



**UNIVERSITY OF NAIROBI**

**CHALLENGES TO THE IMPLEMENTATION OF THE CONSTITUTIONAL  
PROVISIONS OF THE TWO-THIRDS GENDER RULE IN THE NATIONAL  
ASSEMBLY OF KENYA**

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## DECLARATION

This research project is my own original work and has not been presented to any university for examination.

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The research project has been submitted for approval by the University supervisors.

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## **DEDICATION**

I dedicate this work to my family, my parents Gabriel Olendo and Alice Kubumba; my children Joy Gift, Josiah Griffins, Jane Gracia and Janice Gloria; Fostine Wabwire; and Stephen Wabwire for the sacrifice they made for me to complete my research project. Their love, care, concern, support, encouragement and enthusiasm inspired me to achieve this goal. I love and appreciate you all.

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## LIST OF ACRONYMS

AG	Attorney General
AMWIK	Association of Media Women in Kenya
CEDAW	United Nations' Convention on the Elimination of all Forms of Discrimination against Women
CIC	Commission on the Implementation of the Constitution
CKRC	Constitution of Kenya Review Commission
CMD	Centre for Multiparty Democracy
CREAW	Centre for Rights Education and Awareness
CRECO	Constitution and Reform Education Consortium
DTM	Development Through Media
FEMNET	African Women's Development and Communication Network
FIDA	Federation of Women Layers
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEA	Institute of Economic Affairs
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KEWOPA	Kenya Women Parliamentary Association
KHRC	Kenya Human Rights Commission
MP	Member of Parliament
MYWO	Maendeleo Ya Wanawake Organization
NGP	National Gender Policy



NGOs	Non-Governmental Organizations
PWDs	Persons with Disabilities
UPDK	United Disabled Persons of Kenya

## ABSTRACT

The study aimed at investigating challenges to implementing the Constitution of Kenya provision on two-thirds gender rule in the National Assembly. Specifically, the study examined the judiciary-related challenges, the parliamentary initiatives and challenges, and efforts by the women's movement and groups towards ensuring the two-thirds gender rule is implemented in the National Assembly of Kenya. The study was guided by the Feminist Political Theory, and the Critical Mass Theory in the analysis of the findings. The study was carried out through a desk review and content analysis to provide descriptive analytical information about the subject of the study. A checklist was developed as a tool to guide the review and analysis of the documentation on the implementation of the gender rule. This study contributes to the general knowledge and understanding of the implementation of two third gender rule in Kenya. It verified that the 2010 Constitution of Kenya clearly outlined the provisions on the two-third gender rule. It established that parliament and judiciary have demonstrated reluctance and lack of good will to ensure the gender rule is implemented. Efforts by the women's movement and groups to have the two-thirds gender rule implemented have not yielded fruits. The patriarchal nature of Parliament and the judiciary has played a key role in trivializing the realization of the gender rule and legitimizing this failure. The study recommends further research on electoral laws as a means of ensuring that women are purposely included in political leadership right from the point of party nominations. It also recommends further study to analyze and provide a roadmap for the realization of the 2/3rd gender rule, whether progressive or immediate. Further research should be carried out to analyze the extent to which the government of Kenya has adhered to the New Constitution, and how this should inform formulation of policies to improve the involvement of women in politics. Research should be carried out to establish mechanisms of building effective collaborations between the legislature and the judiciary, facilitating better coordinated mechanisms for interpretation and implementation of the law.

# **CHAPTER ONE**

## **INTRODUCTION**

### **1.0 Introduction**

This chapter comprises of the background of the study, statement of the problem, objectives of the study, the research questions, justification of the study, the significance of the study, the scope of the study and the limitations of the study. The chapter will then conclude by providing definitions of key concepts and terms as used in this study.

### **1.1 Background**

Women's affirmative action, traced back in the vindication of the women's rights nineteenth century work, of Wollstonecraft (2017) emphasizes that a woman's environment greatly influences her work; her argument was that cultural beliefs placed men to be termed as the only sex which can take leadership and that women were weak. Society saw women like objects of pleasure for men (Bashevkin, 2013).

In current days women have both obligation and right to actively participate in political leadership. According to Johnson (2017) study, human rights and obligations, and political analysts from different regions have observed the difference made by women's participation in leadership and management. Arriola and Johnson (2014) argues that increasing the number of women in political forum will help reduce the issue of poverty or it affects women. In addition, Cook and Glass (2014) finds out that, increasing the number of women not only help in building a nation but also brings about balanced decision making processes.

The United States writings on women legislators observed that decisions concerned with education issues, gender violence, health, peace, dignity, rights, women's economic empowerment and democracy greatly concerned women leaders. The average percentage of women in political leadership at global level stands at 18%. In the study done by Bjarnegård (2013), there are significant differences between regions in regard to representation of women. Countries with the highest number of women's participation are the Nordic countries while Arab states have the lowest representation and this trend varies among nations. For example, the law of medieval shows that the women of Nordic had greater rights compared to their peers in the other contemporary parts. In addition, Norway the medieval inheritance laws followed family relations for both female and male line hence women opted for divorce. This right looks not very impressive in current times but they were very unusual at that time. Organizations of feminist viewed the Norway, Sweden, Scandinavian Countries, Finland and Denmark as women equality model and hence since 1970s this countries enjoyed high women representation in their parliament and local council Bjarnegard concluded. The woman right groups in Arab countries are fighting for their rights in the United Nations' Convention on all Forms of Discrimination against Women (CEDAW) elimination, the most women's right treaty comprehensive and use it in demanding for government action asserts (Bush & Jamal, 2015).

Kenyan society is rooted in patriarchal culture and societal belief that see women as secondary to men. Women's fight for equal rights and participation can be traced to the 1992 National Women's Conference. During this Conference, Prof Maria Nzomo challenged political parties to increase the representation and participation of women

(Nzomo, 2013). Women's rights have been sidelined for the population of men in the political arena. Women have been struggling a lot to get a chance in political forum. Furthermore, the society is yet to accept women as capable of taking up leadership roles as they are still influenced by the patriarchal views embedded in the Kenyan culture. Affirmative action has been one of the policy strategies adopted as a redress measure to the discrimination of women's representation and participation in decision making processes. Wishart, et al. (1995), describes affirmative action as a set of public policies and initiatives that have been put together to abolish discrimination based on race, color, religion, sex or national origin. It is a practice that rectifies discrimination in society and so meant to advance equal opportunities between men and women.

The Supreme Court, established the deadline of 27<sup>th</sup> August 2015 within which legislation for implementation of the 2/3<sup>rd</sup> gender rule was to be enacted by parliament. The study established that there is resistance and lack of political will to ensure realization of the gender rule. Parliamentary bills for the implementation of the gender rule were not passed; they were lobbied against and/or the required quorum of a minimum of 233 members of parliament present in Parliament to ascent to the bills was never attained, practically leading to the defeat of the bills. The Constitution of Kenya (Amendment) bill, 2015 (the Chepkong'a Bill), which sort to post implementation of the gender rule was lobbied against by women parliamentarians. The Constitution of Kenya (Amendment) bill, 2018 (Duale Bill, 2018), was also lobbied against. Four attempts to pass the Duale Bill failed to get the bill passed into law on the floor of the House, there was no quorum to vote for the bill. Political parties remain key gatekeepers to supporting women to elective leadership. Implementation of the gender equality rule is facing some

resistance and delaying tactics. The main reason for this is the fact that male leaders do not want to give out their privileges. 27<sup>th</sup> August 2015 date lapsed without enactment of legislation on the gender rule and to date, the Kenya Courts are yet to declare the National Assembly, as it is constituted, is unconstitutional hence call for the dissolution of the House. Kenyan women continue to suffer systematic discrimination.

Kenyan women leaders like Martha Karua, Beth Mugo and Phoebe Asiyo, tabled several Affirmative Action bills in parliament in an effort to increase the percentage of women in parliament. President Mwai Kibaki in 2007 issued a presidential directive and declared that 30% of all job vacancies be reserved for women (GoK, 2007). This led to a campaign requiring the government to implement Affirmative Action before the General Elections of 2007 (Manyala, 2007) A mission to collect a million signatures was started by the civil society organizations and women leaders with the purpose of compelling the government to implement the Affirmative Action.

The called for constitutional amendments advocated for equal participation and rights in all life spheres. The calls for constitutional reforms and change not only in the realm of human rights protection, but also in the political system, initiated in the mid-1990s, was the fundamental reason that Kenya endorsed the new constitution in 2010. These efforts culminated in the two-thirds gender rule, Article 27 in Kenya's Constitution promulgated in 2010. The research finds out the challenges facing the implementation of the two-thirds gender rule in Kenyan society

## **1.2 Statement of the Problem**

A critical mass of 30% of women in decision making and management process is needed for the realization of major changes in legislative institutions, behaviour, policy priorities, and policy voting occurs, leading to transformative legislatures, and effective governance systems and processes where the women's agenda and strategic needs are addressed. The Constitution of Kenya, article 27 (8) provides for affirmative action, requiring the State to take legislative and other measures to ensure that not more than two-thirds of the members of elective or appointive bodies are of the same gender. Article 81 further recaps that the same rule should be applicable in elective public bodies, including the National Assembly, to bridge the gender gap in participation and representation of women in decision making processes, hence ensuring an inclusive parliament where women and men population is represented and ensuring Kenya moves towards becoming a vibrant and strong democracy.

It is nine years since, and Kenya has held two general elections, 2013 and 2017, yet the two-thirds gender rule is yet to be implemented or realized in the National Assembly. Parliament is yet to pass a legislation to effect the implementation of the gender rule. Women make up 21% of the National Assembly, falling below the 30% constitutional requirement. Despite Kenya's 2010 Constitution establishing the gender quota, to enhance women's participation in leadership and in politics, attempts to successfully enhance implementation of this provision in the National Assembly have failed. Political parties, remain key gate keepers to women's entry into politics; they are often reluctant to support female candidates (OSCE/ODIHR, 2014). Women candidates face complex

challenges in their electoral campaigns. These include a lack of gender-sensitivity in candidate selection as well as inequitable distribution of party resources.

Judicial interventions to ensure parliament enacts legislation for implementation of the two-thirds gender rule have been generally slow and not effective. Further, efforts from specific legislations and court cases brought by women's organisations have not borne fruit. The study therefore seeks to analyze the challenges to the efforts in implementation of the two-thirds gender rule in Kenya, with a specific focus on the National Assembly.

### **1.3 Objectives of the Study**

#### **1.3.1 Main Objective**

This study aims at analyzing the challenges to the implementation of the constitution of Kenya provision of two-thirds gender rule in the National Assembly.

#### **1.3.2 Objectives**

The specific study objectives were to:

- i. Analyze judiciary-related challenges on implementation of the two-thirds gender rule in the National Assembly of Kenya.
- ii. Examine challenges on proposals tabled in parliament on implementation of the two-thirds gender rule
- iii. Analyze efforts by the women's movement and groups on the implementation of the two-thirds gender rule.



### **1.3.3 Research Questions**

- i. What are the judiciary-related challenges on implementation of the two-thirds gender rule?
- ii. What are the challenges in the implementation of the proposals tabled in parliament?
- iii. What have been the efforts of the women's movement and groups in Kenya towards implementation of the two-thirds gender rule?

### **1.4 Justification of the Study**

It is acknowledged that the attainment of the critical mass representation of women in decision making bodies, including parliament is important in achieving a society that is equitable and strong in delivering more representative democracy. Whereas a strong and vibrant democracy is possible when parliament is fully inclusive of the population it represents, the Kenya parliament is yet to achieve the critical mass of women's representation required by Kenya's supreme law, the Constitution. Women continue to face systemic discrimination in Kenyan society. The deadline for legislation for implementation of the two-thirds gender rule lapsed on 27<sup>th</sup> August, 2015, after which parliament extended the period by one year, which also lapsed on 27<sup>th</sup> August 2016. The 60 days given to parliament by the High Court on 30<sup>th</sup> March 2017 to ensure the gender rule legislation was enacted lapsed and parliament is yet to pass the legislation. The constitutionality of the Kenyan National Assembly is questionable with the failure to implement the two-thirds gender rule, hence a risk of a constitutional crisis and the consequence dissolution of Parliament.

There seems to be no easy solution to the implementation of the 2/3<sup>rd</sup> gender rule. The purpose of the study was to analyze the challenges to the implementation of the 2010 constitutional provision on the two thirds gender rule in the National Assembly. The study focused on National Assembly since it is one of the institutions that has largely been affected by lack of implementation gender rule.

### **1.5 Significance of the Study**

The results of this study offer valuable contributions from both a theoretical and practical standpoint. Theoretically, it contributes to the general knowledge and understanding the implementation of two third gender rule in Kenya. To scholars and researchers, the study provides information that forms a basis for further research in addressing some key challenges to the implementation of the 2/3<sup>rd</sup> gender rule in the National Assembly of Kenya. It also provides information that can be used to inform the formulation of policies and legislations for improving involvement of women in elective and appointive decision making structures. The study also provides information to the government of Kenya on the extent to which it has adhered to the new constitution.

### **1.6 Scope of the Study**

The study focuses on the implementation of the constitutional provisions on the two-thirds gender rule in the National Assembly of Kenya. The primary sources included the Constitution of Kenya, 2010; Constitutional amendment bills tabled in parliament in relation to the implementation of the two thirds gender rule, and the parliamentary Hansards on the debates on the same; Supreme court petitions and rulings on the two thirds gender rule; and proposals tabled by the women's movement on the two-thirds gender rule.

## **1.7 Limitations and Delimitations of the Study**

This research was based on secondary data, mainly qualitative in nature, focused on the implementation of the 2/3<sup>rd</sup> gender rule in the National Assembly, and not in other elective and/or appointive institutions, to which the two thirds gender rule provisions are also applicable. Since the study is based on data collected by other researches, guided by their study objectives and interest, all the information desired for the current study may not have been captured in the literature review and the study findings. In addition, as is with limitations of using secondary data, values and beliefs of individuals and groups, as well as reasons that may be underlying the current trends in the study subject may not be revealed.

The documents analysed were too many and challenging especially when checking for the content for the specific theme. All these were addressed by developing a checking list to guide the analysis, interpretation, understanding and presentation of the findings, guided by the research questions.

## **1.8 Definition of Kenya Terms**

The following are the key terms of the study:

**Affirmative Action:** A set of administrative practices, laws, guidelines policies and guidelines, aiming at ending and correcting specific form of discrimination effects. It is a deliberate move to reforming or eliminating past and present discrimination using a set of public policies and initiatives designed to help on the basis of colour, creed, geographical location, race, origin and gender among others (WiLDAF, 2010).

**Discrimination against Women:** Any restriction, or exclusion made on sex basis purposing to impair the enjoyment, irrespective of their marital status, on a basis of equality of men and women, the recognition, rights of human, and political fundamental freedoms, cultural, economic, social, civil or any other field.

**Gender:** It is the qualities that differentiate masculinity and femininity. These qualities can include biological sex; the state of being male or female-based social systems such as gender roles and other social responsibilities and gender identity.

**Implementation:** execution, carrying out, or plan practice, a method, or any design for doing something. An action that must follow any preliminary thinking in order for something to actually happen.

**Legislation:** is a government suggested set of law which is made official by a parliament.

**Two-thirds:** This is a principle which politically requires two third rather than majority simple of politically organized group to be taken so as to exercise the power to make decisions binding upon the whole group compare majority rule.

## **1.9 Structure and Organization of the Dissertation**

**Chapter one:** This chapter has set the stage for the study by introducing the context of the study. The purpose and significance of the study have also been discussed.

**Chapter Two:** Introduces the reader to the elaborate literature review and theoretical framework of the study. This chapter has also introduced the reader to the theoretical framework employed in the study.

**Chapter Three:** Explains in detail the research design and data collection processes, along with justifications for the methodology and methods adopted.

**Chapter Four:** Presents the findings of the study. It answers the research questions which relates to the study subject.

**Chapter Five:** Summarizes the main findings of the study in the light of the analysis and interpretation of the challenges in the implementation of the two-thirds gender rule.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.0 Introduction**

This chapter presents a literature review and the theoretical framework for this study. The literature review covers what other researchers have written on the two-thirds gender rule around the world and in Kenya. It also examines literature on implementation of the two-thirds gender rule in Kenya.

#### **2.1 Background of Two-Thirds Gender Rule in the National Assembly, Kenya**

Women are the key figures and assets for any development to take place. Despite the constitution providing for women's representation, there has been continued resistance to women and ending gender inequality in leadership. There is a need for a radical move in the Country because women must form at least on third of any elective public positions. The principles of the two-thirds gender rule have not been fully implemented, even in the recent key appointments that have been already carried out; though there has been a bit of change in the women's involvement. A good example is the appointment of the cabinet secretaries (Wafula, 2015).

The fact that this principle has not been implemented in parliament has made it difficult for women to be represented in the national level especially in the making of decisions that involve them which has been increased by the parliament's failure to implement the constitutional two-thirds gender rule. In current days women have both obligation and right to actively participate in political leadership. Human rights and obligations, and political analysts from different regions have observed the difference made by women's participation in leadership and management. These researchers and analysts note the

increasing the number of women in political forum will help reduce poverty and its effects on women. This will contribute to building a nation as well as bring about balanced decision making processes.

The 2010 Constitution's two-thirds gender rule inclusion changed the perception of understanding and gave hope to women. Despite the hope, there have not been great efforts in ensuring that the rule is implemented in parliament. The rule is strengthened by provisions such as Article 26 (6), Article 27 (8) and Article 81 (b) which indicated that all issues in parliament should not be ruled or decided by the same gender of the two thirds thus increasing gender balance in leadership. The Constitution of Kenya introduced the two-thirds gender rule in 2010 as an affirmative form. It indicated that the two thirds of the members of parliament should be of different genders. The Kenyan constitution has brought changes that give women the right and freedom to participate in political issues and mostly in democratic governance.

Following the discussed provisions, the 2/3<sup>rd</sup> threshold was not met during the 2013 general election, except at the County Assembly. The realization the threshold was due to deliberate efforts to have the 2/3<sup>rd</sup> gender rule met. There were arguments that failure by the Senate and National Assembly to meet and conform to the constitutional provisions rendered these institutions unconstitutional. (Barasa, 2012). The 8th August 2017 general election did not see the realization of the 2/3<sup>rd</sup> gender rule, as the National Assembly required one hundred and seventeen (117) Members being of the opposite gender. There were only 76 women in parliament out of the total 349 members, that is 23 women directly elected from the constituencies, 47 County Women Representatives, and 6 women members nominated by political parties. Due to observed challenges the study

goes deep to analyze the challenges faced to have the two-thirds gender rule implemented in parliament.

### **2.2.1 Judiciary Related Challenges on Implementation of the Two Thirds Gender Rule in the National Assembly of Kenya**

This section reviews challenges on implementation of the two-thirds gender rule by the judiciary in Kenya and globally.

Provisions in the Kenyan constitution provide for a gender representation which is further enhanced by a gender diversity clause which requires employment in public institutions to meet no more than two-thirds principle. (Constitution of Kenya 2010, Article 27(8)). All appointing authorities in organizations are expected to comply with the rule. Nyariki (2013) notes that debate on the applicability of the two-third-gender principle in the Senate and National Assembly were stimulated when efforts to review laws and regulations for guiding the 2013 general elections under the new constitution. It is argued that since the membership provision, two houses doesn't require the two third rules, there is no need for immediate application of the principle (Kameri-Mbote, 2016).

Some exemplary examples in judicial challenges is in a study done in Afghanistan by Pangamlung (2014) which shows that the head of juvenile and family courts in Kabul exception, there is still continued exclusion of women in the judiciary. Incases were women act as judges perform different functions from their male counterparts. Female judges mostly act as judicial clerks and never involved in cases of adjudication. Outside Kabul is rare to find a female judge. This is suspected to be the reason behind lack of gender justice. According to Skaine (2014) in the 2004 amnesty international fact finding



mission found a good number of females jailed for adultery, running away and unlawful engagement in sexual activities was because of lack of knowledge of prevailing the Zina law by many judges and judicial officials and lack of basic legal skills in many instances by interviewed legal professionals which led to many sentencing of offenses is left to judge's autonomous discretion and they often handed down arbitrary sentences to women. A good number of jailed women are charged for going against social morals and norms.

Globally, as per the work done by Jessica (2016), England has had a rise in the number of women representation in every election since 1966 except in 2001, when there were 36 women candidates fewer than 1997. In the general election of 2017 the women representatives were fewer than 2015 with 60 women, but there was a good increase compared to men. In 1918, 17 women candidates were able to stand for parliament seats. This included four Liberal Democrat, four Labour, Conservative candidate and eight others. Until 1979, when for the first time women's proportion of total candidates reached 20%, the proportion of women candidates never raised 10%; a clear evidence that women were being overlooked in the allocation of the parliamentary seats.

The fourth World Conference on Women in Beijing advocated for 30% affirmative action and asked governments and non-governmental organizations to put in place efforts to increase women's participation. In addition, the Kenya National Gender Policy (NGP) recommended and sought for 35% affirmative action in political and public service positions. In Ethiopia, CEDAW committee recommends temporarily to adopt special measures like, gender quota throughout the national electoral board structure and also take affirmative action to increase the women judges, diplomats, and civil servants

percentage. The committee further recommends using affirmative action in recruitment and training of female teachers, giving priority to women in public sector recruitment and setting quota for female university students (Wang, 2013). Regionally, participation of women in appointive and elective leadership is very low. Nigeria as a Country has not been spared on the low status of women's representation and participation, currently standing at 5.6%, according to the International Parliamentary Union report of 2017.

In Kenya, the two-thirds gender rule is premised on the provisions of Article 81 (b) which states that, "not more than two-thirds of the members of elective public bodies shall be of the same gender". Creation of the 47 elective positions for women in the National Assembly was one of the ways to have the gender rule is realized. There has been a notable increase in the number of women holding decision making positions in the country, especially in the political realm. However despite this progress, it has been very difficult for parliament to achieve the minimum threshold of ensuring that 30% of its members are women. Rwanda has maintained the records of the Country with the highest female representatives in the world since 2003, going beyond the Nordic Countries (Dahlerup, 2013). According to the publication by Inter-Parliamentary Union, (February, 2019), three of the world's top 10 Countries, in women's representation in parliament, are in Sub-Saharan Africa are: Rwanda at 61.3%, Namibia at 46.2% and South Africa at 42.7%.

It was noted by the Supreme Court of Kenya that, lack of specific requirements relating to the two Houses of Parliament showed that in a county assembly's case, the principle of two-thirds gender was only amendable to realization of progress related to the parliament of two houses (Wafula, 2015). Thus it should not be immediately enforced. The court

advised that incase action on principle crystallization and enforcement of rights won't be taken before 2013 election the principle won't be applicable to the said election. Parliament's Justice and Legal Committee engaged in public participation on a proposed law change in line with court decisions and the Fifth Schedule to the Constitution. The Bill sought to amend the Constitution for the membership of the Senate and the National Assembly to conform to the gender principle through creation of special seats over 20 years from the next elections (Maingi, 2015).

There are several proposed mechanisms inclusive of that which requires nomination of enough women in political parties, reservation of strongholds women's seat in the party, and affirmative rotational seats. According to World Bank (2015), there is low representation of women in elective posts. In Kenya's 12<sup>th</sup> parliament there are 349 members, with only 76 (19%) being women. The same problem is in the political representation of parties. Among the 12 top party officials in Jubilee Alliance one is a woman and holds a member position in the secretariat (Mzalendo, 2015).

The Women's League in Jubilee Alliance attempted to lobby for inclusion of women as top officials of the Jubilee party but in vain. UN WOMEN funded printing of Newspaper Adverts and Fliers for the Women League in order to persuade the Party Leaders to include more women in the administration and management of the party. Underrepresentation of women is still evident. The number of men and women in parliament is greatly determined by the nomination processes by political parties. (Kameri-Mbote, 2016).

There are common judiciaries' challenges in Africa: lack of enough courts especially in local areas, few qualified judicial officials, qualified staff deficiency, a dearth of resources; overcrowded dockets; inadequate infrastructure and logistical support; limited budgets; corruption; and large cases backlog (Barry, 2010). Judicial education continuance is unstructured or inadequate and not available to all court actors' level. Interaction between various judicial actors is very minimal and legal aid funded system examples are very few. Blocking of women access to justice can be because of many reasons such as; lack of knowledge on how to access system of justice or legal right ignorance; scarcity of financial resources; language barriers; corruption and/or discriminatory practices of police and/or judicial personnel and language barriers (CEDAW, 2018).

Though the Constitution of Kenya has created a two-thirds gender rule in the constitution that was promulgated in 2010; there is still a challenge in implementing it. For effective delivery, government should involve both the women and men in planning and implementing their development agenda for their counties; hence the great need for consultation from genders, that is, the women and men. As we all know, when people are involved they own up the whole process of development. The sense of getting the devolution to work is very vital (Wamai, 2014).

Article 27(b) of the constitution provides for implementation of the 2/3<sup>rd</sup> gender rule through the legislature (Constitution, 2010). Article 27(8) provides further affirmative action the State to take measures to make sure the principle is realized in appointive and elective decision making bodies. Article 81 recaps further for this to be applied in all elective public bodies. However, in many public institutions, gender balance has been

twisted against women, failing to honour the constitutional requirement; and parliament has not been spared on this (Kameri-Mbote, 2016).

Wegulo (2017) states that legal interpretation was one of the challenges to implementation of the two-thirds gender principle. There lacked clarity as to whether the two-thirds gender rule was a minimum requirement or a maximum measure. This had to be cleared by the court when it gave its advisory opinion and recommended that the gender rule be achieved progressively.

Another challenge was lack of clarity on the timeframe for the realization of the two-thirds gender rule, as revealed in the court's advisory opinion no 2 of 2012 (Kenya Law, 2012). The Constitutional amendment Bill, 2015 (the Chepkonga Bill) suggested that there ought to be a specific time frame when it is generally expected that the two-thirds gender rule is realized and fully implemented (Nyikal, 2014). The Justice and Legal Affairs Committee on the other hand suggested that the timeframe should be included in the constitution so as to avoid postponement of the implementation.

In conclusion, it is evident that the challenges highlighted are not only infrastructural or resource-based, but also a lack of political good will which is central to the implementation of this constitutional provision.

### **2.2.2 Challenges Facing the Implementation of the Proposals Tabled In Parliament on Implementation of the Two Thirds Gender Rule**

According to Barasa (2012), many Countries have come with guidelines and legislations due to the increased gender imbalance to help deal with the underrepresentation of gender on board which most of the time is the feminine gender. Formulation of these gender

policies arise from agreement, resolution and covenants on gender ratified by Countries. Example of such gender law is the Kenyan Constitution two-thirds gender rules.

There is a challenge based on the formula to be used to achieve this two-thirds gender rule. One of the proposals that have been fronted to cure this challenge was that political parties should nominate women so as to fill in the nomination positions and to ensure that they regulate and insist that only women would be elected in their various strongholds and to further have rational seats so as to achieve the gender threshold. The nomination of women has been endorsed by the National Gender and Equality Commission, and in doing so, recommended that the provisions of article 177 that apply to the County Assemblies should be extended to the National Assembly (Bauer & Burnet, 2013).

Implementation of the two third gender rule in Parliament is said to be costly. According to the Institute of Economic Affairs, it is estimated that for every seat created in the National Assembly, the tax-payers would have to part with almost Kshs. 2.5 billion per year to finance the position (IEA, 2015).

Lack of political good will remains one of the greatest challenge to the implementation of the two-thirds gender rule in parliament. The Constitutional Amendment bill has been tabled in parliament several times but it has never sailed through the floor of the House. The bill was first tabled in Parliament by the then Minister for Constitution and Legal Affairs, Hon. Martha Karua, but it flopped. It was shot down three times when it was reintroduced in Parliament by Martha's successor, Hon Mutula Kilonzo. Still the gender bill did not sail through the floor of the House when it was tabled by Hon. Samuel Chepkonga. Hon Aden Duale, the latest crusader of the gender bill, has tabled the bill in

the House, and all his four attempts to have it sail through have not seen the light of the day. The bill has often hit a quorum hitch; a good number of legislators particularly the male parliamentarians opt to boycott the sessions thus crippling proceedings. This gesture alone shows the lack of commitment on the side of the National Assembly especially from the male parliamentarians to commit to ensuring that the Country realizes the gender rule. This can be attributed to the fact that the male parliamentarians are keen to retain their privileges and as such patriarchy still continues.

### **2.2.3 Women's Movement and Groups in the Implementation of the Two-Thirds Gender Rule**

Huse and Seierstad (2013) explains that, Countries which face a lot of challenges in ensuring women's representation as leaders are those with economic and socio-political upheavals. Aycan (2004) of Turkey believes that women in senior positions of making decisions, as well as non-traditional and traditional employment sector low ranking positions, are at risk of losing their positions. According to Waylen (2014), collective action is shaped by informal and formal norms and rules. This political system design can encourage or discourage cooperation, both mainstream and feminist. For instance, in Afghanistan parliamentary electoral rules, politicians' localized support biases and executive authority and vote-buying come together to discourage political parties formation, alignment of politicians with specific causes or legislative business prioritization and public goods provision. In Gaza and Afghanistan, when it is seen to favor particularly most of the time women's organization, external funding can put women and other organization in a competition rather than encouraging alliances or support nascent social movements.

A study done by Okafor and Akokuwebe (2015), on challenges and prospects facing Nigerian women in leadership, they examined critically some factors brought about by wide socio-economic and political disparity. Using both descriptive and historical approaches and guidelines from theories of liberal feminism and patriarchy, the paper arguments are that various political, economic, systemic practice and social practice is an obstacle to women's effective participation in politics, decision making and governance in Nigeria. The study concludes that there was greater participation of women in all spheres of leadership in Nigeria which used policies and programs that empowered women economically, politically and socially.

Personal economic power for women is also a matter in public relations influence (Basu, 2018). . Kayuni and Muriaas (2014) adds that women have less political power for they are likely to have less resource required of powerful patrons. Women don't have the access to patronage resources for the concentrate on less positions jobs, for example, appointments to obtain finance access from male dominated network is excluded. For instance, the increased competitive electoral and competitive competition in Malawi with no party finance control and men fewer economic resources, women candidates are disadvantaged.

In 1990 the UN came up with a rule that women should occupy 30% of parliamentary seats but by 2010 only 26 of 189 Countries had got to this mark. In addition, the UN in 1990 called for women to hold a critical mass of 30% parliamentary representation, a percentage believed to be enough to bring national political change. According to International Parliamentary Union 20 years latter only 26 Countries out of 189 had



reached that mark. 16.8% of seats in the US were held by women in 2010, a little lower than the 19 % world average lawmakers in the worldwide lower house (Maingi, 2015).

Furthermore, women's participation cannot be promoted by democracy alone, for regardless of democracy, France and the United States, the oldest democracies have the lowest women representation in executive bodies. Some of the programs of affirmative action like women specific training programmes and gender quotas create opportunities for women to get involved in politics (Ogato, 2013). Although women representation in the world has increased, it is still at a low level. Whilst devastating, women's movements played a role to catalyze the change and made it easy for women to seize openings, make ideologies on gender changes and make significant political gains. Women were left to be head of households, major society actors and economic providers (Ndangiza, Masengo, Murekatete & Fox, 2013).

The East African Countries have taken up the mantle and have done well in encouraging the inclusion of women in governance systems of their Countries; such is the case in Rwanda (64%), Uganda (34%) and Tanzania (37%). Rwanda now leads global statistics on women's representation in elective politics. In Rwanda, Women movement campaigned for women's political participation and played a key role in the framing of the 2013 Rwanda constitution. Strong commitments in gender empowerment and equality of women has been made in Rwanda, it's the most domesticated and ratified regional and international law promoting women's rights (CEDAW, 2018).

The 1994 genocide changed the gender balance radically in the society of Rwanda; even though the women bodies in the conflict were seen as rape objects and sexual torture, it changed some women's situation ironically. In addition, the East African region has constitutions which guarantee equality, and election laws that provide for affirmative action measures which have been implemented in Rwanda, Uganda and Tanzania (OSIEA, 2017).

In Kenya women's political success is limited by lack of resources (Stiftung, 2013). The affirmative action on gender in regard to Kenyan women goes back to the inception of Maendeleo Ya Wanawake Organization (MYWO) in 1952 to deal with women's rights and gender equity in Kenya. In its mission it has several agendas like; training women in leadership and development, child health, maternal health and family planning. There was a feeling of girl child negation and discrimination such that the defunct 1980s Joint Admission Board for selecting the Kenyan students joining universities puts girl's entry cutoff marks lower to male student by two points. The affirmative action motion was tabled by Phoebe Asiyo in 1997 aimed at increasing women's participation in leadership and decision making by 33.3%. The women of Kenya under the auspices of Women Political Caucus rallied behind this notion. The motion was defeated making all these unsuccessful. Similar motion was tabled by Beth Mugo in 2000 and it was forwarded in the Constitution of Kenya Review Commission (CKRC) and was defeated too. In the drafting of constitution in 2005 similar motion was proposed, the defeat of 2005 referendum made this hope not to be realized. Women still caucused and rallied for the implementation of affirmative action. Martha Karua the then Minister for Justice and Constitutional Affairs tabled this motion before the 2007 general election to amend the

repealed constitution. 50 women parliamentary seats were to be established by this amendment. Lack of quorum led to rejection of this motion.

For a democracy to be vibrant and strong, parliament must include the population it represents. Until government boosts the participation of women in parliament, parliament cannot consider itself inclusive. Women's involvement in parliament is said to deliver a democracy which is more strong and representative and produce equitable societies. Uplifting of women improves the whole society and contributes to the government's efficiency. This allows different concern such as those which affect women to be highlighted and new political agendas brought forward. In accordance to Ronald Dworkin, affirmative acts have launched programs for minority groups, disadvantaged and disabled to increase their participation and capabilities in development activities. The affirmative action in Kenya is rooted to quest for equal opportunities regardless of gender or any other discrimination basis.

According to Dzodzi, (2009) affirmative action is set of adopted measures by the government, corporation, institutions and companies to deal with discrimination history and particular social group's exclusion and encouraging such group's participations. He continues by stating that, there are two categories of gender affirmative actions; strong and weak affirmative action. Dzodzi adds that the use of procedures so as to encourage and promote equal opportunities and stop gender based discrimination is known as former while implementation of policies for preferred treatment usually for achieved through system of quota, policies or plans is referred as latter. Kenya, in establishing an affirmative action to deal with the injustices and inequality women have faced in politics,

opted to implement a strong affirmative action through the use of quota system, which is a stronger affirmative action.

According to Nzomo, (2013), affirmative action proponents says that it creates opportunities for disadvantaged groups and women to showcase their leadership qualities, talents and skills so as to compensate for their historical discrimination. They could have remained untapped without affirmative action. A successful woman encourages and motivates other women that they can achieve anything (Nyariki, 2013). Affirmative action helps in promotion of diversity and encourages public welfare by giving the previous disadvantaged groups more opportunities, thus reducing potential conflicts for all members of society find themselves in the same social, economic and political level. Again proponents state that the organizational harmony created by the affirmative action is morally desirable and socially just, (Mzalendo 2015), used in productivity improvement, (Maingi, 2015), and assists the understanding of greater customer needs (Kivoi, 2014).

The affirmative action opponent's belief is that this strategy rewards people according to their determined trait, acts in favor of women and go against the equality opportunity concept. They say that women should compete for opportunities like men do without favor (Cooper, 2013). Cooper adds that this action goes against the compensatory justice principle. According to the principle, everyone should be compensated for any wrong or harm done. Further critics states that this action lowers women's self-esteem and self-worth. For they are not sure they have sailed through because they are treated in favor or is because of their abilities and expertise.

Moreover, unequal treatment of people acts against the equality and unitary goal and leads to increased hostility for men who think they have lost an opportunity to a woman becomes hostile and hates all women in general (Clayton, 2015). Clayton continues by claiming that opponents treating women in favor, make it be seen that they cannot make it on their own and this leads to poor performance for people without experience are employed just to fulfill the two-third gender rule.

The affirmative action consensus is used in redressing intractable socio-economic political inequalities coming from systemic discrimination affirmative action programs have often been fraught. Most of the time there is disagreement between society and government on the particular provision, implementation, necessity and their successes (Bayeh, 2016). Most of the time tasking of public official conceptions and implementation causes pronouncements which can affect the objectives and aims of particular programs. While there is a rag of controversies, the affirmative action programs beneficiaries can't make a sustaining interest grounded on social group and this improved representation (Kaimenyi, Kinya & Chege, 2013). There is a UN system consensus that a target of 30 percent in all bodies of decision making is needed to ensure critical mass which brings in a difference. The United Nations Economic and Social Council (UN ECOSOC) has agreed to this target which has also become part of the Beijing Platform for Action (Kivoi, 2014).

Its nine years since the promulgation of the 2010 constitution in Kenya- which is hailed as one of the best across the globe due to some of its provisions on gender equality such as Article 27(3) which states that "it's the right for both men and women to be treated equally, right of political equal treatment, economic, cultural and social spheres". The

Article further states that “the State shall take legislative and other measures including groups because of past discrimination” Moreover, the Political Parties Act (2011), a subsequent legislation of the Constitution, is very clear on gender equality but this too did not serve to increase the number of women elected and nominated through their parties given the results of Kenya’s General elections on March 4<sup>th</sup>, 2013. Whereas Affirmative action was meant to bridge the glaring disparities between men and women in political representation, the numbers are still dismal, at 20% which is a 10% increase from the previous parliament largely bolstered by the affirmative action seats of women MPs.

An analysis of the 2017 Kenya General Election revealed that cultural, economic, and political factors discourage women from participating in the nation’s electoral process. Machogu, Gitaka and Tibbs (2013) conducted a study on the compliance of the two-third gender rule in appointments and promotions of staff in public universities elevated in 2012 and 2013, Kurea (2016) also conducted a study on the implementation of the 2/3<sup>rd</sup> gender rule in the devolved government, County government of Meru, as stipulated in the Kenyan Constitution. These studies found that most women felt that the two-thirds gender rule was being observed though a good number of women felt that it was not being followed.

With the legal framework for women’s empowerment in place, it was highly expected that women will turn out in large numbers to actively participate in political processes in the future such as political party engagement, presenting themselves for elections and ideology formation among others. But as has always been the trend, political parties gave women a raw deal. Despite some being winners in the political parties primaries, they were denied the nomination certificate. Male-led campaign against women, intimidation

and violence, retrogressive culture, inadequate finances, propaganda, and low educational qualification all combined deny women from participating in political processes. It's hard for Kenya to achieve the 33.3% female representation without the affirmative action help. Thus a study on affirmative action in Kenya should offer methods which might work for Kenyans to ensure implementation of 33.3% required representation. This study looks into the Challenges faced by the women's movement and groups in the implementation of the two-thirds gender rule.

## **2.3 Theoretical Framework**

This thesis is anchored on the feminist political theory and the critical mass theory.

### **2.3.1 Feminist Political Theory**

Feminist political theory was born out of the struggles of the feminist movements of the 20th century. It works to fight inequality, social, cultural, economic, and political subordination of women (Tucker, 2011). The theory states that patriarchy has power and dominance over women due to anchored societal and state structures that are designed to systematically maintain women in a position of subordination (Tucker, 2011), and this theory examines why this is so. The goal of feminist politics is to end the domination of women through critiquing and transforming institutions and theories that support women's subordination. (Watson 2013) suggests that the theory works towards three principle objectives:

- i. To comprehend and study the part of gender in how political theory is expectedly interpreted;

- ii. To re-case and re-verbalize ordinary political theory in light of women's activist issues (particularly gender fairness); and
- iii. To bolster political science assuming and seeking after gender uniformity.

The theory examines the role of social, feminist politics in a variety of fields, interests, sociology, economics, literary, philosophy, education, knowledge and experience, and psychoanalysis (Barker & Kuiper, 2003). While providing a social relation critique, feminist theory targets on analyzing gender inequity and promotion of women's interest. Researchers in feminism embrace two key tents; research focusing on the condition of women in the society, and research being assumed on grounds that women generally experience subordination.

This theory analyses policies and their impact in relation to gender, thus contributes to science and political analysis in general. There are different perspectives coming from different analyses- radical liberal, Marxist and socialist (Hooks, 2000). With this theory, the State's instruments of subordination are analysed in feminist perspective in terms of power relation, economic groups, social, class, structuration and influence of gender roles and relations.

Women's feminist political theory sees women and their situation as central to political examination. It dissects why that in every practical sense each and every known society men appear to have more power and advantage than women, and how this can be changed. The goal of feminist politics is to end the dominance of women through continuous and persistent critique and implementing deliberate endeavours to transform



institutions and theories (societal narratives) that support the dominance of men over women (Tucker, 2011).

In this study, the feminist political theory has been applied in analyzing the debates and arguments by men and women in parliamentary discussions and in court rulings on the two-third gender rule related issues. It demonstrates the ways in which politics, understood as power relations, is present in our everyday lives, and in these institutions of power – judiciary and parliament, and how this has contributed to the failure to enact legislation to implement the 2/3<sup>rd</sup> gender rule. In addition, this theory has been applied to examine the state and its role in redressing gender inequality in the National Assembly.

### **2.3.2 Critical Mass Theory**

Scholars have drawn on the work of Kantar and Dahlerup in analyzing and understanding the behavior of women in legislative processes and politics. The notion of a “critical mass” is supported by a 1992 study by the United Nations, which concludes that “only a critical mass of 30% to 35% of women in politics will make a significant difference to the political culture due to the priority women give to ‘the needs of other women, children, elderly, disabled and disadvantaged’” (Kurebwa & Ndlovu, 2017).

Women in political leadership not only stand as women but will also act for women as a group. They bring into leadership their experiences and articulate better how these experiences affect and impact on their lives; something that men cannot do on behalf of women. Until women’s representation has reached a critical mass, it is unrealistic to expect major changes in political processes and leadership.

The concept of critical mass has grown and focus is not only on promoting descriptive, but also substantive representation of women. Phillips (1995) observes that entry of women to political office has not yet resulted in the widespread of feminisation of politics because there are simply not enough of them to “make a difference”. Hence the importance and need to take measures to achieve a “critical mass” of women, which will greatly contribute to domestication and legislation of women friendly policies and policy changes.

According to Childs, (2004) critical mass theory critique focuses primarily in cases where there is no occurrence of policy change, even if women percentage in the legislature reaches the proportion of critical mass, identified at ranging levels from 10% to 40%. Childs argues that expecting an automatic change once women attain a certain proportion of seats in decision-making bodies is theoretically dubious. This may even undermine the case for women’s increased presence in leadership if the existing female politicians appear to be failing women as a group. It is however recognised that critical mass is vital as a few token of individual women is not sufficient to pursue major and large scale policy changes. Women’s percentage in the institution determines their key behavior, thus a demonstration that gender differences can be eliminated especially in women's progression. (Blum & Smith, 1988).

According to Bratton, (2005) legislatures with high proportion of women introduces and passes bills of issues affecting women than female counterparts who are lowly represented. An increase in the number of women increases enactment of women-friendly bills (Skard & Haavio, 1985). Flammang (1985) notes that more legislative supportive environment resulting from more inclusion of women leads to changes even for those

who don't see themselves as women representatives or drawing women issues in the processes. This explains the focus behind the opportunities presented by the critical mass, facilitating women to form coalitions with one another, anticipating that their critical mass is enough in promoting women-friendly policy outcomes.

Other scholars argue that women are likely to be more influential when they are few for they can mobilize each other (Crowley, 2004), or through the caucuses of women legislative (Reingold, 2000; Thomas, 1991) to achieve women's gains without the influence of powerful men. It is important to delineate condition of various boundaries that may hinder women from taking reforms to address the concerns of women

In this study, the critical mass theory is applied to analyze the participation and engagement of women in pursuing for the implementation of the two third gender rules, either as individuals, in their institutions, or in groups, both in parliament, court and within the women's movement.

## **CHAPTER THREE**

### **THE METHODOLOGY OF THE STUDY**

#### **3.0 Introduction**

The purpose of the study was to explore challenges to the implementation to the constitutional provisions of the Two-Thirds Gender Rule in the National Assembly of Kenya. In order to produce credible results, methodological and procedural requirements were adhered to in a standard, non-biased, reliable and valid manner. This chapter elaborates on the research design, data-generation strategies, data analysis and presentation. The steps are presented to show the relationship between the research questions/objectives and the data generation, analysis and interpretation, as proposed by Saunders (2011). Leedy and Ormrod (2013) define methodology as the researcher's general approach in carrying out the research project with respect to sampling, data generation and analysis, in such a way that the research can be criticized, repeated and adapted. The methodology for this study was selected and intended to answer the main research questions, so as to attain the purpose of the study.

#### **3.1 Research Design**

The study was carried out as a desk research. The literature review was designed primarily as a descriptive study to provide baseline information on the existing status of the implementation of the two-thirds gender rule in the National Assembly as provided for in the 2010 Constitution of Kenya. Considering the objectives of this study, a case study research design dominated the study. The study adopted the case study method in the compilation of data. Case study method involves and enables close examination of data within a specific context. This approach enables the researcher to investigate

contemporary real-life phenomenon through detailed contextual analysis of a number of events or conditions, and their relationships within the study area.

Yin (1984:23) defines the case study research method as “an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used.” According to Creswell (2013), case study design is used for inquiry in several fields and is used by the researcher in developing an in-depth analysis of the case. Cases studies are influenced by factors such as time, activity and the employment of different data-generation procedures (Yin, 2012).

Case study method involves simply observing what happened to or reconstructing the case history or a single or group of participants. According to Creswell (2013), case study design is used for inquiry in several fields and is used by the researcher in developing an in-depth analysis of the case. Cases studies are influenced by factors such as time, activity and the employment of different data-generation procedures (Yin, 2012).

The selection of the case study design for this research was to allow for the study of complex data on the subject of study within the original context in which the phenomenon occurred. This was to provide an in-depth understanding of the nature and complexity of the phenomenon. Through case study method, the researcher was able to go beyond quantitative statistical results and understand the behavioral conditions through the actor’s perspective.

In addition to the case study method, documentary analysis was used due to its ease of understanding and its cost effectiveness. It is easy and straight forward in establishing reliability and it does not require contact with people, in which case the collection of data can require large amounts of time and resources (Katchmarchi, Taliaferro, & Kipfer, 2017). According to Bowen (2009, p. 27), a documentary analysis is a “systematic procedure for reviewing or evaluating documents; and it requires the data to be examined and interpreted, in order to elicit meaning, gain understanding and develop empirical knowledge”.

In relation to this study, documentary analyses on constitutional provisions of the two-thirds gender rule in the National Assembly of Kenya were used. This includes, documented journals, reports from Kenya Law Report and parliamentary Hansards. In addition, information was sought from main print media in Kenya, as well as from reports and documentation on the implementation of the Affirmative action principle and the bills. The information sought from these documents involved those that cover issues that are spelt out in the constitution of Kenya 2010 on the subject of study. The data generated from the documentary analysis of these documents were guided by research questions focusing on issues related to constitutional provisions of the two-thirds gender rule in the National Assembly of Kenya.

A checklist was used for the documentary analysis. A checklist is a list of questions that are set systematically based on the objectives of the study. The research questions were intended to guide the researcher on which document is to be analysed. For this study a checklist (Annex 1) was used in order to analyse the constitutional provisions of the two-

thirds gender rule in the national assembly of Kenya. This provided a chance to investigate thoroughly on the information available using desk study evaluations.

### **3.2 Source of Data**

The study employed secondary data where information relating to the study was sourced from books, documented scholarly journals and papers, and government reports. The Constitution of Kenya, 2010, the Kenya Law Reports and Parliamentary Hansards on the topic of study were reviewed. In addition, information was sought from main print media in Kenya, as well as from reports and documentation on the implementation of the Affirmative action principle. Information sought from these documents involved those that cover issues that are spelt out in the Constitution of Kenya 2010 on the subject of study.

### **3.3 Data Analysis and Presentation**

Data was analyzed using content analysis where information was arranged in thematic form. This gave the researcher an ample time to investigate thorough, the issue that this study aims to investigate. Examination of the data was conducted within the context of implementation of the two-thirds gender rule in the Kenya National Assembly. The detailed qualitative accounts on the study area helped to explore and describe the data in real-life environment in the Kenyan parliament and courts. In addition, review and analysis of the court rulings, parliamentary debates, hansards and reports on the study topic helped to explain the complexities of real-life situations which may not have been captured through survey research. Data was presented in prose form based on the themes that the study addressed.

### **3.4 Validity of the Data**

According to Lincoln et al. (1995), trustworthiness of the qualitative findings includes: dependability, credibility, confirmability and transferability. Cope (2014) and Houghton et al. (2013) add that dependability, transferability, confirmability and credibility are the standards used to evaluate the qualitative research rigour. As previously discussed, the above criteria were used in assessing the validity in the research.

### **3.5 Conclusion**

This chapter looked at the research methodology, outlining the methodological approach in collecting data for explaining challenges to the implementation of the Constitutional provisions of the two-thirds gender rule in the National Assembly. A qualitative desk case study was chosen for this study. The chapter also discussed the generation of data and the analytical data approaches in this study. Lastly, the validity considerations for the study was explained. Chapter four includes data analysis and presentation.



## **CHAPTER FOUR**

### **DATA ANALYSIS, PRESENTATION AND INTERPRETATION**

#### **4.0 Introduction**

The study findings, interpretation and data analysis are represented in this chapter. The study sought to investigate the challenges to implementation of two-thirds gender rule in the constitutional provisions of the Constitution of Kenya, 2010. Presentation of the findings in this chapter has been done along the three specific objectives. Challenges encountered in ensuring that the two third rule is implemented and that representation of women in parliament is increased are also determined in this chapter.

#### **4.1 Judiciary-related Challenges on Implementation of the Two-Thirds Gender Rule**

This section presents the judicial-related challenges on the implementation of the two-thirds gender rule in Kenya.

The two-thirds gender rule, as it exists in the Constitution, has been reviewed several times in Kenyan courts since 2012 but less action has been taken in parliament. The first case regarding the realization of the principle in elective positions came barely two years after the Constitution's passage. In 2012, the Attorney General (AG), Githu Muigai approached the court to establish whether the two-thirds principle would apply to the impending 2013 general elections. The Supreme Court held that the provisions of Article 81(b) as read with Articles 27(4), (6), and (8) could only be realized progressively as the government could not redress gender inequality through a single act. However, it noted that the Fifth Schedule of the Constitution which required parliament to pass the necessary legislation to provide a mechanism to realize of Article 81 (b) and to realize

sufficient representation of marginalized groups within five years of the Constitution's promulgation. Thus, parliament was given until August 27, 2015 to enact necessary legislation to promote representation of women, youth, persons with disabilities (PWDs), ethnic and other minorities and marginalized communities (Wafula, 2015).

Despite constitution providing County Assemblies in Article 177 (b) principle was implemented, the National Assembly have not come up with effective mechanisms to ensure this is realized. This is despite there being a deadline of August 27 2012, which has since passed, for the Commission on the Implementation of the Constitution (CIC) to recommend legislation for the implementation of the law. The study shows that equal gender representation is clearly supported by the constitutional framework. However, there has been elusiveness in the implementation.

In the 2013 elections, the Kenya's Attorney General (AG), Githu Muigai indicated that he was sure that enough women would not be elected as per the constitution. Muigai indicated that it was likely that the one thirds of the required representation of women in parliament would not be met (Muigai, 2006). This also portrayed the constitution's failure of not ensuring that the gender rule was implemented. The Supreme Court was then sought for advice by the AG on the crisis that had faced the constitution. Discussion on whether it was possible to have implemented the rule by 2013 elections was also discussed. They argued on Article 177 that stated that the rule must be implemented unlike Article 97 and 98 which did not guarantee on the implementation. Article 38 also indicated that it was the political party's duty to ensure that they nominated the number of women according to the constitution. The court noted that the Attorney General Muigai had apprehended the realization of gender rule through political parties'

nominations; *“there is no guarantee that the number of nominated persons from the lists of nominees provided by the political parties will ensure that at least one-third of the members in each House will be of one gender.”* (Advisory opinion no. 2 of 2012, page 3)

“It is not guaranteed that nominated persons from the lists of nominees provided by the political parties will ensure that at least one-third principle in each House will be met.”

He further recognized the fact that implementation of the rule required effective mechanisms. The way forward the achievement of this rule was to ensure that all political parties nominated the required number of women to represent the seats so that their membership can be well represented in the National Assembly and the Senate. There was a suggestion that the prose should be progressive due to the fact that it would require Kenyans to dig deeper for taxes so that the principle could be implemented. This was a slow move that required patience and understanding from the parties involved.

The Constitution provides that “Not more than two-thirds of elective or appointive bodies shall be of the same gender in public sectors”, (Kenyan Constitution Article 27(8), 2010). With this provision in place; it goes without saying that the law has been put so that no gender dominates the other in employment and leadership opportunities. The clause becomes strong when read together with Article 232(1) (i) of the constitution concerning the values and principles of public service. Part of the Article reads “The values and principles of public service include affording adequate and equal opportunities for appointment, training and advancement, of men and women at all levels of the public service.” Such measures cannot, by their very nature, be enforced immediately, unless the State provides for enforcement mechanisms to realize this principle. The Court agreed

with Mr Kanjama's argument that Article (81) is a soft gender quota which required progressivity. It advised that legislative measures should be taken by August 2015 to realize the two thirds rule. This unfortunately was not achieved.

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

While parliament constituted a multi-sectoral technical working group after a directive by Attorney General Muigai, various members of parliament also developed diverse affirmative action and Constitutional amendment Bills seeking to either progressively realize affirmative action or altogether do away with it. By May 2015, these parallel processes had not resulted in legislation forcing further Court action. Centre for Rights Education and Awareness (CREAW), Non-governmental organization filed a suit, Nairobi Petition No.182 of 2015, in the Constitutional Court seeking a declaration that the AG and the CIC had failed in their duty to develop and present affirmative action legislation ahead of the August 27<sup>th</sup> 2015 deadline placed by the Supreme Court (NGEC, 2018). The events narrated above partly capture the court cases and judicial rulings around the provision of the two-thirds gender rule. The unwillingness by the political

parties and parliament which is male-dominated speak to the feminist political theory as captured by Turker (2011). Turker takes note that patriarchy has dominance over women due to anchored societal and state structures that are designed to systematically maintain women in a position of subordination. While constitutions are good in ensuring inclusivity, male imposed structures must be addressed to ensure full implementation.

In her ruling on June 26, 2015, Justice Mumbi found that the AG and CIC had, ‘dropped the ball’ and demonstrated, ‘laxity and reluctance’ in preparing legislation for tabling in Parliament that would see the constitutional requirement that no more than two thirds of elective and appointive bodies are composed of the same gender, realized. The AG, she said, had waited until the ‘last minute’ to set in motion mechanisms toward the drafting of a bill and the CIC, she said, ‘attempted to wash their hands’ of the failure to meet the August 27 deadline set by the Supreme Court in December of 2012.

According to Mumbi, the AG and CIC had therefore threatened to violate Article 27(8) and 81(b) of the Constitution, which set out the two-thirds gender rule:

*“It is hereby declared that the foregoing failure, refusal and or neglect by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is a threat to a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11<sup>th</sup> December 2012 in Reference Number 2 of 2012”*

With Mumbi’s directives, AG and CIC were instructed to put in place legislative by August 2015, within 40 days of the ruling (Kenya Law Reports, petition 182 of 2015, page 5):

*“An order of Mandamus be and is hereby issued directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents directing them to, within the next Forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11<sup>th</sup> December 2012 in Reference Number 2 of 2012.”*

The result was the adoption of the Technical Working Group proposed Bill (the Duale 1 Bill) by the Leader of Majority in the National Assembly who moved it for publication as a Government Bill (NGEC, 2018).

Kenya’s High Court found that the Country’s Parliament had violated women’s right to equality, and freedom from discrimination. It had done this by refusing to enact legislation to enforce the principle that requires not more than 2/3<sup>rd</sup> of its members are of the same gender. The 60 days lapsed and there was no word from the House. This clearly shows that, despite the judiciary clearly recognizing that the parliament has a fundamental role to ensure constitution is followed to later, the judiciary was reluctant to make a final judgment based on the parliament act of not coming up with applicable formula to ensure this is achieved.

This was enough reason for the courts to declare parliament as constituted as unconstitutional hence call for dissolution and ensure the gender rule is implemented. However, due to patriarchal prejudice and the patriarchal nature of the Kenyan courts and parliament, this ruling did not see the light of the day, hence the continuation of subordination of women and denial of their constitutional right on representation.

The timeframe within which the courts gave parliament to enact legislation for implementation of the 2/3<sup>rd</sup> gender rule lapsed in 2015 and there is no word from the House on how and when this will be passed. The judiciary has remained reluctant to make a final judgment based on Parliament's act of not coming up with applicable formula to ensure the 2/3<sup>rd</sup> gender rule is achieved. It is reluctant to declare that the National Assembly as it is currently constituted, is unconstitutional and the need for the dissolution of the House. The judiciary, like the Parliament, is playing delaying tactics to ensure that women of Kenya enjoy their constitutional rights on representation in the National Assembly. It is yet to consider a constitutional crisis for failure by parliament to achieving the constitutional provision of the gender rule. It is therefore important to investigate further the challenges in implementation of the 2/3<sup>rd</sup> gender rule.

The study established and confirmed that patriarchy is institutionalized. The ideologies, institutions and even religion is patriarchal in nature. The Kenyan courts, as the State's instruments of power - have patriarchy entrenched and this is used to legitimise the way the courts act and even make the rulings to trivialize efforts towards gender equality and implementation of the gender rule. Breaking down the barriers that prevent women from pursuing public leadership is key to establishing a more representative democracy in Kenya.

## **4.2 Challenges in the Implementation of the Proposals Tabled in Parliament on Implementation of the Two-Thirds Gender Rule**

The study established challenges in the implementation of the proposals presented in parliament, and these are hereby discussed.

Parliament has failed four times, to pass a bill that would give effect to the two-thirds gender principle. The bill was rejected many by members of parliament whose main argument was that the new provisions would result in a bloated parliament which would add to the heavy taxpayer burden. Some of the parliamentarians argued that the provision would give women free seats. Some male politicians like Deputy minority leader Jakoyo Midiwo claimed that, *‘women politicians are simply ‘busybodies’, ‘idlers’ who squander public funds saying that they rarely contribute to debates’* (Parliament of Kenya, 2016).

Recommendations were made on how to ensure that mechanisms that had been suggested by the Supreme Court were made by the parliamentarians. The amendment of the constitution was one of the recommendations made by Honourable Samuel Chepkong’ a, who was the National Assembly’s Justice and Legal Affairs Committee then. Thereafter the amendment was made as a bill which ensured that the implementation of the bill was made progressively, the Two-Third Gender Short title. Rule Laws (Amendment) Bills, 2015 (Chepkong’ a Bill) published on April 30, 2015. The bill sought to *“amend various laws; to give effect to Article 100 of the Constitution; to promote the representation in Parliament of women, youth, persons with disabilities, ethnic minorities and marginalized communities in elective and appointive positions and for connected purposes”*. It also sought to increase the number of women’s seats in parliament.



It is noted that the Chepkong'a Bill did not succeed to ensure that both genders were represented as required by the two thirds principle of the Constitution. The women members of parliament rejected the bill as they felt that it was a mechanism that the men intended to use so as to delay the realization of the implementation of the two thirds principle. Institute of Economic Affairs (IEA) disagreed with the proposal in the bill on increasing the number of women seats in parliament, indicating that this would lead to increased costs of between 21.1 and 31.3 million shillings, which would burden Kenyans.

The defeat of the Chepkong'a Bill led to Constitutional (Amendment) Bill, 2018 (the Duale Bill) published on April 27, 2018. Hon Duale proposed a bill to increase the number of women in the National Assembly and the Senate. It involved giving the seats to women even those that had lost seats in the election, intending to increase the number of women in Parliament. The bill proposed that these women would serve for two terms. It further stated that the provision should take at most 20 years to be effectively implemented into a bill in parliament. This bill too was rejected by parliamentarians. Failure to pass the bill by the male dominated parliament by way of lack of a requisite quorum further confirms the political power structures often times controlled by men and in addition their numbers, to deny women their constitutional right. According to the feminist political theory, men in every society appear to have more power and advantage than women, a position they exploit to their advantage.

As a way to ensure and to force the implementation of 2/3<sup>rd</sup> gender rule, Kenya Women Parliamentary Association (KEWOPA) ambushes the parliament by wearing white headgears on August 29 2018. This did not sound good to the male counterparts, despite their knowledge on what the women were advocating for. This was well demonstrated

when Garissa Town MP Aden Duale sought the Speaker of the National Assembly, Justin Muturi, to guide parliament on whether or not it was in order and within the standing orders for the female MPs to wear headscarf in parliament. In his sentiments Duale said *“Mr. Speaker, this dress and this group of MPs who are wearing this particular headscarf are threatening, very intimidating.”* Similar sentiments were given by Hon. Ayub Savula, MP for Lugari, who accused his female counterparts of intimidation. In his argument Hon Savula said that Parliament has rules and procedures for undertaking legislation, and not through a particular dressing. Savula said *“Mr. Speaker, I seek your indulgence to give guidance to Hon Mbarire whether this Parliament legislates through intimidation or an attire”*. (Parliament of Kenya, 2018).

The dressing of women parliamentarians was a non-issue. Instead of the male members of parliament recognizing the big issue at hand, passing of legislation for implementation of the 2/3<sup>rd</sup> gender rule, to which KEWOPA as pursuing, they attempted to shift their attention to the women’s attire, terming it as intimidation. The House Speaker Muturi decided not to dwell on the non-issue of dressing as implicated by the male MPs; *“Honorable Savula I hope you are not intimidated by a headgear? Already a bill to amend the constitution has been published, gone through the full cycle of 90 days publication period, all that remains is for this House to come debate and discuss the bill.”* Parliament of Kenya, Hansard of 29th August 2018, page 5) Had Muturi dwelt on the dressing issue, the male MPs would have used that opportunity to divert from the main point that the women MPs were communicating on the need for parliament to pass legislation for implementation of the 2/3<sup>rd</sup> gender rule.

There is general unwillingness to enact legislation to realize the two-thirds gender rule. Parliament has on four occasions failed to enact legislation for implementation of the gender rule as provided by the constitution. Arguments by those opposed to the enactment of the gender rule, particularly the male MPs, are characterized by hostility and male prejudice to women's leadership. This can be seen in the language used to pin down women's leadership, as seen in Jakoyo Midiwo's claim that, "women politicians are simply 'busybodies', 'idlers' who squander public funds and who rarely contribute to debates". This act by Parliament proves the arguments by the political feminism theory, in which the State uses its instruments for subordination of women, in this case, Parliament. The rule of gender equality is facing lots of resistance. Men are the main resistants as they feel the rule will enhance gender equality, which they think will threaten their ego. Women continue to be ignored despite the fact that most teams pretend to support them. Women continued to be denied the rightful positions in parliament, both at County and the National government (Kivoi, 2014).

Parliament being patriarchal in nature, most of the men in parliament have taken advantage of this state and used patriarchy to legitimize their actions and language in trivializing the efforts to pass legislation for implementation of the gender rule. Due to the male dominated parliamentary processes and structures, even though the current parliament has more women than previous parliament, these women have been unable to rally their male counterparts to pass the gender rule in parliament.

Women continue to generally face discrimination in parliament and in the society at large. This discrimination will be reduced when parliament will show that women have power and should have seats the same way as men. Some African countries have made

positive strides in including women in their parliaments to ensure equal representation. For instance, Rwanda has the highest representation of women's representation in parliament at 61.3%, followed by Namibia at 46.2%, South Africa at 42.7% and Senegal 41.8%. These countries have made immense changes in ensuring that women representation in their parliaments is made. They have made these efforts by ensuring that women are elected from the ground and rise to the positions and their opinions respected also. Such move should be emulated in Kenya.

It is unrealistic to put women in political leadership without questioning and changing the nature and processes of the governance system, and expect the women leaders to perform and influence major policy changes. The deeply rooted patriarchal ideologies, coupled with the male-dominated structures and process in these political institutions, need a total overhaul even as we pursue the realization of the critical mass in the Kenya National Assembly through the implementation of the two-thirds gender rule. This is the only way that women leaders in the political arena will be effective and perform exemplarily in pursuing the women's agenda and influencing transformative policy changes. The Kenya Parliament should enacted legislation for implementation of the of the two-thirds gender rule and achieve equitable representative and move towards being a strong and vibrant democracy.

### **4.3 Efforts by the Women's Movement and Groups to Ensure Implementation of the Two-Thirds Gender Rule**

This section provides information on women's movements and groups such as FIDA, CREAW and others, and their efforts to ensure implementation of the two-thirds gender rule

Failure by parliament to implement the two-thirds gender rule led to the emergence of the women's movement and civil society organizations to lobby for the implementation of the 2/3<sup>rd</sup> gender rule in Kenya. Women movements, have played a key role to ensure 2/3<sup>rd</sup> gender rule is implemented as per the constitution. For instance, during the Constitutional Amendment Bill, 205 by Hon Samuel Chepkong'a (the Chepkong'a Bill), which aimed to postpone the implementation of the "Not more than two-thirds" constitutional principle in elective positions, women from various groups condemned the act. Women organizations and human rights organizations namely FIDA-Kenya, MYWO, Women's Empowerment Link (WEL), Centre for Multiparty Democracy (CMD), GROOTS, Kenya Human Rights Commission (KHRC), National Women Steering Committee, Constitution and Reform Education Consortium (CRECO), African Women Futures-Kenya, URAIA Trust, CREAW, Association of Media Women in Kenya (AMWIK), Action Aid, United Disabled Persons of Kenya (UPDK), Youth Agenda, Development Through Media (DTM), and African Women's Development and Communication Network (FEMNET), submitted a petition on behalf of the women of Kenya, rejecting the Chepkong'a Bill.

In their petition, they condemned, in the strongest terms possible, this bill, which intended to take away the gains that the people of Kenya put in place to ensure gender equality. They noted the change that Chepkong'a intended to introduce and maintained that the 2/3<sup>rd</sup> gender rule needed to be implemented according to the Kenya's constitution. In their petition, the women's organizations required parliament to ensure that law was made to ensure successful implementation of the gender rule. This they noted that parliament was the main reason that the gender rule had not been implemented due to its delays hence denying the women of Kenya to enjoy their rights enshrined in Kenya's supreme law.

Kenyan women in various women's organizations had confidence with the Supreme Court that they would put pressure on the parliamentarians to ensure that the gender rule was implemented and that the mechanism was also needed to be put up by the Technical Working Group (TWG) through the advice of the Constitution and the Supreme Court. The intervention of the Justice and Legal Affairs Committee office was also considered since it would help in ensuring that the process was fastened for the Kenyan women to be satisfied. The women wanted a 50:50 equality; something that men felt was diminishing to them and thus delayed the process.

As a way to ensure women are accorded what is rightful to them, the caucus demanded that the election of 2013 would not apply the article if it was not implanted before 4<sup>th</sup> March 2013 general elections and the measures required taken. By the 27<sup>th</sup> August 2015, measures were supposed to be taken as the court required. However, the National Assembly had not reached at this. The achievement of the gender rule was delayed despite the commitment of the judiciary to ensure its realization. The bill was drafted

when it was late due to the setting of the mechanisms by the attorney general. The deadline set by the Supreme Court, that is, August 27<sup>th</sup> 2015 was not met by the CIC. The Supreme Court had mandated the IEBC to make sure that during nominations the political parties complied with legislation, something that they failed to achieve. From the petitions that were submitted by human rights and women's organizations to the court hearing, it is clear there is reluctance to the action of ensuring that the gender-equity rule is implemented. The main reason is that the male gender do not support this article as they feel that their positions will be taken by women. The Kenyan society discriminates against women greatly (Kenya Law Reform, 2016).

On August 29 2018, female MPs caused a disruption in parliament after they walked in together wearing white headgear over two-thirds gender rule catching their male counterparts off guard. KEWOPA explained that they were conducting peaceful protest as women Members of Parliament, and that they were coming to put a message across, over specific timelines for certain legislative proposals to be passed by the House. "The proposal to enable the implementation of not more than two-thirds gender rule is now nine years and has not been passed. We are requesting humbly that that proposal be considered and passed on this floor. We will be wearing white headscarf until we pass this law" (Parliament of Kenya, 2017)

Further, National Women's Steering Committee proposed the formula to be employed to ensure 2/3 gender rule is fully realized. All the constituencies were expected to follow suit. Women were expected to be represented from the 290 constituencies by 4 women chosen countrywide. This included that all political parties were to nominate a woman in all the seats intended. 72 women would then represent the 290 constituencies. The

women would therefore be 120 in total due to the other 47 who were to be chosen as their county's women representatives of the National Assembly. This process was thus great as it was in hand with that of the two thirds rule as only 117 women were needed to implement it. This was also rejected by the members of parliament.

Recommendations were made on how to ensure that mechanisms that had been suggested by the Supreme Court were made by the parliamentarians. The amendment of the constitution was one of the recommendations indicated that women the National Assembly and Senate would be represented by clauses. The matter was disagreed upon after the AG consulted the Supreme Court which was against it. Parliament was questioned on why it has been slow in ensuring the implementation of the bill. The proficiency of the women is feared by men and they are not able to accept ideas that women bring forth. Most men take women as just idlers who do not have sufficient knowledge on contributing to debates (Mzalendo, 2015). This proves men to be derogatory. The 2/3rd gender rule has been undermined and therefore women have not been given a chance to realize their capabilities in politics. Equality should thus be embraced so as to ensure that women are equal to men in politics.

The Women's movement and groups contributed to the constitution making process in Kenya, and continued to follow up on its implementation, particularly the implementation of the two thirds gender rule constitutional provision, which is key in ensuring that a critical mass of women get to the decision making table . They engaged at different levels to ensure implementation of the two thirds gender rule, and that decision makers are accountable on issues on the rights of women and girls. They consolidated their efforts and worked collectively in their pursuance to ensure the realization of the 2/3<sup>rd</sup> gender



rule. They adopted a multipronged approach in their efforts, ranging from lobbying and rallying key political leaders to support enactment of the law, petitioning the courts, developing proposals for implementation of the gender rule, and rallying behind the women MPs, supporting them to effectively push from within the Parliament for enactment of the law.

Despite the many efforts that the women's movement and groups have put in to ensure legislation of the two third gender rule in the National Assembly is in place, reluctance, resistance and laxity from both the Judiciary and Parliament; lack of political will; and deep rooted patriarchal culture, have not facilitated the realization of the gender rule. With that said, it is paramount to recognize and embrace the fact that there is a paradigm shift with the New Constitution and there is no turning back. The gender-equity rule must be realized and Parliament must ensure its realization.

## **CHAPTER FIVE**

### **SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

#### **5.0 Introduction**

The presentation of gender equality has continued to be sought in parliament through the Constitution 2010 provisions. Some of the efforts of the provision are actions that are affirmative such as the gender rule of two-thirds. The implementation of this rule has borne no fruits and this makes these provisions futile. There have been challenges in legislating mechanisms to implementation of the two-thirds gender rule. This chapter presents summary, conclusion and recommendations of the study.

#### **5.1 Summary of Findings**

##### **5.1.1 Judiciary Challenges Related to the Implementation of the Two-Thirds Gender Rule**

Equal gender representation is clearly supported by the constitutional framework according to the study's findings. There has been elusiveness in the implementation though. The reason as to why this Constitution has not been implemented is because its requirements have not been met. The Supreme Court deadline of August 27<sup>th</sup> 2015 when the mechanisms to see the success of implementing the constitutional quagmire should be met and the two gender principle actualized has not been achieved.

The ruling of 2012 of the Supreme Court to have the principle actualized together with other mechanisms to make it easier for it to be implemented have not borne fruits; a mechanism or a framework for the implementation of the two-thirds gender rule has not been taken by parliament as the court required. The achievement of the gender rule has

delayed despite the rulings by the judiciary to ensure its realization. The deadline set by the Supreme Court ruling of August 27<sup>th</sup> has not met by the CIC. The Supreme Court had mandated the IEBC to make sure that during nominations the political parties complied with legislation something that political parties have failed to achieve.

From the petitions that were submitted to the courts hearing, it is clear there is reluctance to the action of ensuring that the gender-equity rule was implemented. The main reason is that the male gender do not support this article as they feel that their positions will be taken by women. The Kenyan society discriminates against women greatly. The article on supporting women's leadership should be strongly enforced. The rule should have been applied in the polls of 2013 according to the constitution after it was promulgated in 2010. The crisis that rose after the 2013 elections also interfered with the implementation of the rule by the court as they were busy trying to solve the post-election violence. The requirement of the constitution that parliament should be represented by 30% of women was not the case in the 11<sup>th</sup> and 12<sup>th</sup> parliaments which had only 19% and 21%, respectively, of women.

Biasness for women to participate in politics remains a great issue of discussion. The women that are courageous enough to join politics face great challenges in their roles. These challenges cannot be solve rapidly as should be the case. However, implementation of the 2/3<sup>rd</sup> gender rule in the National Assembly will greatly contribute to preventing the institutionalized discrimination of women in the political arena.

### **5.1.2 Challenges related to Parliament Proposals on Implementation of the Two-Thirds Gender Rule**

Mechanisms such as political parties ensuring that they nominate the number of women required so as to meet the threshold, a party's stronghold should ensure that they reserve women's seats and application of affirmative action of rotating seats have not seen the light of implementation. The bills suggested by the parliament to be implemented were not adopted so as to successfully ensure that the two third bill was implemented. The parliamentary Constitution Implementation Oversight Committee seems to have abandoned its oversight role. The committee failed to ensure the realization of the gender rule by passing a legislation in parliament. It has taken more than nine years and still the rule has not been implemented since the promulgation of the constitution. The men do not want their privileges to be taken and have frustrated parliamentary efforts to have legislation passed to support implementation of the rule. This issue has no easy solution to it. Parliament should however make efforts to ensure the right thing is done.

Even though there was no critical mass in the number of women in parliament to rally their male counterparts to support their quest for enactment of a legislation for implementation of the 2/3<sup>rd</sup> gender rules, the few in parliament consolidated their voices and lobbied against the Constitutional Amendment Bill, (Chepkong'a Bill, 2015) which sought for the postponement of implementation of the bill; the bill did not go through. The society should be made to embrace women as leaders and the men in politics should be the first to ensure that the article is implemented. The equality of gender is a major concern of the Country.

### **5.1.3 Women's Movement and Groups and the Two-Thirds Gender Rule**

The women's movement and groups have continued to engage at different levels to ensure implementation of the two-thirds gender rule constitutional provision, and ensure the decision makers are accountable on issues on the rights of women and girls. They adopted a multipronged approach in their pursuance to the implementation of the provision. They lobbied and rallied key political leaders to support enactment of the law of the gender rule. They petitioned the courts, developed proposals for implementation of the gender rule, and rallied behind the women MPs, supporting them to effectively push from within the Parliament for enactment of the law. The women's movement and groups provided technical support to KEWOPA, the National Gender and Equality Commission and other committees working on the implementation of the gender rule to ensure achievement in the implementation of this provision.

Reluctance and laxity from both the judiciary and parliament and lack of political will, coupled with the deep rooted patriarchal culture have made the efforts by women's movement to ensure implementation of the gender rule futile. The arguments, presented in both judiciary and parliament have not highlighted the significance of investing in gender equality.

### **5.2 Conclusion**

Implementation of the two-thirds gender rule constitutional provision remains a subject of discussion to achieving gender equality, just and democratic society and sustainable development. This rule should be realized with immediate effect and progressively. The implementation of this provision determined a country's history towards achieving gender equality and sustainable development.

Women have taken this fight to have a place in parliament and especially have the same rights as men but along the way they are faced by numerous challenges that sometimes shows them that men are not yet ready to involve women fully in parliament as they are in fear their privileges will be taken from them. The patriarchal system is the main problem to the laxity experienced in implementing the gender rule. The passing of the gender rule has been failed by parliament itself especially for the fact that men are the most in the parliament. The constitutional amendment bills not having been accepted and the laxity of the parliament not implementing it needs to be greatly questioned. Parliament is questioned on why it has been slow in ensuring the passing of legislation for implementation of the provision. The capability of the women is feared by men and they are not able to accept the ideas women bring forth. Equality should thus be embraced so as to ensure that women are equal to men in politics.

The women's movement and groups have played an active role in advancing for the realization of the 2/3<sup>rd</sup> gender rule. Taking into consideration the active role the women's movement and groups played in an attempt to ensure a legislation for implementation of the 2/3<sup>rd</sup> gender rule is in place, and the achievements of KEWOPA in parliament, this is sufficient proof that women advocate for women friendly legislation. As supported by Dahlerup (2013), had parliament had a critical number of women MPs, they would have done fairly well to lead the debates on the gender rule and rallied their male counterparts to support women friendly reforms. However, the capacity and resilience of the few women in parliament is important in ensuring they effectively influence parliamentary debates and rally their male counterparts to support and pass the women's agenda and legislation in parliament. Until, there is an institutional overhaul on how Parliament

operates, providing a women-friendly Parliament and parliamentary structures and procedures, realization of Constitutional provisions on women-related issues through enactment of legislation by Parliament for implementation, gender equality and implementation of the two-thirds gender rule will not be achievable.

### **5.3 Recommendation**

It is important to ensure the equal representation of women in leadership, the same way citizens should ensure that the women they elect are competent and have the capability to lead and represent them in parliament. The constitution is determined in ensuring that these factors are met. The rule of gender equality must be realized by the parliament. Implementation of the two-thirds gender rule involves self-regulation where members are elected using a topping- up mechanism. Further research can be carried out to analyze and critique government programs towards addressing all the necessary factors for implementation of the gender rule. In addition, research should be carried out on the extent to which the government of Kenya has adhered to the New Constitution, and how this should inform formulation of policies to improve the involvement of women in politics. Further research can be carried out to establish the relationship between the capacity of women in parliament and how this impacts on their engagement and influence in parliament and parliamentary processes.

Good will and building of synergies between the Judiciary, Parliament, the Executive and the women's movement towards achieving gender and social equality and justice cannot be underestimated. Several bodies were needed to ensure that the gender rule was successfully implemented as viewed by the Supreme Court. Whether progressive or immediate, realizations must be adhered to. Further study can be carried out to establish

mechanisms of building of effective collaborations between parliament and the judiciary, and facilitating better coordinated mechanisms, interpretation and implementation of the law. In addition, further research can be carried out on electoral laws as a means of ensuring that women are purposely included from the point of party nominations. It should be noted that constitutional provisions are not necessarily translated into results without implementation mechanisms being put in place to ensure they are really achieved. Affirmative action can only succeed if implemented within a framework of supportive policies, practices, legal and political environment. Political will is therefore crucial in realizing the benefits of affirmative action. Further research should be carried out on the relationship between the 2010 New Constitution and involvement of women in politics.



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## APPENDICES

### **Appendix 1: Checklist for Analysis for documentation on implementation of the Two Thirds Gender rule in National Assembly of Kenya**

#### **A. Interventions**

1. What interventions have already happened?
2. What is currently happening? What is the subject of the issue being debated and/or being ruled or discussed?
3. Does the bill being debated or the judgement being made include a broader commitment to improving gender equality?
4. What are the specific issues relating to implementation of the gender rule that are being discussed in the parliamentary debates and/or in the court ruling?
5. How these issues relevant or weighty in determining the final decisions arrived at in pursuing gender equality?
6. How does the initiative (bill, proposal, court petition/ruling etc) fit into the “big picture” of constitutional implementation of the gender rule?
7. What arguments are being made by the male and female members of parliament (MPs) or judges and what are their implications?

## **B. Language**

1. What language is being used by the male and female MPs or judges in their argument for or against the issue of discussion? Is it gender sensitive? Is it derogatory?
2. How is the language being used likely to positively or negatively influence the decisions that are arrived at in pursuing the gender agenda?
3. How do both female and male MPs/judges perceive implementation of the gender rule in terms of its costs, benefits, acceptability and practicality?
4. Are the arguments or discussions in court, parliament or the women's movement reminding the government and its institutions on their responsibility to ensure social justice and sustainable human development.
5. Are the arguments being presented demonstrating political will for implementation of the gender rule?
6. Is there any evidence of explicit discrimination against women in discussing the legislations, proposals or rulings made?
7. What kind of arguments for adapting a gendered approach and promotion of gender equality is the intervention seeking to address?

**C. Clear reference to the constitution and informed expertise**

1. Is there indication that gender expertise information and consultation informed the drafting of legislation or the ruling?
2. Based on the arguments presented and/or comments made, what do the MPs/judges know about the 2/3<sup>rd</sup> gender rule? What don't they know? What do they portray?
3. Are the arguments being made drawing from and/or referring to the mandate given for enhancing gender equality level?
4. In the arguments being made, is reference made to the constitutional provisions which provide adequate basic legislation that prohibits discrimination on the basis of sex?
5. Are the arguments presented highlighting the significance of investing in gender equality?