Judicial Perspectives on the Question of the Two-Thirds Gender Principle – Kenya

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Abstract

Although on the face of it, correcting 'historical injustices' including righting the wrongs of exclusion of women from Kenya's political space by enforcing affirmative action to place women in public decision-making spaces is reasonable, urgent and necessary, this may not be the case going by how the pursuit of this goal has unfolded. There has been a general resistance towards affirmative action, which resistance has paved way for the incessant discrimination against women in total disregard of the Constitution of Kenya and other supporting legislation. The study traces the struggle for representation by women in public offices within the Kenyan governance ecosystem since 2010. It unpacks the legal framework embedding affirmative action and delves into varied efforts at reducing gender disparity through attempts at passing enabling legislations and judicial interventions. This study reveals that Kenya is not short of laws on affirmative action and exposes the insufficiency goodwill to realise this constitutional aspiration. Drawing from the experiences of the Judiciary, it makes practical recommendations aimed at resolving the outstanding constitutional question. Among other recommendations, this paper enjoins the Judiciary to maintain allegiance to the law through strict interpretation of the letters of the law, and to adopt a common ideology in determining constitutional matters to avoid back and forth on its own decisions, thereby taking away progress already made among others. It further calls for judicial review of the status of implementation of past decisions as well as remodelling or restructuring the electoral system to adopt the principle of affirmative action among other recommendations.

Key words: Law, Judiciary, Kenya, election, two-thirds, affirmative action, Constitution.

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1. Introduction

Leadership and politics in Kenya are often perceived as dangerous ventures and are therefore ordinarily the preserve of men and considered ill-fitting for women. Dominance of the political system, the economy and patriarchy and constant threats of violence are some of the major challenges to women's leadership and involvement in politics. This is happening despite it being an issue of notoriety that empowerment of women and girls is essential for economic growth and social development,[2] and that societies that include women's output generally have better outcomes.[3] This brings to the fore the principle of affirmative action which calls for the inclusion and empowerment of women to enable their effective participation in public affairs, to counter this problem. The two-thirds gender principle, popularly known as affirmative action is a principle for social justice that entails putting in place policies that bring disadvantaged or discriminated groups to the forefront - a form of positive discrimination. Notwithstanding that affirmative action is prescribed in their laws, many governments, Kenya included, continue to discount women's rights, or preside over practices and laws that contradict equality and inclusion of women, for political and or social gains of a few individuals, to the detriment of the national economic growth and development.[4]

Although Kenya is one of the most jurisprudentially progressive countries in Africa, it is a patriarchal society characterised by the domination of men over women.[5] Examples of cultural practices that illustrate subjugation of women include the payment of bride-price or dowry on the head of a woman in marriage, female genital mutilation, domestic violence, exclusion of women from inheriting ancestral property, and relegation of women to domestic matters

1. UN Women, Pambana: Political Economy Analysis of Women and Participation in Politics in Kenya Implications for UN Women programme strategies (2023) <Political Economy Analysis on Women Political Participation in Kenya.pdf (unwomen.org)> accessed on 22 July 2023

2 United Nations, Gender Equality: Why it Matters, Goal-5.pdf (un.org) accessed on 29 August 2023.

3 United Nations Department of Peace and Operations, Gender Equality and Women, Peace and Security Resource Package, <https://peacekeeping.un.org/sites/default/files/gewps19_respack_v7_eng_digital.pdf> accessed on 29 August 2023.

4 Sarah Hewitt, 'The Struggle for Women's Participation in Kenya - AIIA.' Australian Institute of International Affairs (blog), 9 January 2018 <The Struggle for Women's Participation in Kenya - AIIA - Australian Institute of International Affairs> accessed on 22 July 2024.

5 UN Women, Facts and Figures: Economic Empowerment Benefits of Economic Empowerment (2018)<https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures#:~:text=Empowering%20women%20in%20the%20economy,employment%20and%20decent%20work%20for> accessed on 5 September 2023.

and chore among others.[6] As a consequence of these and other practices beyond the scope of this study, there is serious gender disparity in economic, social, and even political spheres. Women are marginalized by being 'structurally' locked out of decision-making spaces including the National Assembly and the Senate.[7] Affirmative action appears to be one of the practical steps for bringing women into the limelight.

Notably, the Independence Constitution of Kenya (1963 as amended in 1969) did not provide for affirmative action measures necessary to reverse the systematic and historical marginalization of women.[8] This is why the Constitution of Kenya, 2010 is a symbol of great hope for the women of Kenya.[9] Often referred to as the new dawn, this Constitution among many firsts inspired national renewal through inclusion and representation of all voices, women included.[10] This desire is evident in the constitutional guarantee of equality of all people, the right to participate in political leadership, and the right to equality before, during and at the dissolution of marriage.[11] While these have been lauded to be among many other progressive clauses, they are yet to level the playground for women in politics as was envisioned.[12] It still seems like the solution to gender discrimination and consequently gender disparity remains elusive. With every major political appointment and with every passing election cycle, the hope that historically marginalized groups had in the Constitution

6 Sarah Hewitt, "The Struggle for Women's Participation in Kenya - AIIA." Australian Institute of International Affairs (blog), 9 January 2018 <The Struggle for Women's Participation in Kenya - AIIA - Australian Institute of International Affairs> accessed on 22 July 2024.

7 UN Women, Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development (New York, 2018)<https://www.unwomen.org/en/digital-library/publications/2018/2/gender-equality-in-the-2030-agenda-for-sustainable-development-2018> accessed on 5 September 2023.

8 Centre for Rights Education and Awareness (CREAW), Tracing the Journey: Towards the Implementation of the Two-thirds Gender Rule Principles. Tracing-the-Journey-Two-Thirds.pdf (creaw.org) accessed on 6 September 2023.

9 Maria Nzomo, Patricia Kameri-Mbote, Gender Issues in the Draft Constitution of Kenya, International Environmental Law Research Centre (2003) <Gender Issues in the Draft Bill of the Constitution of Kenya (ielrc.org)> accessed on 6 September 2023.

10 Migai Akech, Kenya: Institutional Reform in the New Constitution of Kenya, 2010 p 4 https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf accessed on 29 August 2023

11 Constitution of Kenya articles 27, 38 and 45(3) encapsulate the right of every Kenyan to equality, right to participate in the political life of the country, and equality at the time of marriage, during the subsistence of the marriage and even at dissolution. It was hoped that these provisions would level the playing field for the women to participate in the public life.

12 Gloria Nyambura Kenyatta 'The Political Participation of Women in Kenya' (2023) Vol 25 (2) Journal of international Women Studies <The Political Participation of Women in Kenya (bridgew.edu)> accessed on 6 September 2023.

2010 is slowly giving way to disillusionment. This is because time is passing by, and the women's participation in public affairs remains below the constitutional stipulation. Although there are more women in the top echelons of various government entities such as commissions, with the Parliament recording women representation at 23%, Kenya has a long way to realise the letter and spirit of the Constitution.[13] Acknowledging and recognizing the Judiciary's mandate in upholding the rule of law, this study investigates the effort made by the Judiciary to realize affirmative action for gender equality and mainstreaming. It focuses on the judicial reasoning that has kept this idea still-born (or liberated?) with a view to diagnose where the problem might be and consequently offer solutions.

1.1 Kenya's Socio-cultural Context

Having mentioned that Kenya in terms of cultural setting is a patriarchal society characterised by dominance of men over women, it helps to point out that after the promulgation of the Constitution, among very urgent wrongs to be righted included remedying the said imbalances.

Gender disparity in Kenya has normalised gender violence exemplified by early marriage of girls, denial of girl's rights to return to school after cases of teenage pregnancies, polygamous relationships, discriminatory distribution of matrimonial property after a divorce, among others. A report revealed that women still suffer greatly from physical and verbal domestic violence.[14] Constraints to women's political participation or hinderances to women's effective enjoyment of the right to contest for political positions include violence, intimidation, lack of funds and backward cultural beliefs.[15]

Backward practices that promote and rubber-stamp the exclusion of women stem from biases deeply entrenched in cultural, social and gender norms that relegate women to household responsibilities and reserve leadership roles exclusively for men.[16] Patriarchy supports the male candidate as it castigates the female competitor. Anti-woman epithets are widely used and normalised in

13 Kenya Institute of Public Policy and Research (KIPPRA), 'Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – 2022' <Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – KIPPRA> accessed on 19 July 2024

14 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2014.

15 *Ibid*

16 International Alert (2022), Women and power: Political participation in Wajir county, Kenya, <https://www.international-alert.org/blogs/women-and-power-political-participation-in-wajir-county-kenya> accessed on 23 July 2024.

folklores that paint the picture of a woman in the negative, such as a person that cannot be relied on, irresponsible, disloyal among other negative connotations.[17] Case in point is Honorable Charity Kaluki Mwendwa Ngilu - Kenya's first female presidential candidate - who endured the hassle of being a female politician including being beaten, stoned, and teargassed by the police while on the campaign trail.[18]

Additionally, the few women in politics struggle with finding a constituency in which to contest; if they vie for a position in their constituency of birth, they are criticised for not identifying sufficiently with their husband's family, as a good wife is expected to leave her natal home when she gets married. Yet, if they vie for positions in the constituency of their husband, they are still criticised as they are considered 'outsiders.'[19] For example, the late Honourable Joyce Laboso, one of the first three women to be elected governor in Kenya, went through a tumultuous experience in her political leadership journey elaborate on how her being married in Kisumu vis-a-vis coming from Bomet affected her politically.[20]

Therefore, it is little wonder that underrepresentation of women in positions of leadership and power and even other public spheres continue to characterise Kenya's political landscape, contrary to Kenyan laws. It is impossible for a county to progress economically, politically and even socially without the inclusion and participation of half its citizens.[21] Despite being the largest economy in East Africa, Kenya is leading from behind in matters gender inclusion, having failed and or refused to establish a programme for gender representation in the National Assembly and in the Senate.[22] In the current levels of gender inclusion

17 *Ibid*.

18 Nasibo Kabale, 'Charity Ngilu: Kenya's first female presidential candidate' The Standard (Nairobi, 2017) <https://www.standardmedia.co.ke/evewoman/achieving-woman/article/2001259266/charity-ngilukenyas-first-female-presidential-candidate> accessed on 5 September 2023; Anne Simmons 'Female Candidates Vie for Kenya's Presidency' (Los Angeles Times, 1997) accessed on 5 September 2023

19 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2023.

20 International Alert (2022), Women and Power: Political participation in Wajir county, Kenya, https://www.international-alert.org/blogs/women-and-power-political-participation-in-wajir-county-kenya/accessed on 30 August 2023.

21 Gloria Nyambura Kenyatta, 'The Political Participation of Women in Kenya' (2023) Vol 25 (2) Journal of international Women Studies <The Political Participation of Women in Kenya (bridgew.edu)> accessed on 6 September 2023

22 International Institute for Democracy and Electoral Assistance (IIDEA), 'Women's Political Participation ~ Africa Barometer 2021' (2021) <Women's Political Participation: African Barometer 2021 (idea.int)> accessed on 6 September 2023.

of women in political leadership positions locally, women hold less than 5% of the 90 registered parties.[23] In the East Africa region, Kenya performs dismally at 20.7%, against Rwanda and Tanzania at 58% and 36% respectively, with Uganda and Burundi tying at 35%.[24]

Notably, Kenya's legal landscape is also characterised by gender neutral norms, with legislations referencing "All persons" or 'every person…' While on the face of it, this style of drafting laws seems to promote equity, the devil being in the details. Such drafting of the law in the context of a male dominated society, means that unless women are specifically provided for, the 'system' will continually lock them out of, and keep their contribution to public life insignificant. Additionally, such drafting styles reinforce historical marginalization of women, and reinforce *de facto* discrimination.[25] Therefore, despite the gender neutrality of Kenyan laws, legal egalitarianism, and equal protection of the law remain a facade.[26]

Worthy of note is that the post-election violence (PEV)-2007 profoundly shaped women's attitude towards involvement in politics; on the one hand, having paid the highest price in terms of exposure to violence, some women have since cut back on their political involvement. On the other hand, others gained the impetus to continue fighting for their space on the table of leadership to facilitate or rather to be the change they hope to see.[27]

23 Office of the Registrar of Political Parties 'Fully Registered Political Parties' Fully Registered Political Parties, 2022) <Register_of_PoliticalParties_June2023-1 (1).pdf> accessed on 22 July 2024.

24 World Economic Forum, Global Gender Gap Report (2022), WEF_GGGR_2022.pdf (weforum.org) accessed on 31 August 2023.

25 Centre for Rights Education and Awareness (CREAW), 'Tracing the Journey: Towards the Implementation of the Two-thirds Gender Rule Principles' Tracing-the-Journey-Two-Thirds.pdf (creaw.org) accessed on 6 September 2023.

26 Maria Nzomo, Patricia Kameri-Mbote 'Gender Issues in the Draft Constitution of Kenya; an Analysis' (2003) 1 <https://www.ielrc.org/content/w0301.pdf> accessed on 6 September 2023.

27 Osogo Ambani, 'The roots and effects of electoral sexual and gender-based violence on women's political participation in Kenya' in Japhet Biegon (ed), Gender Equality and Political Processes in Kenya: Challenges and Prospects (1stEdn, Strathmore University Press, 2016).

1.2 Conceptual and Legal Framework Relative to the Two-thirds Gender Principle

1.2.1 Conceptual Framework

At the very least, gender equality and gender equity are among the basic principles of human rights.[28] The two-thirds gender principle has developed over the years, applied to redress inequalities, or promote equal opportunities between men and women.[29] Gender imbalance is just one of the challenges in Kenya. Vision 2030 envisages the two-thirds gender principle as the antidote to resolving gender inequalities in Kenya, and the means to achieving equity in access to and distribution of resources among its populace [30] However, its implementation has not been without challenges, and perhaps that is why the principle of affirmative action, while quite reasonable, has not been taken up *sans* resistance.

According to Bacchi, there are two divergent understanding of the concept of affirmative action that are mutually exclusive. In his view, this presents a challenge when it comes to supporting this principle and is therefore counterproductive. While the dominant understanding is that affirmative action is the 'preferential treatment of a group over the rest', the subdominant ideology is that it is an instrument of social justice.[31] The success or otherwise of the application of this principle predominantly hinges on how it is understood or perceived by those entrusted to implement it. Where it is seen as preferential treatment, it is unlikely to be well received and supported. But when it is seen as an instrument of social justice, then often, the recipient of the affirmative action is viewed as the individual in a disadvantaged position who needs to be brought up to par with what is acceptable.[32] Although this view completely ignores why the person at a disadvantaged position is in that position in the first place,

28 Maria Nzomo, Patricia Kameri-Mbote, Gender Issues in the Draft Constitution of Kenya, International Environmental Law Research Centre (2003) <Gender Issues in the Draft Bill of the Constitution of Kenya (ielrc.org)> accessed on 6 September 2023.

29 J Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press, 2006) 444.

30 Kenya Vision 2030 'Affirmative Action' (Affirmative Action) <https://vision2030.go.ke/project/affirmative-action/> accessed on 4 September 2023.

31 Carol Bacchi, 'Policy and discourse: challenging the construction of affirmative action as preferential treatment' Journal of European Public Policy (2004) 11(1) 134 <Policy and discourse: challenging the construction of affirmative action as preferential treatment (tandfonline.com)> accessed 4 September 2023.

32 Donald Black (1989) Sociological Justice, New York: Oxford University Press.

it is better received as it is deemed to raise the status of marginalised groups. Examples of how this presentation or understanding has worked is in India, when it comes to positive discrimination of backward classes such as women, Dalits and other low castes and scheduled classes.[33] This way of looking at affirmative action tends to work because affirmative action is treated as charity, and the conversation moves from the degree of assistance needed as against the degree of assistance that is permissible.[34]

Yet again Barnes Narcoste's analysis of affirmative action from the psycho-legal viewpoint is that it presents itself in situations where criterion other than merit have been used as the basis for a decision. Such selection criteria may be based on racial, ethnic, gender, or any other consideration. The danger he sees in affirmative action is that it necessitates the diminishment of merit as a criterion for selection, leaving the selected personnel uncertain as to whether they really have what it takes to clinch that position without the favour. In his view, this breeds stigma, and stigma is damaging as it takes away self-belief and confidence.[35] Nacoste's position aligns with Sher's who posited that affirmative action waters down the achievements of persons elected by virtue of their social class rather than on merit, and by the same token, affirmative action deprecates the accomplishments of every individual belonging to the very marginalised or minority groups it is intended to benefit, and such being the case, affirmative action is not effective in creating equality or inclusion.[36]

The essence of this understanding is that the use of affirmative action to treat all cases of imbalance introduces a level of uncertainty in the selection process and even in how individuals see/view their own capabilities. That even those who are capable of contesting for selection on merit might as well fall back to affirmative action when they become doubtful of their abilities, and this makes affirmative action not a good policy. This theory has also been critiqued by Ramalekana who holds the view that indeed, while the existence of stigma

33 Marc Bossuyt (2002) Prevention of Discrimination: The Concept and Practice of Affirmative Action. Final Report by the Special Rapporteur in accordance with Sub-Commission Resolution 1998/5. Economic and Social Council. E/CN/Sub.2/2002/21.

34 Carol Bacchi, 'Policy and discourse: challenging the construction of affirmative action as preferential treatment' Journal of European Public Policy (2004) 11(1) 134 <Policy and discourse: challenging the construction of affirmative action as preferential treatment (tandfonline.com)> accessed on 4 September 2023.

35 Rupert Barnes Nacoste, Sources of Stigma: Analyzing the Psychology of Affirmative Action. Journal of Law and Policy, Vol 12, No. 2 April 1990 <file:///C:/Users/JO11956/Downloads/Law%20%20%20Policy%20-%20April%201990%20-%20NACOSTE.pdf> accessed on 4 September 2023.

36 Sher, George (1975). Justifying reverse discrimination in employment. Philosophy and Public Affairs 4 (2):159-170.

is undeniable, the illusion that stigma is caused by affirmative action is not only misleading but a white lie. He asserts that stigma roots from unequal power relations inherent in systems that preside over or promote the domination of women by men which predate and operate independently of affirmative action.[37] While this paper agrees that indeed affirmative action cannot cure all situations, especially where a skill set is required as opposed to tokenism, this paper argues that affirmative action has more positives than negatives, especially where the imbalance is pervasive.

Looking at the Kenyan context in which patriarchy rules, it is not easy to change already deeply seated practices even if they were unreasonable. But it is even harder to change them if it means taking away 'goodies' from the group that has benefitted from the same to give it to another, as it is viewed as threatening.[38] For example, President Kibaki declared that 30% of all government job vacancies be reserved for women in a directive in 2011,[39] yet the move was rejected by his cabinet and many supporters as technically impossible and unattainable.[40] Even the first lady Lucy Kibaki rejected the proposed gender quota saying it violates the right to free and fair elections.[41]

The two-thirds gender principle straddles between two important constitutional principles: the right to political participation on the one hand and on the other, the right to equality. As pertains to political participation, the Constitution has provided a clear path to democracy by entrenching in it a culture of accountability and people's participation in decision-making at all levels, rule of law, and the national values and principles that guide the application and the interpretation of the Constitution.[42] Equality can be achieved through multi-

37 Nomfundo Ramalekana, A Critique of the Stigma Argument Against Affirmative Action in South Africa, University of Oxford Human Rights Hub Journal (2022) Vol. 4 p 2-8. U-of-OxHRH-J-Stigma-Argument-Against-Affirmative-Action.pdf accessed on 05 September 2022.

38 Threatening to those who already have secured their positions and are therefore comfortable. Questions or excuses that arise include that affirmative action is too expensive to implement, or that it involves the bringing people who do not qualify to the table of leadership. This happened in Kenya and where at some point nominated MPs and elected MPs did not have the same benefits.

39 The president issued a directive in 2011 that one third of government's contracts must go to women, youth, and persons with disability. We remember this and wish that those who came after you could have the passion, the wisdom and the vision to implement the directive and raise the economic status of women in society.

40 BBC, Kenya's cabinet rejects quota for female MPs, 19 August 2011 <https://www.bbc.co.uk/news/world-africa-14590598> accessed on 4 September 2023.

41 Voice of Africa, Kenya Struggles With Female Lawmaker Quota, 24 October 2011 <https://www.voanews.com/a/kenya-struggles-with-female-lawmaker-quota-132530993/159062.html> accessed on 22 July 2024.

42 Constitution of Kenya, article 10 stipulates national values and principles of governance that bind all State organs, State officers, public officers and all persons in the interpretation of the law and in the

dimensional approaches, one of which is affirmative action, which mandates the government to initiate programmes to both alleviate and stop historical injustices and even present-day discrimination that women continue to face. The Constitution has further guaranteed marginalised groups the recognition of their ethnic and diverse cultures in addition to the determination for all Kenyans to co-exist in peace and unity. That national values and principles of good governance entrench the protection of marginalized groups speaks volumes regarding how important equality is in Kenya.[43]

All in all, there are varied perspectives on affirmative action, and one is likely to make an opinion regarding its impact based on his/her environment, their beliefs about social and which side (minority or majority) of the divide they come from among many other criteria. The motivation or understanding of affirmative action notwithstanding, it appears that there is the political goodwill for affirmative action, success stories have been the result. Could this misunderstanding of affirmative action be the reason behind the lack of political goodwill to actualize it?

1.2.2. Legal Framework Embodying the Two-thirds Gender Principle

The Constitution of Kenya, 2010

While the repealed Constitution of Kenya, 1963 was mute about the lack of inclusion and blatant discrimination buttressed and fortified by retrogressive ideologies and cultural practices, the Constitution of Kenya (2010) introduced significant reforms. Examples of such reforms include affirmative action, the quota system and devolution clauses, all geared to promoting gender equality.[44] Devolution created a political system that opened doors to leadership of women, youth and other previously marginalised groups in all the 47 counties across Kenya.[45] This is evident from the fact that both the inaugural general election of 2013 and subsequently the 2017 general elections had the highest number of women elected in the history of Kenya.[46]

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implementation of public policy decisions.

43 *Ibid*.

44 Kenya Institute of Public Policy and Research (KIPPRA), 'Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – 2022' <Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – KIPPRA> accessed on 19 July 2024.

45 Chapter 11 of the Constitution of Kenya provides for devolution, its objects, and principles. Article 174(e) provides that one of the objects of devolution is to protect and promote the interests and rights of minorities and marginalised communities.

46 However, most state institutions did not attain the one-third gender rule, hence violating the

Article 27 of the Constitution stipulates that:

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

There are well established statutes to actualize the aspirations of the people in the Constitution.[47] In relation to matters representation in public spaces or politics, there is article 27(8) which directs the state to take steps to ensure that no more than two-thirds of all elective or appointive positions are occupied by people of the same gender. This provision must be read together with article 100, which directs the state to enact a legislation around representation of marginalized groups in Parliament.

In the same vein, article 56 directs the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; and are provided special opportunities for access to employment.

Equally, article 59 of the Constitution compels the Parliament to establish the National Gender Equality Commission. In line with this, the Commission was created primarily with an oversight and advisory role. It also conducts civic education on gender and equality-related matters and oversees compliance with the Constitution on gender matters and general protection of the interests of marginalised groups.[48]

The Constitution directs the government of Kenya to ensure compliance with the two-thirds gender principle,[49] and implores it to pass a law to promote

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Constitution.

47 Including matrimonial laws, adoption laws, property laws, employment laws, health laws among others. In addition to the above, and particularly in relation to inclusion, article 27(6) of the Constitution requires the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination

48 Constitution of Kenya, article 59(2).

49 Constitution of Kenya, article 81(b).

the participation and representation of women and other marginalised groups.[50] There are protective measures entrenched in the Constitution to ensure that these actions are implemented.[51] That said, despite constitutional backing, uptake has been a challenge, hence the two-thirds gender principle remains a pipe dream.

Notably, during the drafting of the Constitution of 2010, many local and international experts were involved, including representatives of women's voices. As was expected of a country that is not used to treating women fairly both culturally and politically, advocates for women's rights pushed for affirmative action clauses to be embedded in the Constitution. It is not surprising that the three most contentious issues were gender-related including debates around abortion, laws pertaining to marriage and matrimonial property, and the right to inheritance among others. It took significant lobbying to get women's issues captured in the law.[52]

Legislations

The Constitution directs Parliament to put in place enabling legislation for the realization of affirmative action. Examples of such attempts include the Kenyan Constitutional (Amendment) Bill of 2007, which proposed the automatic reservation of 50 seats for women in the 10th Parliament. During public participation, 51.6% voted in support, compared to 48.4% who opposed the Bill on the account that just like men, women should compete to obtain votes to get into positions of public representation. This was closely followed by the Constitution of Kenya Amendment Bill, which made a provision for post-election nomination of women to achieve gender parity in Parliament. However, this Bill was so contentious that it never saw the light of the day. Subsequently, in 2015, the Constitution of Kenya (Amendment) Bill which called for the progressive realization of the two-thirds gender rule was proposed. However, it lapsed for lack of popularity. In the larger picture, the frustration of the two Bills evidences the lack of appreciation of gender inclusion by duty bearers in the Kenyan public and political space. It might also be that the place

50 Constitution of Kenya, article 100.

51 See the Constitution article 261(7) on consequential legislation provides that 'If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament'.

52 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) p 8 <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2023.

of women is appreciated but the impetus to keep leadership inaccessible to the womenfolk is stronger.

In 2022 there was the Presidential Memorandum for two-thirds gender rule, which mandated the Speaker of the August House to consider some issues that the President believed would enhance institutional capacities, strengthen complementary interrelationships, and refine mandates to conform with the constitutional provisions. He proposed a gender top-up to ensure that Parliament is properly constituted, and the establishment of a fund to promote inclusion and political participation.[53] While appreciating these milestones towards the realization of affirmative action in Kenya, their impact remains to be seen.

International Law

In international parlance, Kenya is a signatory to various global efforts to promote women's rights. Some of the notable agreements Kenya subscribes to include the UN Charter, whose preamble articulates faith in human rights and dignity of all persons, and equal rights of all men and women.[54] The Beijing Declaration and Platform for Action also implored Member States to put in place and implement strategies to promote the involvement of women in leadership.[55] The United Nation's position on equality of genders is further reinforced in the Sustainable Development Goals (SDGs) 2030, particularly number 5 which castigates gender bias as a practice that not only devalues women but also a tremendous waste of the human capital.[56] Not to mention the women's convention, also known as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[57] the African Charter on Human and Peoples' Rights,[58] and the Maputo Protocol among others.[59]

53 Presidential Memorandum on constitutional amendments Dec 2022_0.pdf (parliament.go.ke) accessed on 30 August 2023.

54 United Nations "Charter of United the Nations."

55 United Nations Specialised Conferences, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women-United Nation, 27 October 1995

56 UN General Assembly, Convention on the Elimination of All forms of Discrimination Against Women, United Nations, Treaty Series, vol. 1249, p.13, 18 December 1979.

57 The United Nations General Assembly, 'United Nations Charter' (1945).

58 Organization of the African Unity (OAU), African Charter on Human and People's Rights ("Banjul Charter") CAB/LEG/67/3 rev.5 (1982) 27 June 1981.

59 African Union, Protocol to the African Charter on Human and People's Rights of Women in Africa, -, African Union, 11 July 2003.

1.3 Judicial Interventions

Courts are elemental in the realm of constitutional implementation. The Constitution of Kenya alludes to this pivotal role particularly in its values, including equality of gender and equal participation of women in the affairs of the republic.[60] Naturally and rightfully so, the Judiciary has found itself at the centre of disputes pertaining to constitutional implementation. Kenyans look up to courts - the fountain of justice, to provide guidance even in the interpretation of the Constitution. One such dispute pertains to affirmative action that has been a daunting task for the institutions entrusted with its realization. The said struggle has been seen both in the Legislature, evident from the pieces of 'enabling' legislations that have been attempted to be passed for Affirmative Action to materialize, most of which flopped. This section captures the journey of affirmative action in the context of court decisions that have supported it or otherwise, that have led us to the affirmative action gender conundrum we are in today.

In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*,[61] the Attorney-General sought the court's advice on whether article 81(b) as read with article 27(4), article 27(6), article 27(8), article 96, Article 97, article 98, article 177(1)(*b*), article 116 and article 125 of the Constitution required immediate or progressive realization in light of the fact that general elections were scheduled for 2013. In its advice, the court highlighted that in a democracy, it was very crucial that all citizens are included in governance, in order to address any underlying inequalities associated with marginalization. The Court also ruled that article 81(*b*) would not apply in the March 2013 general elections. Additionally, the Court laboured to discuss the question of soft gender-quotas and hard-gender quotas, implying 'low-hanging' fruits and the latter, longer-term issues, the Court advised that hard-gender quotas should apply in the subsequent general election, to provide ample time to make arrangements for the same. The timeline for effecting the two-thirds gender rule was agreed on as being 27 August 2015. However, this timeline was not adhered to, leading to a subsequent case. From the Court's ruling in this case, one can conclude that the Court was leaning towards the gradual achievement of the gender parity rule.

60 Constitution of Kenya, article 10 embeds the national values that are the guiding attitudes, actions, and behaviour of Kenyan citizens. National values are normative principles that oblige the State to perform its functions in a manner that promotes the general well-being of the people.

61 [2012] eKLR.

The Supreme Court's *Advisory Opinion* to the Executive and Parliament was to the effect that the realization of the two-thirds gender rule in all public bodies with elective positions would be progressive and dependent on State's further action.[62] Therefore, in the view of the majority, in its conclusion, article 81(b) of the Constitution could not be attained immediately. However, the then Chief Justice, Dr. Willy Mutunga in his dissenting judgment against progressive implementation stated that the women of Kenya had been kept waiting for too long, and they did not need to wait any longer than 27 August 2015, particularly now that their struggles had birthed both article 27 and article 81(*b*). He urged the courts to speak up in the face of bigotry that continued to withhold from the women of Kenya, their hard earned right to equality in all spheres including in political representation.[63]

Following the above Supreme Court decision, the Attorney General constituted a technical committee comprising representatives from twelve stakeholders to draft a framework for the realization of the two-thirds gender principle.[64] Notably, the technical committee received a lot of input from the public through public participation. However, the recommendations it made therefrom were completely disregarded in the subsequent steps.[65]

Once again, in this case, the question of commitment comes up, as the relevant government arm was directed to put in place the requisite enabling legislation and policies to facilitate the implementation of the Constitution. However, to date, those legislations and policies are yet to see light of day. Three election cycles later, the debate on gender inclusion is still going on. Begs the question whether fidelity to the Constitution exists, and if so, to enforce it, who must crack the whip on who?

The Matter of FIDA-K challenged the gender composition of the Supreme Court.[66] The petitioner sought a ruling on the correct interpretation, full tenure, meaning and effect of the equality clause, and the proper approach to

62 No. 2 of 2012[5].

63 Dudley Ochiel, Unpacking the Gender Rule and the Supreme Court Advisory Opinion of December 2012: Quotas Options for the Representation of Women in Kenya in 'The Walls we Can't See: Public Policy Lethargy on Women's Political Participation in Kenya (March 2016) <https://ke.boell.org/sites/default/files/uploads/2016/06/gender_briefs_-_ochiel_>accessed on 31 August 2023.

64 The working group comprised of State departments and civil organization groups.

65 Society for International Development (SID), Actualization and Implementation of the 'Two-thirds Gender Principle' In Kenya, <https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya.html#_ftn6> accessed on 31 August 2023.

66 *The Federation of Women Lawyers Kenya (FIDA-K) and others v Attorney-General and another* [2011] eKLR.

the interpretation of the Constitution.[67] This was after the Judicial Service Commission (JSC) had recommended to the president to appoint five persons (1 woman, 4 men) as Judges of the Supreme Court. The petitioner alleged that the respondents had flouted the constitutional provisions on gender equality and described the respondents' act as not only gender insensitive but also discriminatory and disrespectful to the women of Kenya. Subsequently, the petitioner sought the court to quash the appointments.

The Court determined, firstly, that the provision of article 27(8) was unequivocal in so far as it directed Parliament to enforce the two-thirds gender rule. Secondly, the Court also stated that courts can only enlarge rights and take appropriate steps where a right has been breached; and thirdly, that the petitioner failed to prove the harm suffered by women as a consequence of JSC's act or omission. It enunciated that and had evidence of suffering, or any other injustice been adduced, the court would have found a basis admonishing the JSC. While the court was clear that judicial appointments must reflect the diversity of the populace, in the case at hand, it found no evidence that the JSC in performing their mandate under article 172, had failed to comply with non-discrimination clause in article 27. Additionally, the court articulated that the purpose of article 27(8), is to place a future obligation on the State to redress long-standing injustices encountered and or visited upon some segment of the populace. As such, this case was premature, as the rights protected under article 27(8) had not crystallized. A claim could only be made when the state failed to take the requisite legislative or other measures to redress injustices to marginalized groups within the time set in the 5th Schedule to the Constitution.

Even on this occasion, the Court interpreted article 27(8) as a future obligation on the State to right the wrongs and other atrocities committed against marginalized groups. This appears to make sense considering that the State is yet to put in place measures, both legislative and even programmatic, for purposes of seeing to it that it delivers on this promise. The problem is that unless given strict timelines, the State (read Parliament) has the tendency to not observe timelines, in which circumstances, it is understandable that people, especially belonging to the marginalized groups particularly women would receive this judgement half-heartedly.

The point of contention in the *Matter of National Gender and Equality Commission*[68] was that women, youth and other marginalised groups had been

67 Constitution of Kenya, article 27.

68 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission and Another*, Petition 147 of 2013

excluded in the party lists contrary to article 90 of the Constitution. The petitioner[69] contended that the respondent had failed to supervise the creation of party lists for the 2017 general election. The arguments were anchored on article 27 of the Constitution which requires not only equality and freedom from discrimination but affirmative action to remedy historical marginalization through inclusion. The State's and by extension the respondent's duty to ensure inclusion is anchored in articles 54 and 56 of the Constitution. Dismissing the petition, the Court argued that the respondent's role was to allocate seats on the basis of lists submitted by the political parties; it could not interfere with the making of party lists.

In *the Centre for Rights Education & Awareness (CREAW)*, the petitioners contended that the composition of Parliament flouted the gender parity principle as women had only 23 out of the 290 seats in the National Assembly, while only 6 women had been nominated in the 47 counties.[70] By law, to meet the threshold of the two-thirds gender principle, the National Assembly requires 117 members to be of the opposite gender. It was the petitioners' contention that the total count of 76 for women created a shortfall of 41; they, therefore, among other prayers, sought a declaration nullifying as unconstitutional, the composition of the National Assembly and the Senate, for failure to meet the two-thirds gender requirement. The Court directed that members of Parliament take oath of office as required under article 74 of the Constitution, so that - Parliament begins its operations in thirty (30) days after election in line with article 126(2) of the Constitution. It was also the Court's position that the amended notice of motion to seek conservatory orders was merely an afterthought. Additionally, the Court noted that since the petitioners were not seeking to bar members of Parliament from being sworn in at all, thus far there was no essence of a conservatory order.

In *Katiba Institute v. The Independent Electoral and Boundaries Commission*,[71] political parties failed to comply with affirmative action principles during nominations just before the general election. The petitioners sought declarations that; political parties are bound by the provisions of articles 10, 19, 20, 27, 28, 56, 81(*b*) and 91(1) of the Constitution and a declaration that the respondent

69 The National Gender and Equality Commission (NGEC) is a Commission is established under article 59(4) of the Constitution and the National Gender and Equality Act, 2011. Its overall mandate is that of promoting gender equality and freedom from discrimination as provided in article 27 of the Constitution.

70 *The Centre for Rights Education & Awareness (CREAW) and 3 Others v Speaker of the National Assembly and 3 others*, petition number 397 of 2018

71 Petition number 19 of 2017

is mandated to ensure that political party nominations meet the constitutional threshold. Although the court determined that indeed, political parties are bound by the two-thirds gender rule, unfortunately, it did not quash the nominations at the time to not disrupt plans that had already been made pertaining to elections. To the disappointment of the petitioners, the court ordered that compliance with the two-thirds gender rule be pushed for the subsequent general elections, scheduled for 2022. On this occasion, yet again, to not disturb the progress in terms or arrangements that had already gone into the election at hand, the Court thought it wise to push the strict compliance with affirmative action to the next cycle of election. Progressive as opposed to immediate.

In *Adrian Kamotho Njenga v Cabinet Secretary Ministry of Interior ICT*,[72] appointment of Board members of the ministry was contested on the basis that it was contrary to the principles of public service,[73] national values,[74] equality and non-discrimination,[75] and also the right of dignity of individuals.[76] The petitioner sought a declaration that such appointment was unconstitutional and to compel the respondent to comply with the affirmative action principles.

In September 2020, following Parliament's refusal or failure to implement affirmative action in accordance with the law, the then Chief Justice David Maraga pursuant to article 261(7) presented an advisory to the then president, Uhuru Kenyatta.[77] Calling for the dissolution of Parliament, Maraga stated that failure to realize the envisioned proportional representation was a great omission and everyone involved must be held accountable. This reignited the conversation on the two-thirds gender issue, but which quickly shifted to whether an advisory by the Chief Justice is legally binding. This advice originated from six petitions to the Chief Justice seeking that he advises the president to dissolve Parliament under article 261(7) as read with articles 27(3) & (8), 81(*b*), and 100 of the-Constitution. At the time of the said advisory, the CJ also expressed his worry that given the time left, it seemed that the

72 Petition No. 203 of 2016.

73 Constitution of Kenya, article 232.

74 Article 10 encapsulates the national values and principles of good governance include democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, non-discrimination, and protection of the marginalized.

75 Constitution of Kenya, article 27.

76 Constitution of Kenya, article 19(2).

77 Constitution of Kenya, article 261(7) on consequential legislation provides that 'If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament'.

10th Parliament was still not going to comply with affirmative action.[78] The Chief Justice stated his displeasure that Parliament had for the 9th year refused to comply with affirmative action, pointing out the Parliament's lackadaisical attitude to the issue.[79]

Drafters of the Constitution forestalled chances that the political class might not embrace affirmative action by prescribing that Parliament be dissolved as many times as may be necessary, if that is what it would take to enforce compliance with affirmative action.[80] The two Chief Justices' appeals to the presidents speaks volumes of disdain for the rule of law by all governments since 2010, and lack of real commitment to the letter and spirit of affirmative action. The focus of this study is on the former. The Justices' appeals were reiterated by the Law Society of Kenya. However, all that was shelved as a hollow suggestion.[81]

As recent as 2022, the Women's Charter was signed to signal commitment to inclusivity in the government. Soon after, the 50% space allocated for women was reduced to 32% and more recently to 21%.[82] It appears, there was no commitment to include women effectively in the very first place. One might say that the gender card was only being used as a political bargaining chip.

1.4 Main Findings and Conclusions

Although gender disparity in participation in public affairs is a universal issue, it is bigger in Africa, and more of a pandemic in Kenya. Despite Kenya having a relatively good human rights track-record and economic development as the largest economy, in East Africa, its track-record in women inclusion

78 David Maraga, Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule. Kenya Law Reports (22 September 2022) <Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule | Kenya Law> accessed on 30 August 2023; Aljazeera, 'Kenya's judge advises Parliament to dissolve over lack of women: Top judge says legislators failed to meet constitutional provision allowing for women to hold one-third of seats' (2020) <Kenya's judge advises Parliament to dissolve over lack of women | Women News | Al Jazeera> accessed on 5 September 2023.

79 David Maraga, Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule. Kenya Law Reports (September 22, 2022) <Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule | Kenya Law> accessed 30 August 2023. Paragraph 24

80 Constitution of Kenya, article 261(9) provides that if (after a dissolution), the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

81 Cyrus Ombati, 'Calls to dissolve Parliament farfetched, House Clerk tells LSK' The Standard (2021) <https://www.standardmedia.co.ke/article/2001389834/calls-to-dissolve-parliament-farfetched-house-clerk-tells-lsk> accessed on 5 September 2023.

82 Loise Mwakamba, 'The Implementation of the Two-Thirds Gender Rule: A Seesaw Progress' <https://mzalendo.com/posts/implementation-two-thirds-gender-rule-seesaw-progr/> accessed on 30 August 2023.

is underwhelming, at 20.7%.[83] Gender inequality springs by and large from patriarchal beliefs and other indoctrinations about capacity and capability of women to perform in academics, business, leadership and other quotas. Such ideologies and attitudes have ensured that women are kept away from public affairs and are only relevant in the domestic environment.[84] It is no surprise that in 60 plus years post-independence, Kenya is currently having its very first female Chief Justice, not because there have not been women qualified enough to occupy those positions but because there has been no political will and belief in their performance to appoint women to such important portfolios.[85] Inequality has exposed women to all manner of violence both in private spaces, marginalizing them further.[86]

The Constitution of Kenya, 2010 brought renewed hope among progressive thinking Kenyans. Among many other monumental provisions, as it proposed affirmative action aimed at bringing on board every Kenyan who has been sitting at the periphery of public affairs through the pronouncement that the sovereign were the people of Kenya,[87] provisions around devolution[88] to promote development at the grassroots through enhancing the voices of

83 Society for International Development (SID), Actualization and Implementation of the 'Two-thirds Gender Principle' In Kenya,<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya.html#_ftn6> accessed on 31 August 2023. Abonesh Tesfaye, Maren Radeny, Maurice J. Ogada, John W. Recha, Gebermedihin Ambaw, Nitya Chanana, Sophia Huyer, Getamesay Demeke& Dawit Solomon (2022) Gender empowerment and parity in East Africa: evidence from climate-smart agriculture in Ethiopia and Kenya, Climate and Development, DOI: 10.1080/17565529.2022.2154124

84 Anthonia M. Essien, Donatus P. Ukpong 'Patriarchy and Gender Inequality: The Persistence of Religious and Cultural Prejudice in Contemporary Akwa Ibom State, Nigeria:International Journal of Social Science and Humanity' (2012) Vol 2 No. 4 <https://www.researchgate.net/profile/Anthonia Essien/publication/272910137_Patriarchy_and_Gender_Inequality_The_Persistence_of_Religious_and_Cultural_Prejudice_in_Contemporary_Akwa_IbomState_Nigeria/links/61544e7914d6fd7c0fb989b3/Patriarchy-and-Gender-Inequality-The-Persistence-of-Religious-and-Cultural-Prejudice-in-Contemporary-Akwa-IbomState-Nigeria.pdf> accessed on 5 September 2023.

85 Voice of Africa 'Kenya's President Names Country's First Female Chief Justice' (2022) <https://www.voanews.com/a/africa_kenyas-president-names-countrys-first-female-chief-justice/6206013.html> accessed on 5 September 2023.

86 Exemplified by the fact that women in Kenya for a long time could not own property in their name, could not get their fair share of matrimonial property in the event of a divorce, could not be appointed in certain positions.

87 Constitution of Kenya, article 1(1). This means that all the people have a right to participate in government, and that the government can only exercise its authority within popular sovereignty if the people have explicitly granted it.

88 Constitution of Kenya, article 174

women and other marginalized groups who have for the longest time stood on the sidelines.[89]

Over a decade after promulgation of the Constitution, reality has dawned on the women that the good intentions on paper have hardly translated into cogent action on the implementation front. While other new provisions of the Constitution were being implemented without much trouble, strict compliance with affirmative action has been pushed aside for the next convenient occasion. This was the basis of sustained legal battles beginning with the advisory opinion sought by the then Attorney-General, followed by an avalanche of cases in the High Courts and the Supreme Court seeking decisions and advisories on affirmative action. This is besides the directives given by the Judiciary to the Legislature, including, when Chief Justice Dr. Willy Mutunga called out Parliament for what he referred to as derailing of the realization of affirmative action. In the same breath, his successor, Chief Justice Hon. David Maraga's advised to President Uhuru Kenyatta to dissolve the Parliament for failing to adhere to the two-thirds gender rule.

As showcased in the previous section, litigations before the Courts have been vibrant and, in most cases, Courts ruled in favour of expeditious implementation of affirmative action. However, it is important to state rulings in favour of affirmative action are not sufficient. Courts fell short by failing to order immediate enforcement of the principle, which is just as important.

An exploration of the efficacy of judicial interventions in resolving the outstanding constitutional question on gender parity reveals the divergent judicial approaches taken by courts in reaching various decisions. The approaches can be widely classified into progressive realisation approach, midway approach and immediate implementation approach. The progressive realization approach was adopted in most of the cases, beginning with the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*, in which the court held that affirmative action would not apply in the 2013 general election as there was not enough time to put in place structures to facilitate its implementation.[90] In *Advisory Opinion*[91] the Supreme Court directed the Attorney General to implement the ruling on affirmative action by developing a framework within the time set. Also, in *Federation of Women Lawyers Kenya (FIDA-K) and 5 others v Attorney-General and another*, in which it was held that claims relative to article

89 Constitution of Kenya, article 56.

90 [2012] eKLR.

91 No. 2 of 2012 [5].

27(8) of the Constitution had not materialized and could only mature if the State failed to put in place measures to assist disadvantaged persons within the set timelines. Even on this occasion, the Court interpreted article 27(8) as a future obligation.

Finally, the midway approach borders on convenience. Whilst acknowledging that affirmative action is an imperative antidote to the gender imbalance in involvement in public affairs, this approach appears to make excuses as to why this cannot be done just yet. This is exemplified in the *Matter of Katiba Institute* where, agreeing with the Petitioners, the Court held that political parties must comply with affirmative action principles, and hence their processes must comply with the principle. Although it did not quash the nominations, it directed political parties ensure compliance with this requirement in the 2022 general elections since preparations for the 2017 general elections was at advanced stages.[92] As was in the matter of *Centre for Rights Education & Awareness (CREAW).*[93] Here, the petitioners contended that the composition of the Parliament failed to comply with the two-thirds gender principle, with 23 women out of 290 members, but the petition was dismissed. This was also the case in the matter of the *National Gender and Equality Commission*[94] which contested the exclusion of youth, women and persons living with disabilities during party nominations contrary to the law.[95] This study takes a very strong standpoint that immediate implementation of affirmative action is the ideal, and anything short of it is contrary to the intent of the Constitution. From the several cases sampled above, it appears none of them was decided in favour of the ideal decision - immediate implementation. Courts tend to favour progressive realization or mid-way approach.

In view of the aforesaid, it is evident that despite the courts favouring the enforcement of affirmative action, it has not translated into tangible results. To date, none of the orders of the court on realigning the composition of Parliament with the requirements of the Constitution has been adhered to raising the question as to whether the Judiciary emasculated on the extent of its authority on the gender rule question. Or, whether the Judiciary has suddenly become impotent in implementing affirmative action.

92 *Katiba Institute v The Independent Electoral and Boundaries Commission*, Petition No.19 of 2017

93 eKLR, Petition No. 397 of 2018.

94 Petition 147 of 2013.

95 Constitution of Kenya, article 90.

In attempting this question, this study takes the view that although courts unanimously agree that affirmative action should be implemented, the differing and inconsistent decisions (progressive, immediate realization and the mid-way approach as explained above) undermine its realization. In particular, the mid-way approach creates loopholes for exploitation by the Legislature and the Executive. Progressive realisation assumes that the makers of the Constitution did not have forethought regarding the funds and enabling legislation necessary for the successful realisation of affirmative action. It is argued that delaying enforcement to 'allow funds to be allocated or new legislation to be installed' is akin to sanitising the delayed protection or a right. Additionally, by adopting this progressive approach, the Courts largely ignore the urgency of affirmative action as the defining moment or turning point for women's involvement in leadership and other public affairs. In any case, anything short of immediate implementation of affirmative action has more repercussions for women living with disability or those hailing from marginalised communities.

In conclusion, no matter how articulative and well-meaning a Constitution or any piece of legislation is, it is not self-executing. It requires commitment of all arms of government to achieve its mandate and to maintain its transformative potential. This is exactly the case of Kenya, where the influence of the Constitution of 2010 has plummeted, symptomized by Parliament's failure to pass the two-thirds gender law without any fear of, or care for backlash.

Kenyans have looked up to the Judiciary for intervention. The Judiciary has also fallen victim to the failed politics of the day. The Constitution enjoins any person who applies or interprets the Bill of Rights to accord such interpretation to the widest extent possible. It is troubling that the Judiciary has engaged in buck-passing and making flowery but illusory declarations that are devoid of the force of law. The framers of the Constitution never anticipated that the Judiciary would make decisions and accord Parliament the privilege to choose to comply or vary its orders at will. The Judiciary is clothed with sufficient powers to enforce affirmative action, and it is about time it wielded the judicial sword to arrest the current charade on gender rule with absolute finality. It must stop making recommendations and if declaring the institution of Parliament unconstitutional and illegal is what it will take to implement this provision; then the courts must bravely hand down such orders even though heaven falls.

While efforts to realise equality can be seen in certain court decisions including advisories to the president to suspend Parliament until the right number of women representatives are on board, no significant progress has been observed. These milestone moves have been backtracked with decisions which

allowed Parliament to continue working even where improperly constituted so as 'not to disturb' the running of the affairs of the current session, pushing the strict implementation of affirmative action for 'next time.' The Judiciary missed the golden opportunity to help bridge the gender gap in governance in Kenya due to inconsistency of decisions resulting in back-and-forth and consequently, gains are yet to be consolidated. This paper posits that the doctrine of finality in judicial proceedings now, more than ever, needs to be enforced on affirmative action. Courts must resolve the issue with finality without passing the buck to Parliament or to the Executive. Dancing around this important issue further continues to erode the beliefs on which human rights are founded. Further, reinforcing the inherent nature of human rights and the role of the State as merely the 'protector of rights,' this paper asserts that the Judiciary must now redeem its face and adopt reasoning that breathes life into this doctrine.

To some extent, the framers of the 2010 Constitution cannot escape criticism. Having had the benefit of wisdom and political history of the country, they should have comprehensively formulated provisions that embed the two-thirds gender rule in the country's elective architecture. But instead, they chose to leave this onerous task to a male-dominated State organs drawing its composition from diverse cultural backgrounds most of whom still retain a dim view of the role of women in leadership.

1.5 Recommendations

Acknowledging the monumental role that the Judiciary plays in upholding the rule of law, this study has explored the efficacy of judicial interventions in resolving the outstanding constitutional question of affirmative action. Having weighed in on all the measures and constitutional protection of the right to equality and equal participation in public life, the following recommendations are made:

To begin with, the Judiciary should practice fidelity to the law: Almost a decade and a half since the promulgation of the Constitution of 2010, and yet very little observable development regarding affirmative action. Courts should play allegiance to the Constitution by issuing directives to the effect that all matters pertaining to affirmative action must now be complied with within a specified time frame.

This paper also recommends the Judiciary develops a guideline for determination of cases on affirmative action going forward: The lack of clarity/ consistency of court decisions has successfully created loopholes for duty

bearers. Adoption of a guideline/position by the Judiciary, will streamline judicial attitude on the issue, limiting chances for disparities decisions, which in turn back-tracks the gains already made.

Additionally, the Judiciary should follow-up and or revisit all its past decisions where its verdict was for progressive realization, with a view of compelling parties thereof to comply with immediate effect where the time frame that was given in the verdict has already elapsed.

Further, this paper calls for law reform aimed at reconfiguring of the Electoral System: The two-thirds gender rule in elective offices is intertwined with Kenya's electoral system. One of the most prevalent arguments against its realization has been that all implementation proposals have been clothed in such a way that it would amount to selection as opposed to election. To realize it, the electoral system needs to be reconfigured to give effect to these principles. A formula must be developed to meet the gender rule at the ballot through reformulation of the electoral map and system.

Furthermore, there is need for more advocacy on affirmative action: The Judiciary, like the executive and the Legislative has the role of capacity building of the public including awareness creation regarding affirmative action to educate and empower the public. Finally, mop up of all outstanding constitutional issues: After a decade of implementing the 2010 Constitution, it is now apparent that there are outstanding constitutional issues. With the involvement of the Judiciary, the Executive and the Legislature, a timebound process culminating in a constitutional conference to hedge out lingering issues should be set in motion forthwith and its product endorsed through Parliament or a plebiscite.