Kenya with a unique chance to promote female participation in national governance and competitive electoral politics.⁴² She problematizes female representation in Parliament arguing that it should be evaluated for its tangible contribution to the policy process on women empowerment rather than the number of women in Parliament.⁴³ The need for substantial involvement of women in the legislative and political process chimes with the United Nations' view that political participation of women in decision making processes should reduce structural barriers for the engagement of women in leadership and politics.⁴⁴ The text is integral in this study in that it contributes to the development of a timeline for the empowerment of women in Kenya. While the book does assess Kenya's compliance with the gender principle till 2012, it does not discuss inequality in the Kenyan Senate.

Drawing from Mona Lena Krook's school of thought, this research study investigates the application of gender quotas in Kenyan politics with a focus on the Senate. The incursive text aptly discusses the conceptual framework underpinning gender quotas in electoral politics. The strength of the book lies in its exhaustive exposition of the implementation of gender quotas in politics as a precursor to increased female participation.⁴⁵ The author observes that gender quotas may have opposite effects.⁴⁶ In particular, she observes that societal dynamics such as culture and dynamics of candidate selection may have either facilitate or disrupt the implementation of

⁴² Wanjiku Kabira, *Time for harvest: women and constitution making in Kenya*. (African Books Collective: 2012).

⁴³ Ibid.

⁴⁴ Department of Economic and Social Affairs, *Achieving Gender Equality, Women's Empowerment and Strengthening Development Cooperation*, (United Nations: 2010) 33.

⁴⁵ Sarah Childs and Mona Lena Krook. 'Analysing women's substantive representation: From critical mass to critical actors.' (2009) 44 *Government and Opposition*.

⁴⁶ Mona Lena Krook, *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide*

gender quotas.⁴⁷ Because the book does not examine gender quotas in Kenya, this study offers a case study of the Kenyan context.

1.6.2 Chapters in Books

Japhet Biegon contextualizes the achievements and impediments related to female political participation. His edited essays observe that the restructuring of Kenya's Parliament under the 2010 Constitution to provide for the third gender principle has presented Parliament with an ambivalent opportunity to promote the immediate realisation of the third gender rule or progressive realisation of the third gender principle.⁴⁸ The process to actualize the third gender rule provision has been marred by judicial, executive, and legislative reluctance to implement the said provisions with the Supreme Court and in extension Parliament pushing for progressive realisation of the third gender principle in legislative politics.⁴⁹ However, the essays in this collection do not examine the implication of the equality of counties doctrine in the Senate. In fact, they are silent on the design challenges in the Constitution that mar the realisation of the two-thirds gender principle. Effie Owuor in her works offers a chronological itinerary on the political inclusion of women in Kenya. Kameri-Mbote in her writings traces the place of women in Kenya's parliament. She posits that structural forms of discrimination prevent the substantial involvement of women in politics. Writing on women's role in political parties, Dickson Omondi contends that there cannot be gender equality in parliament without party structures that promote gender equity and gender equality. While the phenomenon of independent candidates emasculates political contenders from oppressive and opaque party-based electoral practices, a

⁴⁷ Sarah Childs and Mona Lena Krook. 'Analysing women's substantive representation: From critical mass to critical actors.' (2009) 44 *Government and Opposition*.

⁴⁸ Japhet Biegon (eds), *Gender Equality and Political Processes in Kenya: Challenges and Prospects*

⁴⁹ Ibid

legal framework on political parties can promote gender equity in parliament by ensuring that political parties comply with gender mainstreaming policies.

Maria Nzomo's works and school of thought appears in the widely acclaimed *African Feminism* book. In the traditions of African feminism, Maria Nzomo documents the experiences of the Kenyan women in expanding her participation in the political space. African feminism in Kenya was responsible for the clamor for the abolition of patriarchy and male domination in the political processes predating independence.⁵⁰ She traces the progressive expansion of the political space to accommodate women. She moans the fact that despite the contributions of women to the policy process, social structures continue to serve as structural barriers to women's political participation.⁵¹ The article points out that African feminism fights for gender equity. Nzomo posits that African feminism can help scrutinize some cultural beliefs and laws to answer the question if indeed it's in the interest of the woman.⁵² She appreciates the fact that this kind of feminism acknowledges heterosexuality but most importantly it focuses on judging it through women's actions and that she has no doubt it will bring positive change in Africa's political domain.⁵³ This study is significant it because it provides a historical analysis of the gains made by Kenyan women in the political processes. This research will build on the knowledge to identify the structural barriers to the achievement of the two-thirds gender rule in political representation in the Senate.

1.6.3 Journal Articles

Co-authoring with Kameri-Mbote, Wanjiku Kabira *posits* that the participation of women in Kenya's electoral politics is characterised by patriarchal ideologies that militate against the entry

⁵⁰ Maria Nzomo, Kenyan Women in Politics and Public Decision Making in Mikell Gwendolyn, ed. *African feminism: The politics of survival in Sub-Saharan Africa*. University of Pennsylvania Press; 1997

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

of women in national leadership.⁵⁴ The essay illustrates how legal responses are in themselves inadequate in the resolution of the social and political tensions surrounding the non-implementation and non-compliance with the two third gender principle. This article is integral in this study in that it promotes an appreciation of the limits of law as a social engineering tool to promote gender equality in Kenya's electoral politics.

Moaning the rejection of the proposed 2005 constitution, Kamari-Mbote and Nkatha Kabira argue that "the defeat of the constitution...amounted to throwing away the baby with the bath water".⁵⁵ Although the consultative constitutional process injected legitimacy to the constitution making process, social and political contestations cocooned women thus drowning their voice in the referendum campaigns.⁵⁶ The participation of women in the constitutional review process is of particular importance to this study because it provides a background for locating women in legislative processes. It is worth noting that this article contributes to this study by providing a chronological analysis of the constitutional milestones in the participation of women in legal processes.

Given that the two-thirds gender rule is designed to promote gender equality and gender equality, Kamari-Mbote provides an excellent framework for the analysis of the scope of gender equity and gender equality. It is worth noting that the social engineering function of law through gender mainstreaming does not necessarily translate to gender equity. Put differently; laws may promote formal equality instead of substantive equality.⁵⁷ The same views are echoed by Petra Meier

⁵⁴ Wanjiku Kabira and P Kamari-Mbote 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise, in C Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, 2016

⁵⁵ Patricia Kamari-Mbote and Nkatha Kabira, 'Separating the Baby from The Bath Water: Women's Rights and The Politics of Constitution-Making in Kenya' (2008) 14 East African Journal of Peace and Human Rights pp. 1-44, 1

⁵⁶ Ibid., 12

⁵⁷ Patricia Kamari-Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' (2013) International Environmental Law Research Centre.

and Karen Celis where the authors argue that preoccupation with procedural aspects of gender equity may derail the realisation of substantive equality.⁵⁸ Central to the formal equality-substantive equality contested claims is the concept of intersectional discrimination.⁵⁹ As noted earlier, social and political factors often affect the implementation of legal solutions thus Kameri-Mbote and Crenshaw's groundbreaking discussion on intersectional discrimination contributes towards the formulation of legal and policy responses that promote substantive equality.

Leif Wenar provides an incisive description of the Hohfeldian incidents.⁶⁰ She discusses the Hohfeldian framework as a basis for explicating the meanings of rights assertions. The descriptive article seeks to enhance the reader's understanding of the normativity of human rights from a framework that pits Kantianism against welfarism. In other words, she approaches human rights as normative framework for enhancing the freedom of right holders as well as a framework for promoting the welfare of the right holders. In parity with Wenar's conceptualisation of jural persons as right holders, Kabeer argues that female empowerment is multifaceted in that it requires empowerment of women in education, employment and political processes.⁶¹ Consequently, the MDGs place a positive obligation on states to empower women through political participation. While this study does not descend to an examination of Hohfeldian incidents, Wenar's article contributes to the appreciation of the third-gender principle as a normative framework that creates political rights for women as right-holders.

⁵⁸ Petra Meier and Karen Celis. 'Sowing the seeds of its own failure: Implementing the concept of gender mainstreaming.' (2011) 18 Social Politics 4, 469-489.

⁵⁹ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1989(1), University of Chicago Legal Forum.

⁶⁰ Leif Wenar, 'The nature of rights' [2005] Philosophy and Public Affairs 33 (3). pp. 223-253.

⁶¹ Naila Kabeer, 'Gender equality and women's empowerment: A critical analysis of the third millennium development goal 1' [2005] 13 Gender & Development 1.

In arguing a case for sui generis conceptualization of African feminism, Ahikire observes that the triumph of African feminism has largely been a series of success against various aspects of patriarchy in the political realm.⁶² In addition, the struggle for political inclusion has involved challenging engendered institutions of national leadership and political governance. Therefore, as Clark observes gender legislative quotas exist to promote entry of women in engendered institutions thus political participation of women ought to enhance the social and legal legitimacy of gender equality and gender equity in national governance and electoral politics.⁶³ This mirrors the research findings in the article by Pamela Paxton and Melanie Hughes⁶⁴ where the authors observe that legal provisions of gender quotas catalyse the participation of women in politics leading to a higher number of elected female legislators in the parliament. However, Kenny and Mackay appear to chide proponents of gender quotas by arguing that women have been making substantial progress towards equitable gender representation and that even in the absence of gender quotas women are sure to attain equitable gender representation.⁶⁵ Their particular concern is that there is no evidence as to the extent to which gender quotas promote the construction of new gender identities in institutions that traditionally excluded women. In sum, Ahikire's account of African feminism promotes a grounded understanding of legislative gains in regards to the empowerment of women.

⁶² J. Ahikire 'African Feminism in context: Reflections on the legitimate battle, victories and Reversals' (2014) African Gender Institute, 9.

⁶³ L Clark, *Affirmative Action—Gender Representation in Parliament: Quotas, Political Parties and Reserved Seats* (2006) 2-3

⁶⁴ Pamela Paxton and Melanie Hughes, 'Growth in Women's Political Representation: A Longitudinal Exploration of Democracy, Electoral System, and Gender Quotas'

⁶⁵ Meryl Kenny, and Fiona Mackay, 'Already doin'it for ourselves? Skeptical notes on feminism and institutionalism' [2009] 5 *Politics & Gender* 2.

1.6.4 Institutional Authors (Reports)

FIDA-Kenya moans that Kenya is yet to attain the gender principle. The same is captured by Catherine Kaimenyi, Emelda Kinyua and Chege Macharia where the authors contextualize gender quotas in the 2013 elections by reviewing the implications of gender quotas on the statistical representation of women in parliament.⁶⁶ While this report does not examine equitable gender representation in all election cycles, the article furthers this study by providing a background on the extent of compliance with the third gender rule in the 2013 elections.

1.7 Justification of the Study

The sustained interest on gender equality and equitable gender governance suffers from inadequacy of materials examining critical mass in female representation in Kenya's Senate. My contribution is to interrogate the historical development of the two-thirds gender principle and examine the compliance of Senate with the two-thirds gender principle. Given that no one has examined the connection between critical mass theory and equality of counties, I want to help my reader understand how equality of counties affects the substantive and equitable representation of women in the Senate under the two-thirds gender principle.

1.8 Methodology

This study utilises grounded theory as the research method. The study uses the grounded approach to conduct a content analysis on the history of female representation in elective politics. The grounded theory enables the identification of processes and factors that affect female representation. Furthermore, the methodology provides a framework for linking concepts

⁶⁶ Catherine Kaimenyi, Emelda Kinyua & Chege Macharia, 'An analysis of affirmative action: The two-thirds gender rule in Kenya' (2013) *International Journal of business, Humanities and Technology*.

of presentation and gender equity. By linking the concepts, the grounded research methodology allows this study to develop policy responses to promote gender parity in the Senate.

Second, this study leverages feminist research methodology in the collection and analysis of literature on the historical development of women's empowerment through the two-thirds gender principle. The feminist methodology is both quantitative and qualitative in nature.⁶⁷ The quantitative aspects of the research methodology allow the identification of the proportion of elected female senators. The qualitative aspects of feminist methodology are used in the prescriptive and analytical discussions in this study. Given that feminist research methodology in legal scholarship is contextual,⁶⁸ this study uses the feminist lens to place an emphasis on aggregate factors that affect the interpretation or application of the law. Thus, the feminist research approach shall promote the gathering and analysis of data that captures the experiences of Kenyan women with the law. The study shall adopt a documentary search as evinced by content analysis of Hansard reports to determine legislative efforts to uphold the gender principle in electoral politics. The qualitative approach focuses on descriptive and prescriptive information as contained in documented studies such as peer-reviewed and seminal articles, books, and compiled reports. Also, the qualitative methodology synthesizes counting during interpretation to establish the number of female members in the Senate. As a result, the feminist inquiry promotes a grounded approach that provides an enabling ground to interrogate the adequacy of legislative and institutional framework in advancing the two-thirds gender principle in the Senate.

1.9 Limitations

While Kenya has made considerable progress in augmenting the equitable female representation in elective politics, the research recognises the presence of structural and compounded

⁶⁷ Jane Wambui. *An introduction to feminist research*. (Nairobi: University of Nairobi: 2013)

⁶⁸ Ibid.

discrimination as an impediment to the realisation of the two-thirds gender rule. This study recognises that while the law gives legal legitimacy to women leadership, the gender quotas suffer from inadequate social legitimacy. In particular, the patriarchal system entrenches a gendered approach that makes it difficult to uproot social norms that suppress leadership of women.⁶⁹ Nonetheless, this study does not attempt to offer sociological solutions to the exclusion of women from electoral politics. Also, the study relies on secondary data thus the findings and recommendations do not enjoy the high importance associated with primary data.

1.10 Chapter Outline

Chapter 1 offers the introduction and background underpinning this research.

Chapter 2 provides a historical timeline of the place of women in Kenya's legal system.

Chapter 3 uses an integrated approach that discusses the theoretical and conceptual framework of the two-thirds gender principle vis a vis the regulatory framework and judicial interpretation.

Chapter 4 capitalises on case study to examine the nexus between equality of counties and two-thirds gender principle as demonstrated by the voting patterns in the Senate.

Chapter 5 outlines the findings, the conclusion and recommendation section of this study.

1.11 Conclusion

This Chapter has introduced the research topic and justified the research project. It has also introduced the research problem, provided the theoretical underpinning of the research, outlined the hypothesis, and reviewed the relevant literature.

⁶⁹ It is important to note that Kenya is a patriarchal state in which culture and social circumstances militate against the ascension of women to public power.

CHAPTER TWO

A HISTORY OF WOMENS' PLACE IN KENYA'S LEGAL SYSTEM

2.0 Introduction

This chapter discusses the historical context of the place of women in Kenya's legal system. Divided into three main parts, the first one discusses the pre-colonial period. This section discusses the nature of administration in the African society before the colonisation of Kenya. The second part of the chapter delves into the colonial epoch where it argues that the patriarchal British rule instituted structures and practices that excluded women from political governance. There are two sub-sections in the last part where the first covers pre-2010 era with the second examining the place of women under the 2010 constitutional dispensation regime. Lastly, the chapter concludes with a reflection on the present problem under study.

Although the criticism of Kenya's political space for marginalising women has been a central theme in the gender-mainstreaming and female empowerment discourse in Kenya, the marginalisation of women remains a topical concern even today.⁷⁰ Indeed, a historical examination of Kenya's political development reveals the gendered exclusion of women from the community and national leadership. While there is no single source text devoted to the exhaustive historical examination of women in legislative processes in Kenya, Charles Hornsby's work⁷¹ and Wanjiku Kabira's groundbreaking book⁷² serve as crucial guides in understanding the evolution of female participation in Kenya's politics and governance.

⁷⁰ Wanjiku Kabira, *Time for harvest: women and constitution making in Kenya*. (African Books Collective: 2012).

⁷¹ Charles Hornsby, *Kenya: A History Since Independence*. (I.B. Tauris & Co. Ltd: 2012)

⁷² Wanjiku Kabira, *Time for harvest: women and constitution making in Kenya*. (African Books Collective: 2012).

The historical timeline of the place of women in Kenya's legal system receives a jolt in Wanjiku Kabira's study which places emphasis on the constitutional gains regarding the political empowerment of women in Kenya. She argues that an appreciation of women in the legal system requires an understanding of the grassroots struggles and female participation in constitution-making. This historical appreciation of the multifaceted nature of female struggles for an expanded political voice was instrumental in the codification of the two-thirds gender principle in the 2010 CoK.

2.1 Pre-Colonial

Before the colonisation of Kenya, each ethnic community had its unique system of governance. While most communities had different models of administration, they were mostly patriarchal. Community leadership took the form of chieftainships, the council of elders, and in some cases hereditary kingship.⁷³ For instance, the Luos lacked a centralized form of governance and were headed by a council of elders. Also, the Kikuyu of Central Kenya were governed by a council of elders that collectively guided the community and settled disputes. A king governed the Abaluhya under the title of Nabongo.

2.2 Colonial Kenya: 1867- 1963

Although the entry of whites in Kenya is traceable to 1600s when Portuguese used to trade in the Kenyan coast, the year 1895 marked the formal colonisation of Kenya. While the Portuguese and Arabs had exercised substantial control over the Kenyan coast, 1895 marked a watershed moment in the sense that the EA order established Kenya as a British protectorate.⁷⁴ Using the *East Africa Order in Council* of 1897, the British government effectively wrestled control of the

⁷³ George Bennett, *Kenya: A Political History. The Colonial Period*. (London: Clarendon 1963) p.16.

⁷⁴ See The Report of the Parliamentary Select Committee on the Review of the Constitution.

territory from the IBEA by empowering the Commissioner of the protectorate to govern the locals, albeit adjudication of legal disputes.⁷⁵ In 1907, the British colonial rule established the LegCo vide the *1905 Order in Council*.⁷⁶ The first LegCo seating was an all-white affair as demonstrated by its membership: the Governor and settlers appointed by the Governor. In 1920, Kenya became a colony under British rule.⁷⁷ In 1916 the *Legislative Council Ordinance* of 1919 allowed for elective representation among the settlers.⁷⁸ In 1922, white women were allowed to vote for their representatives in the LegCo. In 1961, Priscilla Abwao became the first African woman LegCo member.

During the colonial period, the administrators concentrated more on white men in building the governing institutions. For instance, in 1921, an order was issued to the governing council to reserve civil service posts in colonies to men.⁷⁹ The trend continued until 1946 when women were officially admitted into the civil service.

Through the Devonshire White Paper of 1923, the whites recognized the need for the representation of the interests of the indigenous population in the colony. This prompted the 1924 nomination of Dr. John Arthur to represent the interest of Africans in the LegCo.⁸⁰ Given the nomination of Dr. John Arthur to represent the interest of Africans, it is worth noting that the East African Association and Young Kavirondo Association had been formed in 1921 and 1922 respectively to agitate for the rights and empowerment of Africans.⁸¹ The Local Authority Ordinance fostered the formation of Local Native Councils (LNCs) whose members were

⁷⁵ George Bennett, *Kenya: A Political History. The Colonial Period*. (London: Clarendon 1963) p.16.

⁷⁶ The Final Report of the Constitution of Kenya Review Commission. See Y P Ghai and J PW BMcAuslan, *Public Law and Political Change in Kenya. A Study of the Legal Framework of Government from Colonial Times to the Present*. (Nairobi: Oxford University Press, 1970).

⁷⁷ George Bennett, *Kenya: A Political History. The Colonial Period*. (London: Clarendon 1963)

⁷⁸ Charles Hornsby, *Kenya: A History Since Independence*. (I.B. Tauris & Co. Ltd: 2012)

⁷⁹ Charles Hornsby, *Kenya: A History Since Independence*. (I.B. Tauris & Co. Ltd: 2012)

⁸⁰ Ibid.

⁸¹ Ibid.

Africans who were nominated by the District Commissioners.⁸² It is important to note that that the LNCs did not have female members thus the leadership was male.

Although African women were excluded from the formal administration structures, their struggle for political participation and empowerment during the colonial era cannot be ignored. In 1902, Wangu wa Makeri became the first female chief in colonial Kenya.⁸³ Her leadership was notable for development and peace. Another prominent leader was Mekatilili wa Menza who led the 1914 Giriama rebellion against the British.⁸⁴ Mekatilili is a classic example of the many women who participated in the struggle against colonial occupation and oppression of Africans.

In 1952, Maendeleo ya Wanawake Organisation was formed as a welfare organisation.⁸⁵ The formation of Maendeleo ya Wanawake as a grassroots movement marked the beginning of the national participation of African women in gender advocacy.⁸⁶

2.3 Pre-2010

Hornsby traces the roots of continued female marginalisation in politics to colonial and independence Kenya. According to Hornby, “The African men (they were all male) who replaced their British (male) rulers in 1963 inherited a highly stratified society and then perpetuate it”.⁸⁷ Although Hornsby decries the birth of political dynasties, he does not connect them to the exclusion of women from the political processes. Nonetheless, the emergence of

⁸² Ibid.

⁸³ Charles Hornsby, *Kenya: A History since Independence*. (I.B. Tauris & Co. Ltd: 2012)

⁸⁴ Ibid.

⁸⁵ Gerface Ojwang’ Ochieng’, ‘*Philosophical analysis of gender based affirmative action policy in Kenya with respect to theory of justice*’ A Thesis Submitted as Partial Fulfillment for The Award of The Degree of Master of Arts in Philosophy of Kenyatta University

⁸⁶ Aili Tripp, Isabel Casimiro, Joy Kwesiga, and Alice Mungwa. *African Women’s Movements: Transforming Political Landscapes*. (New York: Cambridge University Press: 2009).

⁸⁷ Charles Hornsby, *Kenya: A History since Independence*. (I.B. Tauris & Co. Ltd: 2012) p. 12.

political families and inheritance of competitive electoral politics harms female empowerment.⁸⁸ In particular, it constricts the political space by pre-ordaining some women as leaders at the expense of other deserving women who are better placed to serve as political leaders but lack the financial and political clout to launch their political careers.⁸⁹

Kenya did not have any female parliamentarian at independence. It was not until the second parliamentary term in 1969 that Grace Onyango became the first woman to become an MP in independent Kenya.⁹⁰ The third parliament had four elected women MPs and two nominated members.⁹¹ The fourth parliament, 1979-1983, boasted of 6 female MPs with five elected members and one nominated member.⁹² The fifth parliament had two elected female members and one female nominated member.⁹³ The sixth parliament, 1988-1992, had two elected female members and zero female nominees.⁹⁴ The seventh parliament, 1992-1997, had six elected members and one nominated female MP.⁹⁵ The seventh parliament is notable for being the term in which Kenya got her first female cabinet minister in Nyiva Mwendwa. In the eighth parliament, 1997-2002, four women were elected as MPs, and there was a substantial increase from one to five nominated female MPs.⁹⁶ The 9th parliament is notable for having the highest number of nominated female MPs before the new constitutional dispensation. It had eight nominated female MPs and six elected female MPs.⁹⁷ The 10th parliament had the highest number of female legislators hitherto the promulgation of the 2010 constitution. It had 22 female

⁸⁸ R Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*. (New York: Free Press, 1962)

⁸⁹ Ibid.

⁹⁰ A. Aduol. *The Kenya women in politics and Analysis of first and present trends*, (University of Nairobi: 1992)

⁹¹ Regina Mwatha, Grace Mbugua, and Godwin Murunga. 'Young women's political participation in Kenya: a study on the experiences and challenges of young women in political engagement; technical report.' (2013).

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

MPs comprising of 16 elected members and six nominated members.⁹⁸ It is important to note that the available slots for the nomination before the new Constitution was always 12 thus the 9th parliament holds the record for the highest number of nominated female MPs before the 2010 constitution.⁹⁹

In 1978, Maendeleo ya Wanawake under Zipporah Kittony openly supported the one-party rule of President Moi.¹⁰⁰ While suppression of female political participation by Maendeleo ya Wanawake demonstrated the adverse effect of women leadership that locked out other women from politics¹⁰¹, it is important to note that grassroots organisations offered a platform for negotiation of expanded space of political participation.¹⁰² Quoting Nnaemeka, Akin-Aina observes that the entanglement of feminists with government and patriarchal structures should be viewed through a lens of nego-feminism. Nego-feminism requires women to compromise and negotiate for political space.¹⁰³ Thus, Maendeleo ya Wanawake should not be condemned for allying with a government that suppressed the political voice of women. Instead, the alliance should be assessed by reviewing its utility to the social and economic welfare of women.

A key turning point in place of women in Kenya's legal system was in 1975. In 1975, the World Conference on Women was held in Mexico¹⁰⁴ hence the start of the UN Decade for Women¹⁰⁵ whose end coincided with the 1985 United Nations 3rd World Conference on Women held in Nairobi.¹⁰⁶ The Nairobi Conference heralded global commitment for increased involvement of

⁹⁸ Ibid.

⁹⁹ Mary Kanyi, 'Kenyan women's journey in their quest for affirmative action' Heinrich Böll Stiftung, (2016), 8-9

¹⁰⁰ Rosalia Wanjia Ngugi, 'The Kenyan Woman her Historical relationship with the state' *Columbus State University*, 2009, Paper 62, 5.

¹⁰¹ Akin-Aina, Sinmi. 'Beyond an Epistemology of Bread, Butter, Culture and Power' (2011) *Nokoko*, 65.

¹⁰² Maria Nzomo, 'The Kenyan women's movement in a changing political context' (1993)

¹⁰³ Ibid., p. 70.

¹⁰⁴ Fraser, A. *UN Decade for Women*. (Boulder: 1998)

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

women in civic space through constitutional and legal measures.¹⁰⁷ Among other things, the conference laid emphasis on equality.¹⁰⁸ Locally, the conference led to FIDA-Kenya's formation as a civil movement to fight against female discrimination and advocate for respect for women sociopolitical rights.¹⁰⁹ In the same year, Kenya acceded to CEDAW. This marked Kenya's commitment to international standards for gender equality and equity.

In 1995,

The Beijing Fourth World Conference on Women in 1995¹¹⁰ led to the adoption of the Beijing Declaration and Platform for Action.¹¹¹ These reiterated Kenya's commitment to gender equity in public leadership.

On the political scene, the Inter-Party Parliamentary Group (IPPG) was formed in 1997.¹¹² The IPPG reforms led to the formation of the CKRC.¹¹³ The commission sought to reform the constitution to enhance the protection of civil and socioeconomic rights.¹¹⁴

Between 1997 and 2005, there were several attempts to legislate affirmative actions.¹¹⁵ It was not until the coming into power of the NARC government that Kenya showed solid efforts to have a new constitution that respected gender equity and equality. While the constitution draft that was produced by the CKRC was considered a masterpiece in the constitutional design of gender

¹⁰⁷ Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985, Chap. I, sect. A

¹⁰⁸ Charles Choti. 'Gender and Electoral Politics'. (PhD Thesis University of Nairobi, 2005).

¹⁰⁹ George Kurea, 'The implementation of the two third gender rule in the devolved government as stipulated in the Kenyan Constitution: The case study of Meru County' University of Nairobi, 2015

¹¹⁰ Beijing +5, *International Women's Day*. (2005).

¹¹¹ Ibid.

¹¹² Charles Choti. 'Gender and Electoral Politics'. (PhD Thesis University of Nairobi, 2005).

¹¹³ Kabira Wanjiku and P Kameri-Mbote, 'Gender issues in electoral politics in Kenya: The unrealised constitutional promise'

¹¹⁴ Ibid.

¹¹⁵ Mwangi Gituto and Wanjiku Kabira, *Affirmative Action: The Promise of a New Dawn*. (CCGD Publication.: 1998)

equity, the 2005 referendum featured a watered-down version of the CKRC draft.¹¹⁶ Although Kenyans rejected the draft in the 2005 referendum, the draft significantly improved women rights in Kenya's legal system.

2.4 Post-2010 Era

The close of the twentieth century heralded a wave of constitutional and legal reforms. With pressure from the international community and domestic pressure from within, the Moi government and succeeding Kibaki government could no longer afford to ignore the clamour for democracy.¹¹⁷ This wave of constitutionalism pressed for multi-party democracy, equitable gender representation, and increased respect and protection of human rights.¹¹⁸ It is this clamour for democratic governance and the rule of law that culminated in several negotiations for a new constitution and its 2010 promulgation.

Post-2010 is very crucial to the empowerment of women in Kenya's legal system. In particular, the 27th of August is remarkable in that it marked the promulgation of a new constitution. The CoK sought to revise the view that women were weak leaders¹¹⁹ by promoting gender equity and gender equality at the national and local levels.¹²⁰ Thus, the 2010 Constitution placed a moratorium on the constitutional legitimacy for sex discrimination to the extent that the previous constitutional dispensation did not prohibit sex-based discrimination.¹²¹ However, the growth of Maendeleo ya Wanawake as a grassroots movement with the mandate of the socioeconomic and political empowerment of women fostered the emergence of an alternative narrative that

¹¹⁶ Kabira Wanjiku and P Kameri-Mbote, 'Gender issues in electoral politics in Kenya: The unrealised constitutional promise'.

¹¹⁷ David Throup and Charles Hornsby, *Multi-party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections*. (Oxford: James Currey, 1998), p. 89.

¹¹⁸ Ibid.

¹¹⁹ Nyokabi Kamau, *Women and Political Leadership in Kenya: 100 Case Studies* (2010: Heinrich Böll Foundation)

¹²⁰ Maria-Nzomo. Representational Politics in Kenya: The Gender Quota and Beyond. In *African Research & Resource Forum*, 3.

¹²¹ Republic of Kenya, *Report of the Independent Review Commission (IREC)*. (Government Printer, 2008)

recognized women as capable leaders with unique social experiences to enrich the quality of the legislative processes of Kenya.¹²² Despite the change in the trajectory of the widespread perception of the capacity of women as leaders, Nzomo observes that the participation and presence of women in politics are still low.¹²³ Put differently, the effective participation of women in Kenya's legal system is beset by patriarchal factors that discourage the access of women to political positions and involvement in competitive electoral politics.

In particular, a constitutional design that took into account the socioeconomic and political contours of Kenya would substantially promote gender equity and gender equality in national processes.¹²⁴ The product of this view was the legislative gender quotas whose principal aim is to promote gender equity and gender equality.¹²⁵ Thus, the constitutionalisation of affirmative action was designed to catalyse the uptake of women in politics by enhancing their access to political power.

Like many laws which have been enacted to foster gender equity and gender equality in Kenya, the provisions on gender equity and gender quality in Kenya have found reluctant acceptance and application in Kenya's political space. In the 2013 General election, there were only eighty-six (86) female parliamentarians with 16 elected MPs, five nominated MPs, 47 women representatives, and 18 nominated senators.¹²⁶ The 2017 General election saw female legislators increase. 23 were elected as MPs, three were elected as senators, and 47 as county

¹²² Chitere, Preston O. "The Women's Self-Help Movement in Kenya: A Historical Perspective, 1940–80." *Transafrican Journal of History* (1988): 50-68.

¹²³ Maria-Nzomo 'Women in Political Leadership in Kenya: Access, Agenda-Setting and Accountability', Institute of Diplomacy & International Studies, University of Nairobi.

¹²⁴ Wanjiku Kabira and Patricia Kameri-Mbote, 'Gender issues in electoral politics in Kenya: the unrealised constitutional promise' 182.

¹²⁵ Maria-Nzomo. Representational Politics in Kenya: The Gender Quota and Beyond. In *African Research & Resource Forum*, 3.

¹²⁶ Association of Media Women in Kenya (AMWIK), *86 and Counting: Women Leaders in Kenya's 11th Parliament*. 2015

representatives. Also, 18 women were nominated as senators and six were nominated as MPs in the national assembly. While the trajectory of the numbers of female parliamentarians in both the 11th and 12th parliaments show an increase in the number of female legislators, Kenya still falls off the constitutional threshold.¹²⁷

Out of the 1350 wards, only 96 elected women as MCAs.¹²⁸ Bungoma recorded an impressive number with 11 women clinching MCA seats thus emerging as the county with the highest number of elected women MCAs.¹²⁹ In both Kisumu and Machakos counties, only five women were elected as MCAs. Also, Nandi and Nakuru counties each elected five women MCAs. In both Nairobi and Kakamega, only four women were elected as MCAs in each county. Although only 96 women were elected as MCAs in 2017, counties have used nomination to increase female legislators in county assemblies. For instance, Kirinyaga County nominated nine women to the Assembly to meet the constitutional two-thirds gender principle.¹³⁰ In Embu, no female MCA was elected prompting the Assembly to nominate 11 women thus bringing the total count of MCAs to 33.¹³¹

2.5 Conclusion

While laws provide for gender equity, the patriarchal nature of the Kenyan society and to an extent the patriarchal politics have tended to lock women out of the electoral political space. By

¹²⁷ Article 81(b), Constitution of Kenya, 2010.

¹²⁸ Winfred O. Lichuma, General elections 2017-statement on participation of special interest groups. Available at <<http://www.ngeckkenya.org/news/7189/general-elections-2017-statement-on-participation-of-special-interest-groups>>

¹²⁹ Odhiambo Orlale, *History made in Bungoma as 11 Women are elected MCAs* (Kenyan Woman, African Woman and Child Feature Service (AWC): November 2, 2017). Available at <http://kw.awcfs.org/article/history-made-in-bungoma-as-11-women-are-elected-mcas/>

¹³⁰ Geoffrey Kibisu, *Gender equality: Women get nine MCA slots in Kirinyaga*. (The Star: August 30, 2017) Available at https://www.the-star.co.ke/news/2017/08/30/gender-equality-women-get-nine-mca-slots-in-kirinyaga_c1626124

¹³¹ Reuben Githinji, *Women MCAs to keep us warm, says Munene* (September 23, 2017). Available at https://www.the-star.co.ke/news/2017/09/23/women-mcas-to-keep-us-warm-says-munene_c1640148

adopting a grounded approach to the place of women in Kenya's legal system, this chapter has recognized the incongruence between legal provisions and social reality. Although the legislative design of the Constitution 2010 is meant to foster gender equity and gender equality, this section shows that the legal realisation of equitable gender representation is a gradual process that is subject to socioeconomic and political factors. Thus, this chapter has served as a stock-taking exercise that enhances our understanding of the evolution of the place of women in Kenya's legal system. Furthermore, it has identified factors that foster and impede the realisation of gender equity in Kenya.

CHAPTER 3

LEGAL AND INSTITUTIONAL FRAMEWORK

3.0 Background to the Study

This chapter addresses the research question pertaining to the adequacy of the existing legal and policy framework on the actualization of the gender rule. In this light, the research objective is to interrogate the extent to which the Kenyan Senate has fulfilled the third gender rule requirement pertaining to the representation of women. Arguably, African politics exclude and marginalise women from electoral politics. In this light, Kenya's affirmative action is but a policy response to foster the substantive participation of women in governance and political administration.

¹³²This section proceeds on the premise that understanding legal and institutional systems is critical in the analysis of equitable gender representation in parliament. This chapter discusses the legislative and institutional framework that regulate gender representation in Kenya. This chapter argues that although Kenya has a robust legal and institutional framework that provides for equitable political representation, there is a gender gap in the realisation of equitable gender representation in Kenya.

3.1 Legislative Framework

3.1.0 International legal framework

There exist two systems for the application of international law in a state namely dualism and monism.¹³³ Under monism, both domestic and municipal law are construed as the constituents of

¹³² Maria-Nzomo. Representational Politics in Kenya: The Gender Quota and Beyond. (2012) African Research & Resource Forum, 3. Available at

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/15229/Maria%20Nzomo%20-%20Representational%20politics%20in%20Kenya.pdf?sequence=1/>

¹³³ M. Dixon, R. Mcquordale and S. Williams (eds) *Cases and Materials on International Law* (5th edn 2011)

a single legal order.¹³⁴ The implication of this is that states and their judicial bodies shall to give equal treatment to both bodies of law.¹³⁵ Monism exempts states from ratifying international law for it to be applicable. Therefore, international law is applicable and binding in a monist state. Additionally, the international law assumes a higher hierarchy in case of conflict with domestic law.

According to dualism, both international law and municipal law are distinct legal orders. As a result, a state has to domesticate international law before the same can be applied in its legal system.¹³⁶ Given that international legal rules will only form part of a country's laws after their domestication by a state, municipal law prevails over international law where there is a conflict between the two.¹³⁷

Under Articles 2(5) and 2 (6), customary international laws and treaties that Kenya has ratified form part of Kenya's laws.¹³⁸ Under Article 21(4), Kenya is not a strict monist state. Under Article 21(4), international laws are subject to ratification before their application or incorporation in Kenya's legal system.¹³⁹ Therefore, parliament must approve treaties before their ratification. One of the reasons for these provisions is that Kenyans were concerned about the involvement of the Executive in international obligations.¹⁴⁰ Thus, the regulation on parliamentary approval before ratification cushions Kenyans against unconscionable international legal rules and obligations. Against this background, the ratification of treaties leads to the interpretation of international law as part of Kenya's laws.

¹³⁴ M. Dixon , R. Mcquordale and S. Williams (eds) *Cases and Materials on International Law* (5th edn 2011)

¹³⁵ M. Dixon , R. Mcquordale and S. Williams (eds) *Cases and Materials on International Law* (5th edn 2011)

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Constitution of Kenya, 2010

¹³⁹ Constitution of Kenya, 2010

¹⁴⁰ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*. (Nairobi: CKRC 2005) at p. 154-5.

The international legislative framework protects the rights of women in two ways. First, there are treaties and legal instruments that are specific to the rights of women such as CEDAW. Second, there are legal instruments on general human rights with specific provisions on gender equality. Article 26 of VCLT provides that state parties to a treaty have to act in good faith to uphold the treaty.¹⁴¹ Therefore, international laws on women political rights form part of the domestic law and are binding on Kenya.

3.1.1 International Covenant on Civil and Political Rights (ICCPR)

The covenant is a leading international treaty that promotes equality in political life. Article 2(1) prohibits discrimination on any grounds whatsoever be it sex, ideology, beliefs, race, or status:¹⁴² In extension, Article 26 provides the principle of equality by recognizing that people are entitled to equal protection under the law and that the law pre-empts and prohibits any form of discrimination on account of the grounds captured by Article 2(1).¹⁴³

It is instructive to note that the grounds of discrimination captured in Articles 2 and 26 of ICCPR are not exhaustive. Nonetheless, there is a distinction in the applicability of the two articles. Article 2 only prohibits discrimination in relation to the rights that are provided in the treaty.¹⁴⁴ On the other hand, Article 26 is broad in its application. Precisely, Article 26 prohibits discrimination vis a vis civic and political space in party states.¹⁴⁵

Article 3 of ICCPR provides for equal political rights. It places a positive duty on state parties to enhance civil and political rights irrespective of gender.¹⁴⁶ One of the political rights enunciated by the convention is participation in political governance and public administration. The

¹⁴¹ United Nations Convention on the Law of Treaties, 1969.

¹⁴² International Covenant on Civil and Political Rights, UN A/Res/2200A (XXI) 23rd March 1972.

¹⁴³ Ibid.

¹⁴⁴ Sandra Fredman, *Discrimination Law*, (Oxford University Press 2001)

¹⁴⁵ International Covenant on Civil and Political Rights

¹⁴⁶ International Covenant on Civil and Political Rights

entitlement to political participation or representation is captured by Article 25. Article 25 provides for voting rights, rights to contest in elections, voting as a form of expression, and use of secret ballot in voluntary polls.¹⁴⁷

3.1.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The convention was adopted in 1979. Kenya ratified the convention on 9 Mar 1984. Article 1 provides a conceptual definition of discrimination. It specifically refers to discrimination against women.¹⁴⁸ In fact, it takes cognizance of the sex-gender nuances¹⁴⁹ by expressly defining discrimination on the grounds of biological sex as opposed to gender. The definition expressly states that equality rights cannot be abridged by marital status.¹⁵⁰

According to Article 1(1) of CEDAW, discrimination refers to “any distinction, exclusion, or restriction”.¹⁵¹ CEDAW does not offer a limited spectrum of discrimination thus the use of “or any other field” prohibits both direct and indirect discrimination. In this case, Articles 2 and 3 of CEDAW make a case for both de jure and de facto equality. Article 4(1) provides for positive discrimination thus laying the ground for legislative gender quotas.¹⁵² Thus, state parties ought to embrace temporary measures to bolster the political participation of women.¹⁵³

¹⁴⁷ International Covenant on Civil and Political Rights

¹⁴⁸ Andrew C. Byrnes, ‘The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on their role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform’ (2010).

¹⁴⁹ Lisa Baldez, ‘The Impact of the UN Women’s Rights Treaty: Process, Not Policy’ (2012) International Political Science Association.

¹⁵⁰ Ibid.

¹⁵¹ CEDAW

¹⁵² The Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly in 1979.

¹⁵³ Ibid.

Gender inequality in governance is an endemic issue in Kenya. Over the years Kenya has undertaken legal and policy interventions to reduce gender discrimination.¹⁵⁴ This study has adopted CEDAW's definition of discrimination as factors which extinguish or limit the recognition or enjoyment of women to enjoy their rights¹⁵⁵ to show that discrimination and exclusion practices based on Kenya's patriarchal political and social systems promote gender inequality. Consequently, General Recommendation No. 25 obliges state parties to implement policy and political initiatives to reverse discrimination and enhance the capacity of women to enjoy rights.¹⁵⁶ In this light, Kenya has complied with General Recommendation No. 25 by constitutionalising equality rights and adopting gender quotas. Positive discrimination measures foster substantive equality¹⁵⁷ and women's participation in governance.

3.2 Regional legal framework

Although there is dual contestation as to whether Kenya is a dualist or monist state, the Constitution recognises that international legal instruments form part of Kenya's law upon ratification and accession. The regional legal framework forms part of the international legal regime thus regional laws on gender equity and gender equality apply in Kenya. Examples are ACPHR, Maputo Protocol and the Solemn Declaration.

¹⁵⁴ Wanjiku Kabira, *Negotiating the double covenant: Women and Constitution Making*

¹⁵⁵ Ibid., Article 1.

¹⁵⁶ General Recommendation No. 25, CEDAW, 2004. Para.7

¹⁵⁷ Andrew Byrnes and Marsha Freeman, 'The impact of the CEDAW convention: Paths to equality' (2012).

3.2.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Adopted in 2003 and entering into force in November 2005,¹⁵⁸ the Maputo Protocol is Africa's leading legal instrument that seeks to enhance female participation in political processes.

According to the Maputo Protocol, the scope of discrimination against women covers both the purpose and effects of any action that affects the enjoyment of rights by women.¹⁵⁹ In recognising both apparent and unintended discrimination, the Maputo Protocol borrows from CEDAW which prohibits both overt and covert discrimination. Article 2 obliges states to implement regulatory frameworks to weed out discrimination and discriminative practices against women.¹⁶⁰ Article 9 provides for political rights thus a need for affirmative action in promoting women's involvement in governance.¹⁶¹

3.3 Local legal framework

3.3.1 The Constitution

An understanding of political empowerment requires one to examine the extent to which the Constitution of Kenya champions equality and equity. Article 27 provides for the indefeasible right to equality.¹⁶² Although broad in its provisions, the Constitution sets out a conceptual understanding of equality, prohibits discrimination, and outlines prescriptive measures to enhance substantive and procedural equality. In article 27(2), the Constitution conceptualises equality to include “the full and equal enjoyment of all rights and fundamental freedoms”

¹⁵⁸ Referred to as the Maputo Protocol because it was adopted in Maputo during the Ordinary Session of the AU Assembly held in Mozambique.

¹⁵⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Constitution of Kenya, 2010

irrespective of gender or marital status.¹⁶³ Article 27(3) establishes the tenor of equal political rights.¹⁶⁴

Of importance to this study are Article 27(6) and 27(8). State should remedy past injustices associated with discrimination.¹⁶⁵ State should embrace legislative measures to redress past injustices. Also, appointments and elections should meet the two-thirds gender principle.¹⁶⁶

The provision of the right to equality and equitable political representation is in tandem with the national principles and values of governance. Article 10(2) states that equity, equality, and protection of the marginalised are some of the national principles and values of governance.¹⁶⁷ In this light, the provision of legislative gender quotas is designed to enhance equity in electoral politics and governance, equality, and champion for the political rights of women who have been traditionally marginalised and excluded from Kenya's political space.¹⁶⁸

With regards to County Assemblies, Article 177 (1) (b) provides for equitable gender representation. In particular, it provides for special seats to increase the number of members such that the membership meets the two-thirds gender rule.¹⁶⁹ Accordingly, county assemblies meet the two-thirds gender rule by design in the sense that the Constitution obliges them to fill special seats with female county legislators until the two-thirds gender rule is met. Of note, the special seats contemplated above are filled through nomination.¹⁷⁰ Therefore, the electoral commission

¹⁶³ Constitution of Kenya, 2010

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., Article 27(8)

¹⁶⁷ Article 10 2 (b), *Constitution of Kenya*, 2010. It states, "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised" are some of the national values and principles of governance.

¹⁶⁸ See Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23: Women in Political and Public Life*, 1997, Para 15.

¹⁶⁹ Article 177 (1)(b), Constitution of Kenya.

¹⁷⁰ Article 177(2), Constitution of Kenya.

has an obligation to ensure that the list of nominated members submitted by political parties fosters the realisation of the two-thirds gender principle in the county assemblies.

3.4 Institutional Framework

3.4.1 Parliament

Parliament has an obligation to enact laws on the two-thirds gender principle¹⁷¹ and promote the representation of marginalised groups. Article 100(a) identifies explicitly women as a marginalised community.¹⁷²

Although the Supreme Court Advisory Opinion directed that Article 81(b) envisioned progressive realisation of the two-thirds gender principle, the National Assembly is yet to enact a law on the same. In its advisory opinion, the Supreme Court directed that Parliament was obliged to pass a law to activate the two-thirds gender rule by 27th August 2015.

3.4.2 National Gender and Equality Commission

The NGEC was established in August 2011 under the National Gender and Equality Act. The Act was formulated pursuant to Article 59 of the Constitution which created NGEC as one of the constitutional commissions. (NGEC) took over the operations of the National Commission on Gender and Development-Kenya and the Kenya National Human Rights and Equality Commission. The mandate of the National Commission on Gender and Development-Kenya was the monitoring of government fidelity to women's rights and gender issues.

Under Article 27(6) and Article 27(8), the work of the NGEC extends to implementation of positive discrimination programs and policies that remedy injustices.¹⁷³ Also, the commission is

¹⁷¹ Constitution of Kenya, art 81(b)

¹⁷² *Article 100 (a)*, "Parliament shall enact legislation to promote the representation in Parliament of--
(a) women

required to take non-legislative measures such as advocacy and seeking judicial relief to promote the two-thirds gender rule in elective and appointive bodies. The NGEC has exercised this mandate by participating in cases involving the implementation of gender quotas and equitable gender representation in national governance. Thus, the constitutional mandate of the commission is to promote policy initiatives that foster equality.

According to section 8 of the National Gender Equality Act, the Commission is required to promote a culture of equality and freedom from discrimination in the country.¹⁷⁴ Also, the Commission monitors and advises on equality and freedom from discrimination in both the public and private space.¹⁷⁵ The statute empowers the commission to monitor Kenya's compliance with treaties and conventions on equality.¹⁷⁶ Also, the commission spearheads the institutionalisation of gender equality in Kenya through the development of policies and advising the national government, county administration, and government administrative agencies.¹⁷⁷ In sum, the NGEC is tasked with spearheading gender responsive processes to address gender issues in national governance, occupational environments, social environments, economic settings, and political representation.

3.4.3 Judiciary

The courts have been instrumental in the realisation of equality in political representation. One of the most significant cases on marginalised groups was on the right to equal treatment.¹⁷⁸ In *Rangal Lemeiguran* case, the petitioner approached the court seeking an interpretation to the

¹⁷³ This provision envisions marginalised groups. According to Article 260, marginalised group refers to a group of people who, because of law or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)".

¹⁷⁴ National Gender Equality Act

¹⁷⁵ National Gender Equality Act

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ *Rangal Lemeiguran & Others v Attorney General and Others*, Miscellaneous Civil Application 305 of 2004.

effect that the non-representation of marginalised groups in Parliament violated equality and that exclusion from political governance in parliament meant that the interests of the marginalised were not protected.¹⁷⁹ Subsequently, the Court found for the petitioners and directed the government to uphold their political rights. Presently, the judiciary continues to promote equality and equity in political leadership as exemplified by the multiple constitutional petitions on the gender rule.¹⁸⁰

3.4.4 State Department of Gender Affairs of Kenya

Formerly known as the state department for gender, children and social development; the department is tasked with the implementation of government programs geared towards gender equality and gender mainstreaming.¹⁸¹ Gender mainstreaming promotes the integration of gender issues in the national development processes.

3.5 Analysis

Arguably the most comprehensive provision on the implementation of the two-thirds gender principle, Article 177 provides a model which can be used to ensure the realisation of the gender rule in the Senate.¹⁸² The vagueness of the constitutional language does not establish clear timelines for implementation.¹⁸³ Parliamentary efforts to legislate on the two-thirds gender rule highlight the difficulties in setting a timeline for realizing the two third gender principle in the Senate. Also, there is constitutional ambiguity in relation to the limit of the number of elected and nominated members to achieve the two-thirds gender principle. Unlike Article 177, Articles

¹⁷⁹ Ibid.

¹⁸⁰ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, eKLR 2012

¹⁸¹ About State Department of Gender Affairs. Retrieved from <http://www.psyg.go.ke/2016-02-05-06-32-50/gender-affairs-pr?>

¹⁸² Constitution of Kenya

¹⁸³ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, [2012] eKLR

97 and 98 do not provide for a mechanism for achieving the two-thirds gender principle without exceeding the constitutional number of members of parliament.¹⁸⁴

While the Constitution guarantees *de jure* equality, Parliament's failure to legislate denies women from enjoying *de facto* equality. Although the important advisory opinion¹⁸⁵ did not conclusively address the absence of political will to legislate on the gender principle, the Attorney General expressed fear that there was no legal guarantee that nomination of members would meet the two-thirds gender rule.¹⁸⁶ Despite the AG's fears that nomination would not necessarily realise the two-thirds gender rule, the county assemblies rely on nominations to meet the two-thirds gender principle.¹⁸⁷ Under Article 197(1), county assemblies are required to comply with the two-thirds gender principle.¹⁸⁸ Although the elected female members do not meet the constitutional threshold, county assemblies correct this anomaly by nominating extra women members. Speaking of the 2013-2017 electoral term, SID observed that county assemblies had to nominate 600 female members to meet the two-thirds gender rule.¹⁸⁹

Although the existing legislative framework fosters the participation of women in politics, it is inadequate in removing the barriers that increase apathy towards female political leadership. First, social and cultural factors work against political participation of women. The patriarchal

¹⁸⁴ Constitution of Kenya

¹⁸⁵ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

¹⁸⁶ Various parties have petitioned the courts to order the IEBC to disregard nomination lists that did not meet the constitutional threshold of one-third gender principle in electoral posts. See *Katiba Institute v Independent Electoral and Boundaries Commission* [2017] eKLR. Also see S Franceschet. and J Piscopo, 'Gender Quotas and Women's Substantive Representation: Lessons from Argentina', (2008) *Politics & Gender* 393–425 for a discussion on legislated gender quotas requiring political parties to nominate a particular number of women to parliament as a measure to enhance equitable presentation.

¹⁸⁷ Although Kenya's male-defined political processes in party nominations are not particularly keen on female leadership, a statutory legislation obliging political parties to nominate women would substantially promote gender equality.

¹⁸⁸ As per Article 197 (1), "Not more than two-thirds s s of the members of any county assembly or county executive committee shall be of the same gender."

¹⁸⁹ SID, *Actualization and implementation of the 'two-thirds s s gender principle' in Kenya*. Accessed from <https://www.sidint.net/content/actualization-and-implementation-two-thirds-s-s-gender-principle-kenya>.

nature of African politics discourages women from participating in competitive electoral politics thus contributing to inequitable political representation.

With regards to the institutional framework, there is inadequate political will to realise the two-thirds gender principle. Arguably, the direction by the SC that the implementation of the two-thirds gender principle was to be gradual reduced the willingness of Parliament to enact legislative measures to breathe life to the gender principle. In this light, the legislative and institutional framework plays a pivotal role in ensuring gender equality and gender equity in national governance.

3.6 Jurisprudence on Gender Principle

This section acknowledges the intangible input of the courts in the development of indigenous jurisprudence on gender equity, specifically concerning the third gender principle. By integrating policy objectives and rules of constitutional interpretation in their judgements, the courts have illustrated the need for a transformative and purposive approach to the Constitution. While the recognition of the third gender principle by the courts has promoted gender equity, it is unclear how courts can enforce the third gender principle. One of the most critical aspects of the third gender rule that remains unaddressed is the incompatibility or rather compatibility between equitable gender presentation in the Senate and the equitable principle of equality of counties in devolved governance. So far, the courts have only considered the two-thirds gender rule in limited contexts. As such, it is unclear on how Parliament or the Judiciary can provide a roadmap to meet the gender principle in Senatorial representations against the constitutional policy objective of maintaining equality of counties. It is also unclear whether nomination of members is enough to meet the gender principle. Therefore, this section adopts a case study framework to

address the insufficiency of the law to provide a framework to ensure compatibility between the third gender principle and

One of the most important cases is the SC Advisory Opinion of 2012 where the SC was called to determine whether the “*guiding principle*”¹⁹⁰ of gender equality and the “*quantized rights and claims*”¹⁹¹ of two-thirds gender rule in competitive electoral politics required an immediate or progressive realisation. The issue of contestation was whether the two-thirds gender rule in competitive electoral politics required an immediate or progressive realisation.

The case was based on the need for clarity on Article 27(6). According to the Attorney General, Article 81 envisioned a progressive realisation of the gender representation principle as opposed to an immediate realisation of said principle. On the other hand, the Commission on Administrative Justice argued for immediate realisation of the gender rule. Absent the immediate realisation of the gender rule provision; the Commission submitted that Article 100 envisioned a limited duration in which to realize the gender provisions. Under the *Fifth Schedule to the Constitution*, the Ombudsperson asserted that Parliament had a temporal space of five years to take legislative measures and comply with the gender rule.

The Attorney general was apprehensive that Article 27(6) was insufficient to meet the two-thirds gender rule in political representation. The apical court noted the Government has a positive duty to initiate legislative and institutional measures to promote women’s involvement in competitive electoral processes and elective offices. By taking a historical approach to representational

¹⁹⁰ Article 27(3) provides that “*women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*”

¹⁹¹ CoK, Article 81(b) provides: “*not more than two thirds of the members of elective public bodies shall be of the same gender*”.

politics, the Supreme Court observed that women were marginalised in politics and concluded that the Bill of Rights is designed to promote equality and equity in political representation.¹⁹²

The SC argued that the holistic interpretation of the Constitution-gender rule in harmony with electoral principles- required progressive realisation. Nonetheless, the progressive realisation was subject to time limits. The majority took an approach that recognized the third-gender rule as a principle that was yet to be crystallised into an enforceable right.¹⁹³

In *Centre for Rights Education and Awareness vs. The Attorney General and Another*,¹⁹⁴ Mumbi. J. considered whether the AG and the now-defunct CIC had failed to prepare and forward bills on the two-thirds gender principle. In this case, the respondents had failed to table bills to enable legislation on the third gender principle. As a result, the applicants moved to Court alleging that the respondents' inactions had caused Parliament not to take legislative measures geared to enact two-thirds gender principle. The applicants petitioned the High Court to compel the respondents to table bills before Parliament before the time-phase out the date of 27 August 2016.¹⁹⁵ It is instructive to note that some quarters sought to negate the Supreme Court Advisory Opinion on by submitting that the advisory opinion was not binding.¹⁹⁶ Given that CIC was a constitutional body and that Parliament had oversight functions over CIC, the learned judge observed that Parliament had abdicated its oversight duty of ensuring that CIC was performing its duties which

¹⁹² According to the SC, "... in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole."

¹⁹³ Ibid, n 1. Para 71

¹⁹⁴ High Court Constitutional Petition No. 182 of 2015

¹⁹⁵ Ibid.

¹⁹⁶ Article 163(7)

included submission of a bill to enable the realisation of the gender principle¹⁹⁷. Also, while the *Two-Thirds Gender Rule Amendment Bill* and the *Constitution of Kenya (Amendment) Bill 2015* had already been considered; the Attorney General had exhibited laxity in ensuring compliance with the Advisory Opinion.¹⁹⁸

High Court Petition No. 371 of 2016 sought to declare Parliament's failure to legislate on the gender principle as an infringement of the Constitution.¹⁹⁹ To avoid violating the constitution, parliament invoked its powers to extend the legislative window by one year until 2016.²⁰⁰ Despite extending the time phase-out to August 2016, Parliament was yet to enact a statutory framework by the expiry of the deadline.²⁰¹ The court's acknowledged the fact that failure to breathe life into the constitutional gender quotas amounted to discriminative conduct against women that affected their capacity to enjoy and exercise their constitutional rights. Additionally, the failure to legislate on the constitutional gender quotas was a direct infringement of the Constitution.²⁰² Upon finding Parliament culpable for disobeying Constitutional directives, the High Court proceeded to issue a time-phase out for compliance with the constitutional principle on gender representation in electoral politics.²⁰³ Here, the Court exercised its jurisdiction as provided by Article 261(6) (b) which empowers it to make declaratory orders to the effect that the AG and legislature undertake to enact legislation and update the CJ on the same.

¹⁹⁷ High Court Constitutional Petition No. 182 of 2015

¹⁹⁸ Reference 2 of 2012.

¹⁹⁹ *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR. The introduction of the judgement read: "The specific question is whether or not Parliament has passed legislation that gives effect to the two thirds gender rule. If not, Parliament is in breach of its constitutional obligation, and the petitioners ask this Court to invoke provisions of Article 261 of the constitution and allow the reliefs sought in the petition."

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

To cure Parliament's ineffectiveness to implement the gender rule principle, the Court also gave another order to facilitate the dissolution of parliament.²⁰⁴ Arguably, the declaratory order presumed that Parliament's failure to legislate on the gender principle was more of reluctance and inadequate political will to legislate on the same. Given that political will cannot be legislated, it rightfully seemed that the best measure was to dissolve Parliament for failure to discharge its constitutional duties.

Perhaps the most significant acknowledgement by Parliament of the need to implement the gender principle can be found in *Federation of Women Lawyers in Kenya v Speaker the National Assembly & 4 others*.²⁰⁵ The focus of this ruling was the need for consolidation of this case with another constitutional petition²⁰⁶ and staying of the decision pending an appeal case.²⁰⁷ The petition contested the constitutionality of Parliament vide the failure to meet the two third gender rule in its composition.²⁰⁸ Although *High Court Petition No. 371 of 2016* sought to achieve legal certainty, Parliament embarked on a recess on May 28th Of 2017 before enacting statutory laws on the gender principle.²⁰⁹ Therefore, *Petition 401 of 2017* came at the heels of *Petition No. 371 of 2016*. According to *Petition 19 of 2017*, political parties should uphold the gender principle by ensuring their nomination lists comply with the two-thirds gender rule.²¹⁰ Nonetheless, there lacks a legal framework to guide compliance with the gender principle concerning general elections and composition of parliament. Although the court denied the grant of conservatory

²⁰⁴ Ibid.

²⁰⁵ [2018] eKLR, Petition 401 of 2017.

²⁰⁶ Petition No 397 of 2017, Centre for Rights, Education and Awareness (CREW) & Another v the Speaker of the National Assembly and 2 Others.

²⁰⁷ Civil Appeal No 148 of 2017, The speaker of the National Assembly v Centre for Rights Education Awareness and 2 others.

²⁰⁸ Here, the Clerk of the National Assembly entered into prayers for the consolidation of various cases.

²⁰⁹ CREAW, 'Background and current status of the not more than 2/3rds principle' (CREAW Blog, September 25 2017). Available at <http://creawkenya.org/ke/background-current-status-not-23rds-principle/>

²¹⁰ Ibid.

orders to bar Parliament from conducting business because it was constituted illegally, the court took notice of the need to comply with the gender principle.

In considering the gender principle in Kenya's Constitution, it is instructive to note that there is a need for a gendered approach to women rights. The concept of otherness as a contributory factor to the legal emancipation of women receives a jolt from Bartlett who observes that there is a need to examine how gender realities disadvantage women.²¹¹ The ultimate objective of the gender principle is to promote equitable gender representation and gender equality in governance and national processes. However, the failure of Parliament to enact laws to operationalize the two-thirds gender rule remains a bottleneck to equitable gender representation. The issue of how Parliament's failure to provide an enabling legal framework for the implementation of the gender rule continues to affect gender equality and gender equity.

²¹¹ Katherine T Bartlett, 'Feminist Legal Method' (1990) 103 *Harvard Law Review* 829 in M D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 6th ed, 1994) 1116.

CHAPTER 4

A CASE STUDY OF THE SENATE

4.1 Preliminary Remarks

Inspired by critical mass theory, this section will examine the efficacy of the Senate's rules in promoting gender parity and equitable representation. Within the context of the whole study, this chapter explores whether the realisation of the two-thirds gender principle is contingent upon the legislative environment in which Kenya's female senators serve. Although this chapter does not offer a comprehensive analysis of voting patterns between the two genders in the Senate, this study flows on the presumption that gender affects voting patterns. Therefore, processes that limit the voting rights of nominated female senators are inequitable, and they contribute to further exclusion of women in Kenya's politics. The chapter concludes by observing that Senatorial standing rules do promote participation of women in substantive policy and legislative processes, but there is a high need for an innovative approach that supports the two-thirds gender principle in Senate.

4.2 Female Representation in the Senate

There ought to be political nomination of 16 female legislators in the Senate.²¹² In the present Senate, these were nominated by their political parties depending on the proportion of presentation that a party wields in the Senate. Further, the Constitution provides for the nomination of Senators to represent special interests. Although these members are political party nominees, the Constitution expressly requires that they should be qualified for office as

²¹² Article 98 (1) (b). Jubilee Party nominated eight (8) female members, ODM nominated five (5) female senators, with KANU, Wiper, and ANC each nominating one member thus bringing the total number to sixteen (16). These sixteen members are nominated by political parties using a weighted formula for allocation where the party with the highest number of elected members gets to select the most nominees.

legislators in the Parliament.²¹³ The envisioned special interests revolve around the youth²¹⁴ and persons with disabilities.²¹⁵

Table 1: Number of Nominated Female Senators Twelfth Parliament, 2017 onwards²¹⁶

	Name of Senator	County
1	Sen. (Dr.) Inimah Getrude Musuruve	Kakamega
2	Sen. (Dr.) Milgo Alice Chepkorir	Bomet
3	Sen. (Dr.) Zani Agnes Philomena	Kwale
4	Hon Beth Mugo	Nairobi
5	Millicent Omanga	Nairobi
6	Christine Zawadi Gona	Kilifi
7	Mary Yiane Senate	Kajiado
8	Falhada Dekow Iman	Mandera
9	Naomi Jilo Wago	Marsabit
10	Farhiya Ali Haji	Nairobi
11	Judith Ramaita Pareno	Nairobi
12	Beatrice Kwamboka Makori	Nairobi
13	Masitsa Naomi Shiyonga	Kakamega
14	Rose Ogendo Nyamunga	Kisumu
15	Petronella Were Lokorio	Busia
16	Abshiro Soka Halake	Isiolo

²¹³ Article 99, CoK 2010.

²¹⁴ Article 98 (1) (c)

²¹⁵ Article 98 (1) (d)

²¹⁶ Available at <http://info.mzalendo.com/position/senator/?view=grid>.

17	Slyvia Mueni Kasanga	Kitui
18	Mercy Chebeni	Bungoma

A starting place for the examination of the stranglehold effect of the constitutional principle of equality of counties on the two-thirds gender principle and equitable female participation in the evolution of voting in the Senate. Although the Constitution provides for voting rights in the Senate, the Senate relies on parliamentary standing rules when conducting its business. Under Article 124 (1) of the Constitution, each house including the Senate has the power to formulate standing orders. According to the Constitution, the purpose of the standing orders is to regulate proceedings of the Senate and its various committees.²¹⁷ Thus, standing orders should be understood as procedural guidelines that regulate or guide the Senate in its legislative functions among other constitutional duties.

While a senator is generally a legislator in the Senate, the varying procedures of becoming a senator means that elected senators usually are viewed as stronger or as commanding more authority than nominated senators. The issue of supremacy between elected and nominated senators was brought to the fore in the nascent years of Kenya's first Senate under the 2010 Constitution. During the eleventh parliament, there were concerns on the voting rights of senators who happened to represent a single county.²¹⁸ When exercising their oversight and legislative powers over counties, the total maximum possible votes are supposed to be 47. In other words, only a single senator has the right to cast a vote when the Senate is handling matters on devolution.

²¹⁷ Government of Kenya, *The Constitution of Kenya 2010*, Article 124 (1). Government Printer.

²¹⁸ AV Dicey *Introduction to the Law of the Constitution* (Macmillan & Co. Ltd New York 1889). Montesquieu's doctrine, from which Dicey derived his inspiration from, posits that separation of powers empowers Parliament to enact legislations. In this light, Kenya's Senate has legislative functions over devolved governance hence the exercise of voting rights on matters pertaining the adoption and implementation of legislations touching on devolution and county affairs.

First called to attention by Senator Wetangula, the Senate realised the overarching need to revise and tailor the Standing Orders to the unique constitutional innovation of equality of counties. Thus, the inaugural Senate under the 2010 Constitution changed its standing rules to accommodate gender parity partially. The discord in the Senate as to whether nominated senators could vote when county interests were at stake meant that female senators were locked out of most house processes. The effect of this was that the equality of counties doctrine operated to lock out women from the substantial legislation because most of the women members were nominated. Concurrently, the equality of counties reduced the number of female senators participating in voting on county matters further affecting the capacity of the Senate to uphold the two-thirds gender principle in its processes. The effect of this was so severe in the sense that no female senator could vote on bills concerning counties because all female senators in the 2013-2017 parliament were nominated members.

In the eleventh parliament, the first standing orders of the Senate were adopted on 9th January, 2013.²¹⁹ The original standing orders were adopted jointly for both houses. However, the standing orders did not mirror the salient features of devolution as captured by the equality of counties doctrine which limited voting in the Senate to forty-seven members. In particular, the original standing orders of the Senate lacked clear-cut rules to guide the participation of nominated members in legislative matters concerning the counties.

Acting under Standing Orders 247 and 248, the Senate later amended its standing orders twice in the year 2014.²²⁰ The same was also amended in 2018 with the latest standing order coming into force as of 9th August 2018. Under standing orders 78 and 79 of the Senate Standing Orders of 2018, senators have the right to vote on matters on counties and general matters respectively.

²¹⁹ Article 262

²²⁰ 27th February and 25th November.

Under Standing Order 78(1), all senators form a single vote depending on their county of registration as voters. At the same time, the elected senator from a county with more than two senators becomes the head of the delegation.²²¹ Of note, the elected senator delegates the voting right when in absentia to the nominated members within his or her delegation.²²²

4.3 Case Examples of Voting in Senate

Under Article 218, Senate has the mandate to legislate over revenue allocation.²²³ Under this Article, Senate considers both a Division of Revenue Bill²²⁴ and a County Allocation of Revenue Bill.²²⁵ A real implication of this is an equitable division of resources²²⁶ and sustainable economic growth. By drawing on the Senate's standing orders with a particular focus on sections 78 and 79 thus problematizing the interaction between equality of counties principle and the two-thirds gender principle, this chapter has enhanced an appreciation of the nexus between substantive gender participation and house rules,. A case in point where the equality of counties affects voting patterns is legislation on revenue division and revenue allocation hence the need to examine the voting pattern in the County Allocation of Revenue Bill.²²⁷

In *Senate Bills No. 11 of 2018*, Senate sought to provide guidelines for the division of revenue among counties for the FY 2018/2019.²²⁸ At the center of contestation was Clause 3 of the Bill which among other things sought to enhance equitable transfer and transparency in the allocation

²²¹ Article 98 (1) (a)

²²² The Parliament of Kenya, *Standing Order 78(2)(a)*, Senate Standing Orders of 2018

²²³ Senate is supposed to debate and pass a county allocation of revenue bill that fosters equitable allocation of revenue from the national government to the devolved units.

²²⁴ Article 218(1) (a)

²²⁵ Article 218(1) (b)

²²⁶ Article 219

²²⁷ Senate Bills No.11 of 2018

²²⁸ Revenue is distributed to counties from the Consolidate Fund.

of revenue to counties.²²⁹ In the voting, Sen. Mary Yiane and Sen. Halake Abshiro, both nominated members voted on behalf of their county delegations. Other nominated female senators who acted as head of delegations were Senators Rose Ogendo and Farhiya Ali representing Kisumu and Nairobi counties respectively. It is pertinent to note that they all assented to Clauses 3 and 4 indicating their support for equitable allocation of resources.²³⁰

During the eleventh parliament, the then Senate voted on The Public Fundraising Appeals Bill.²³¹ According to the memo, the bill sought to regulate fundraising appeals both at the county and national levels. Additionally, it sought to foster philanthropy.²³² The bill was a county matter because it required the county executive in charge of social development to have a say in the running of public fundraisers at the county level.²³³ In the second reading, Senator Beatrice Elachi of Nairobi County was the only female member who voted in her capacity as head of the delegation. Of note, the eleventh parliament did not have any single elected female senator thus the voice of female senators could have been substantially locked out had the Senate not embraced the head of delegation concept.

Another instance where the voting rights of counties were held as equal is on the Senate's position on *The National Flag, Emblems and Names (Amendment) Bill*.²³⁴ Given that patriotism is an element of governance under both levels of the government, the Bill was a county concern.²³⁵ Consequently, five nominated female senators participated in the voting in their

²²⁹ Clause 3 of the Bill provided that the national government publishes monthly report on the status of allocation of revenue to devolved units. See Maalim Mohamud Mohamed's presentation on the Senate's floor as he discussed the rationale for the Amendments before asking that the Bill move to its third reading stage. Available at <http://info.mzalendo.com/hansard/sitting/senate/2018-05-16-14-30-00>

²³⁰ Parliament of Kenya, *Senate Hansard Report*, (Tuesday, 3rd July, 2018).

²³¹ Senate Bill No. 28 of 2014

²³² Government Printer, *Kenya Gazette Supplement No. 99 of 27th June, 2014*

²³³ *Ibid.*, s 13

²³⁴ Senate Bills No. 8 of 2017

²³⁵ Articles I 10 (1) (a) and Article 123 (2)

capacity as head of delegation. These were Senators Agnes Zani, Naomi Jilo, Naomi Shiyonga, Rose Ogendo, and Farhiya Ali.²³⁶

Voting where the Senate sought to exercise its oversight powers on counties revolves around the committee charged with the assumption of office by a governor-elect. In the period surrounding the swearing-in of elected governors, there was an outcry over the misuse and imprudent use of financial resources with some counties spending excessive amounts on the assumption of office ceremonies.²³⁷ During the voting on the *Assumption of the Office of County Governor Bill*, nominated female senators who acted as head of delegations included Senators Rose Ogendo, Naomi Jilo, Agnes Zani, Naomi Shiyonga, and Farhiya Ali.²³⁸ Had Senate not amended the standing orders on voting, these members would not have voiced their stand on the same.

Cognizant of the need for coherent legislative processes, the Senate has floated the idea of creating the positions of county AGs. In the voting on *The Office of the County Attorney Bill*,²³⁹ senators were called to determine the necessity of establishing the dual offices of county legal counsel and solicitor.²⁴⁰ The bill is inspired by the separation of powers doctrine that seeks to promote administrative efficiency by having a qualified team of legal personnel that assists the county assemblies in the formulation of sound laws and advises the county governors on the texture and implementation of legislations. Nominated female senators who voted as head of

²³⁶ The members served as head of delegation in Kwale, Marsabit, Kakamega, Kisumu, and Nairobi counties respectively.

²³⁷ Sen Wamatangi sponsored a bill to regulate excessive public spending in swearing in ceremonies.

²³⁸ The members served as head of delegation in Kwale, Marsabit, Kakamega, Kisumu, and Nairobi counties respectively.

²³⁹ 2018

²⁴⁰ Otieno, J 'Kidero refuses to assent to bill creating county attorney office', (May 18, 2017), The Star. Available at https://www.the-star.co.ke/news/2017/05/18/kidero-refuses-to-assent-to-bill-creating-county-attorney-office_c1562962

delegations included Bomet's Sen. (Dr.) Alice Milgo, Mary Yiane from Kajiado, and Farhiya Ali from Nairobi county.²⁴¹

4.4 Concluding Remarks

The finding of this chapter is best parsimoniously summarised by observing that the head of the delegation concept does not foster the realisation of the two-thirds gender principle but merely promotes participation of the already nominated female senators in legislative processes. This chapter has engaged the question on the nature of the interaction between equality of counties and the two-thirds gender principle in Senate. The chapter notes that the concept of head of the delegation has cured the latent defect of the original 2013 Senate Standing Orders which excluded nominated female members from participation in voting on devolution and county matters. The procedural provision under rule 78 and 79 where an elected senator can delegate his or her voting right to a nominated member is a remarkable gain that bolsters substantive female participation in legislation. Nonetheless, within the thrust of the Senate's inability to meet the gender threshold, head of delegations are but a mouthpiece for the other members of the delegation.

²⁴¹ Available at http://www.parliament.go.ke/sites/default/files/2017-05/Senate_Votes_20.06.2018.pdf

CHAPTER 5

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Findings

The chief objective of this study was to locate the history of the two third gender rule to understanding its significance under Kenya's legal framework and to address its shortcomings in so far as implementation in the Senate is concerned. For women to equitably participate in Kenya's political governance, there has been a huge need for remedial measures such as nominations and positive discrimination. Until the creation of the elective posts of women representatives, this study has established that nominations were the main vehicle for increasing the number of female members in Kenya's Parliament. Similarly, nominations are still the main vehicle for increasing female representation in the Senate. About the fulfillment of the third gender rule in Kenya's Senate, Kenya has not been able to meet the constitutional thresholds.

This study sought to investigate the relationship between the equality of counties and the equitable representation of women in the Senate. The total number of senators is more than the number of counties hence the innovation under the head of delegation which bundles senators who share a county into one vote in matters on counties. There is a latent structural flaw in the head of delegation concept because the nomination of female members does not result in substantive representation. For there to be a change in the representation of women in Kenya's Senate, there is a need for innovative legislation that considers the equality of counties and substantive representation.

5.2 Conclusion

Although Kenya has constitutionalized the principle of equality in political representation and gender quotas in electoral politics, gender-based discrimination in political processes remains an endemic problem in Kenya. The critical mass theory has allowed this research to engage with gendered realities and othering in the political processes that affect the realisation of the constitutionalized gender principle in political representation. At the same time, the feminist approach has led to the observation that patriarchal structures encourage partial adherence to the Constitution when it comes to women rights. The issue of compliance with the two-thirds gender principle is of immense value to women and the country as a whole. Usually, women legislators infuse the legislative and policy-making processes with unique perspectives that promote equitable social development and poverty alleviation. Thus, eliminating discrimination and promoting political representation is a noble goal that promotes sustainable development.

A salient feature of female participation is that while the law promotes their participation in governance, it does so within a patriarchal environment. As a result, the formal justice concept of representation under the constitution gets watered down by traditional gendered roles of women that distance women from the political space. At the same time, the law has mostly been a gendered tool where the patriarchal system determines the needs of women using the experiences of men. Another dimension of justice in gender representation is that pluralism of legal systems contributes to a low number of elected women leaders. While the Constitution and electoral statutes recognize the need for equitable gender representation, customary norms and traditions often work to the detriment of women. Customary law revitalizes patriarchal supremacy through norms and institutions that frown on female participation. In most Kenyan communities, the electoral decisions are shaped by customary norms and gendered roles. The effect of this is that the formal justice espoused in the Constitution cannot work to revoke or invalidate patriarchal

thinking processes. The relationship between formal justice and customary law thus affects the equitable representation of women in Kenya's parliament.

Compared to the county assemblies, the National Assembly and the Senate have been unable to meet the constitutional thresholds for female membership. The Constitution provides for nomination as a procedure to cure the failure to meet the two-thirds gender principle in a political presentation at the ward level. Therefore, county assemblies are required to nominate female members until the assembly attains the constitutional threshold of two-thirds gender principle. On the other hand, the Constitution provides for a limited number of nomination posts in the Senate and the National Assembly to address the interests of traditionally marginalised communities. These nominations at both the Senate and the National Assembly are not sufficient in bringing up the number of female legislators to the required constitutional composition. At the same time, the Constitution places a positive obligation on Parliamentarians by requiring them to enact a statute to facilitate the realisation of the two-thirds gender principle.

Although Kenya's courts interpret the Constitution, the efficacy of the judicial system in promoting compliance with the two-thirds gender principle is significantly constrained by inadequate political will to legislate on the same. While the Supreme Court directed that the Constitution envisioned a progressive realisation of the gender principle, Kenya still lacks a law to guide the same. Notably, despite the courts issuing time-out orders to Parliament, the National Assembly failed to come up with laws to guide the realisation of the two-thirds gender principle.

The case law regarding compliance with judicial orders on the legislation of the third gender rule is unclear due to Parliament's reluctance and deliberate sabotage on the same. Of the cases involving judicial directions to parliament to breathe life to the third gender principle, all have expressed concern that there should be a time phase-out on the compliance with the gender rule.

The time-phase out on the enforcement of the gender rule existed to prevent the deferral of the realisation of the gender representation to a future without a deadline. The time-phase out first received attention in the *Matter of the Principle of Gender Representation in The National Assembly and The Senate* where the Supreme Court directed the Attorney General to table a bill to give effect to the gender principle.

In problematizing the study, the research sought to examine the compatibility of the two-thirds gender principle and equality of counties principle. Achieving gender equality at the Senate requires a comprehensive understanding of the Senate as a watchdog over devolution. Here, while both bodies are law-making agencies, the Senate is responsible for legislation on matters affecting devolution. In this case, the formula applied to achieve the two-thirds gender principle at the National Assembly would be different from the criterion at the Senate level.

5.3 Recommendations

Short-term

The research in this study forms the basis of a policy book to guide the implementation of the two third gender principle. The policy book should discuss the bills tabled to promote gender representation. These bills include the Sijeny Bill, the Chepkonga Bill, the Compromise Bill, and the Duale Bill. In so doing, the policy should renew interest in the observation of the two third gender rule in elections. Additionally, further research should be conducted to foster the implementation of the same.

There is no question that Parliament ought to enact legislation to guide the attainment of the two-thirds gender rule. Given that Parliament has discussed around four bills on the implementation

of gender principle²⁴², it is important to note that these bills only address critical mass. They are silent on the import of equality of counties in the sense that they just make a case for the use of nomination to attain the two-thirds gender requirement. For instance, the Duale Bill which has received a lot of support is blind to substantive representation in the sense that it introduces special seats that serve as gender top up.²⁴³ Although this would meet the two-thirds principle, it does not foster substantive representation of women because the equality of counties would require the special seat members to abstain from voting on county matters. In other words, the voice of special seat members would still be muzzled by the elected senators when it comes to voting on devolution. A practical solution would be the introduction of a constitutional amendment bill that designates specific counties to produce elected female senators. In this case, the electoral body should select sixteen counties where only female contenders seek senatorial positions. The designation of specific counties to produce female senators should be on a rotational basis.

Mid-term

One particular measure to promote gender parity is by empowering the electoral body to implement the two-thirds gender principle at the nomination level. The Elections Act should be amended to require political parties to either select electoral areas where they would field female nominees or empower IEBC to set aside certain constituencies for female nominees. Specifically, no more than two-thirds of nominees should be of the same gender. Although this could be attacked as a limitation of democracy, it serves the dual purpose of fostering gender parity and removing patriarchal barriers that affect substantive participation of women.

²⁴² Sijeny Bill, the Chepkonga Bill, the Compromise Bill, and the Duale Bill.

²⁴³ Clause (1) (da), of The Constitution of Kenya (Amendment) (No. 4) Bill, 2015 amends Article 98 of the Constitution by providing for gender top up. It introduces special seat members “to ensure that no more than two-thirds of the membership of the Senate is of the same gender”.

Long-term

The need to embrace the two-thirds gender principle continues to provoke mixed reactions among Kenya's citizens and elected members alike. With some patriarchal thinking still downplaying the constitutional two-thirds gender principle by remaining insistent that women have to battle out with men, most of these debates on the implementation of electoral gender quotas tend to marginalize the interplay between equality of counties and gender parity in Senate and its processes. Against this background, the civil movement and women's movements in the country should conduct public awareness of gender-centric policies. These programs should reverse patriarchal thinking and create an ideological shift that acknowledges gender equality in political leadership. At the same time, they should lobby for gender-responsive policies in administration.

Because the prescriptive constitutional doctrine of equality of counties will affect the substantive participation of nominated members, most of whom are female, the discourse on the gender principle in the Senate should shift to cover ways to break the stranglehold of equality of counties on substantive participation and representation in county legislative matters.

Achieving equality and gender equity requires holistic measures that embrace engendered realities of the socioeconomic and political dynamics in Kenya. At the same time, there is a need for Parliament to cultivate and entrench a robust rule of law culture that promotes adherence to the Constitution and judicial orders. Overall, Kenya needs long-term policy and legislative efforts that support and sustain gender equality practices.

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