

**REPORT ON STATUS OF
THE TWO THIRDS GENDER
PRINCIPLE JOURNEY
[2010-2017 ERA]**

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1.0 INTRODUCTION

On 27th August 2010, Kenyans promulgated the new Constitution which was cited as a beacon of hope and a document of transformation that espoused the dreams and aspirations of the people towards good governance. Article 1 of the constitution provides that the sovereign power belongs to the people and must be exercised only in accordance with the Constitution itself¹. The sovereign power may be exercised by the people directly or through democratically elected representatives² in a free, fair and credible process³.

The sovereign will of the people from the date of promulgation manifested in the provisions of the constitution in totality breathing life to the principles as enshrined in the Constitution from the various chapters as contained in the document.

The Constitution as the supreme law of the republic binds all persons and all state organs at both levels of government⁴ meaning it must be enforced to give its full effect without prejudice of any kind since its validity or legality is not subject to challenge by or before any court

¹ Constitution of Kenya 2010; Article 1 (1): All Sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

² Ibid at Article 1 (2)

³ Article 38 (2); Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors-

⁴ Article 2 (1); This Constitution is the supreme law of the republic and binds all state organs at both levels of government.

or other state organ⁵. Therefore, in the same way the Constitution obligates that the two-thirds principle must be adhered to in elective positions as it so does demand in other raft of issues contained therein, without avoidance of any doubt or conflict it must be implemented or a mechanism through legislation must be enacted to fulfil what the constitution demands.

It is important to note that the drafters of the Constitution took to account the barriers faced by women stemming from historic and cultural injustices thereby the need arose to cultivate a political culture of including more women in public and elective offices by firmly rooting that agenda in the Constitution itself.

1.1 BACKGROUND OF THE REPORT

The Two-thirds gender principle has not yet been fulfilled seven years after the new Constitution came into existence at the National Level where the bi-cameral parliament sits i.e. National Assembly and Senate. This is primarily because there is no legislation that has been enacted to tackle the issue of women elected leaders not garnering at least a third of the house membership and the Constitution is silent to that effect when it comes to the membership of the National Assembly and Senate under Article 97 and 98 respectively.

⁵ Article 2 (3); The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ.

At the County Level, unlike the National Level situation, the Constitution speaks to such a scenario and provides that members of the gender that is less than a third of the total assembly membership shall be nominated to the said county assembly to reach the constitutionally-set threshold of a legitimate assembly that can conduct valid legally-recognized business. This has been achieved through the allocation of special seats provided for under Article 177 (1) (b).

The gap that is established exists in the lack of a concise framework at the national level since as observed it has not been covered by the Constitution. In order to cure the deficiency in the Supreme law, legislation is the ultimate antidote which has been elusive in the whole seven year period when the 10th and 11th Parliament existed. Indeed, the process of enacting this key piece of legislation was shrouded with many parliamentary bullets where the bills were shot down as well as various litigation that among other effects principally led to the extended the period for the implementation of the Act and as will be seen creating a Constitutional dilemma as the case is in 2017 whereby the newly-elected 12th parliament in its present constitution does not meet the two-thirds gender rule and there is no law governing such a status raising the question: Is Parliament properly constituted?

2.0 Bills

There are various bills that have been presented to the floor of both houses of parliament whose objective in substance was to provide a framework in achieving the principle.

2.1 National Assembly

2.1.0 Constitution of Kenya (Amendment) Bill, No. 4 of 2015

The bill seeks to amend Article 90 (1), 90 (2), 97 (1), 98 (1) (b) and 177 of the Constitution.

The principal object of this Bill is to amend the Constitution to ensure that the membership of the National Assembly and the Senate conforms to the two-thirds gender principle enunciated in Article 8 1 (b) of the Constitution which provides that:

The electoral system shall comply with the following principles —(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;...

This Bill therefore seeks to give effect to the one-third gender principle through the creation of special seats that will ensure that the **gender principle is realised in Parliament for a period of twenty years from the next general election**⁶. It is hoped that by that time, both genders will have been given a level playing field and will

⁶ The next general election date being August 8th 2017.

be able to compete on an equal plane. The Bill therefore proposes to amend Articles 81, 97, 98 and 177 of the Constitution so as provide that the two-thirds gender rule for elective positions shall lapse twenty years⁷ from the next general election.

The bill also seeks to cap the term of nominated members of parliament or county assembly to a maximum of two terms.

Furthermore, it also seeks to ensure that the special seats are allocated proportionate to the number of seats won by a political party, determined after a general election and that a beneficiary of the affirmative action clause serve a maximum of two terms under the affirmative action clause.

2.1.1 The Constitution of Kenya (Amendment) Bill, No. 6 of 2015

The Bill seeks to give effect to the two-thirds gender principle through the creation of special seats that will ensure that the gender principle is realized in Parliament over a period of twenty years from the next general election. It is hoped that by that time, both genders will have been given a level playing field and will be able to compete on an equal plane. The Bill therefore proposes to amend Articles 90, 97 and 98 of the Constitution.

⁷ Reference made to be on August 8th 2037.

The bill ensures that both Houses of Parliament comply with the two-thirds gender principle that the special seats are allocated proportionate to the number of seats won by a political party. The number of special seats is to be determined after a general election. A sunset clause of twenty-years is included in the amendment with an option for extension for one further fixed period of ten years as it is expected that by that time enormous gains will have been made with regard to gender parity in elected members of Parliament.

2.1.1.0 Proposed Amendments

1. Article 90 amended - (a) in clause (1), by deleting the expression "Articles 97 (1) (c) [***The National Assembly consists of - (c) Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers***] and 98(1)(b), (c) and (d)" [***The Senate consists of— (a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90; (c) two members, being one man and one woman,***

representing the youth; (d) two members, being one man and one woman, representing persons with disabilities; and] appearing immediately after the words "provided for under" and substituting therefore the expression "Articles 97(1)(c) and (Ca)

2. Article 97 of the Constitution is amended— (a) in clause (1) by inserting the following new paragraph immediately after paragraph [(c)— "**(ca) the number of special seat members necessary to ensure that no more than two thirds of the members elected under clause (1)(a) are of the same gender;**" (b) by inserting the following new clauses immediately after clause (1)— "**(1A) The number of special seats under clause (1)(ca) shall be determined after the declaration of the results of a general election. (1B) The members referred to in clause (1)(c) and (ca) shall be elected in accordance with Article 90. (1C) Subject to clause (1D), the provisions of clause 1(ca) shall lapse twenty years from the date of the first general elections after commencement of this Act. (1D) Parliament may enact legislation to extend the period under clause (1C) for one further fixed period not exceeding ten years. (1E) Legislation under clause (1D) shall be supported by not less than two-thirds of all members of the National Assembly and not less than two-thirds of all the**

county delegations in the Senate."] and 98(1)(c), (d) and (da)";

Contentious Issues

1. a) $1/3$ of 290=97. Thus at minimum 97 needed to meet the principle **(this is wrong given the definition of the house)**

But if this theory passes then, the National Assembly will have (if its women in lesser number and taking today's house), there are several scenarios:

a. (97-16 elected) + 47 CWR + 6 to be nominated for special seats thus 134 which is higher than required threshold

b. Intended compromise is $97-16-47-5=29$ thus today you would add 29. This is will not meet the principle

c. If zero women are elected you are asking for 45 women from single constituency seats nomination thus $97+$ (our $47+ 5$ nominated) = 149

3. Article 98 of the Constitution is amended — (a) in clause (1) by — (i) inserting the following new

paragraph immediately after paragraph [(d)—"**(da) the number of special seat members necessary to ensure that no more than two-thirds of the members elected under clause (1)(a) are of the same gender;**" (ii) by inserting the following new clauses immediately after clause (1)— "**(1A) The number of special seats under clause (1)(da) shall be determined after the declaration of the results of a general election. (1B) Subject to clause (1C), the provisions of clause 1(da) shall lapse twenty years from the date of the first general elections after commencement of this Act. (1C) Parliament may enact legislation to extend the period under clause (1B) for one further fixed period not exceeding ten years. The Constitution of Kenya (Amendment) (No. 6) Bill, 2015 2597A (1D) Legislation under clause (1C) shall be supported by not less than two-thirds of all members of the National Assembly and not less than two-thirds of all the county delegations in the Senate.**"] (b) in clause 2, by deleting the expression "**[(1)(c) and (d)]"** appearing immediately after the words "to in clause" and substituting therefor the expression "**(1)(c), (d) and (da)**".]

Contentious Issues

1. $1/3$ of 47= 16. Thus a minimum of 16 women need are needed according to the Amendment Bill

2. However, Senate has 67 members in total. Thus $1/3$ of 67 are 22. (The required number as per The Constitution of Kenya 2010- Article 81 (b))

OUTCOME: Pursuant to Article 256 (1) (d) of the Constitution which provides that for a bill to amend the constitution it must be passed by both houses of parliament in both second and third readings by not less than two-thirds members of each house; The National Assembly thereby requiring a vote of not less than 233 members.

The result was that:

178 - Voted for the amendment

16 - Voted against the amendment

5 - Abstentions

The **bill lost** on account of **two major reasons:**

- ❖ Failure to attain of the constitutional set numerical threshold of two-thirds membership of the house.
- ❖ Quorum hitch. (**150 members of the House failed to attend the session**)

2.2 Senate

2.2.0 The Constitution of Kenya (Amendment) Bill No. 16 of 2015

This Bill seeks to amend the Constitution to give effect to the two-thirds gender principle through the creation of special seats that will ensure that the gender principle is realised in Parliament and further that the state takes legislative, policy and other measures including the setting of standards, to achieve the realization of the principle.

The Bill proposes to amend the Constitution as follows-

(a) The Bill proposes to amend Article 97, on the composition of the National Assembly, by introducing a new paragraph (ca) in clause (1) to ensure that the composition of the National Assembly complies with the requirement that not more than two-thirds of its members are of the same gender. The new paragraph (ca) would require the election, through party lists, of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the National Assembly is of the same gender.

(b) The Bill also proposes to amend Article 98(1) of the Constitution, on the composition of the Senate, by inserting a new paragraph (da) to ensure that the Senate complies with the requirement not more than two-thirds of its members are of the same gender. The new paragraph (da) would require the election, through party lists, of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the Senate is of the same gender.

(c) Further, the Bill introduces new clauses 97 (IA) and (IB) and 98 (IA) and (IB) which require the elections for

the special seats to be undertaken In accordance with Article 90.

(d) The Bill further proposed to amend Article 90(l) by inserting a new clause (IA) which would require that a person who has been elected for a party-list seat under clause I whether in Parliament or a county assembly shall be eligible for election for a party list seat only twice.

(e) The Bill at the proposed new Articles 97 (IC) and 98 (IB) provides for a sunset clause so that the affirmative action provisions on gender representation would be reviewed twenty years from the date of the next general elections.

(f) The Bill further proposes to amend Article 81 of the Constitution to require the state to take legislative, policy and other measures to ensure that not more than two-thirds of the members of elective public bodies shall be of the same gender. These measures would be expected to resolve the gender representation matter for all time.

(g) Finally, to ensure that the enactment of this Bill does not affect the composition of the Eleventh Parliament⁸, the Bill at clause 2 expressly provides that the proposed provisions shall apply to the general elections following the coming into force of the Act- Dated the **4th August, 2015**.

⁸ The sitting parliament at the time.

3.0 Case Laws

3.1 Supreme Court Advisory Opinion No. 2 of 2012

This was an application brought by the Attorney General under Article 163 (6)⁹ of The Constitution of Kenya in the matter of the principle of gender representation in the National Assembly and the Senate.

The Advisory opinion of the Court was founded on the following issues:

A. 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 of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?

B. Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?”

The Attorney-General position is that ***“there is no guarantee that the number of nominated persons from the lists of nominees provided by the political***

⁹ The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

parties will ensure that at least one-third of the members in each House will be of one gender.” There is a foundation to the Attorney-General’s qualms. The uncertainty left in Articles 97 and 98 of the Constitution are not repeated in the case of *County Assemblies* [Article 177], in respect of which the two-thirds-and-one-third rule is clearly provided for.

The Court notes that the AG moved the court seeking an opinion as to whether the terms of Article 81(b)10 apply in respect of the very next general elections, to be held on 4 March 2013, or on the contrary, apply progressively over an extended period of time.

The court deduced the broad concerns that were to be considered as a digest from the facts, arguments and standpoints brought forth by the counsels in the case which were:

- (a) What constitutes the “progressive realization of a right?”
- (b) How should general principles declared in the Constitution be interpreted, in determining the content, and scheme of enforcement of safeguarded rights?
- (c) Is it appropriate to treat the general guiding principles in the Constitution in the same way as specific, quantized rights declared in the same Constitution?

¹⁰ not more than two-thirds of the members of elective public bodies shall be of the same gender;

(d) Where the Constitution requires the Legislature (or any other organ) to take certain steps for the realization of a particular rights or welfare situation, how is such to be timed? does the Legislature have a discretion?

(e) Suppose such a requirement is placed on a collective, programme-bound and life-time-regulated organ such as the National Assembly, can the right be presumed to have crystallized, notwithstanding that no legislative measure was passed – on the principle that there has been some intolerable default?

(f) Suppose the default in realizing the gender-equity principle is more directly occasioned by the pre-election process, by the actions of political parties which are essentially political organizations, would the resultant elected-assembly be adjudged to stand in violation of the terms of the Constitution?

(g) Under what circumstances is the Constitution's prescribed membership-quota amenable to immediate or to progressive realization? Does interpretation in favour of a progressive application contradict the principle of the holistic implementation of the Constitution?

(h) Is it the case that the interpretation calling for progressivity offends the constitutional principle of separation of powers, because the Judiciary has no role in standard-setting and implementation which are to be restricted to the Executive Branch?

(i) Can it be contemplated that an interpretation favouring the immediate realization of the gender-equity principle, could lead to the inference that the National Assembly or Parliament, as constituted following the general elections of March 2013, is unconstitutional?

(j) Considering that the Supreme Court, by the Supreme Court Act, 2011 (Act No. 7 of 2011) is required to [s.3(a)] “assert the supremacy of the Constitution and the sovereignty of the people of Kenya”, how would this Court, in the instant case, perform its role as the guardian of the public interest in constitutional governance by declaring the parliamentary pillar of the constitutional order to be a nullity? How could the constitutional order, in such circumstances, be saved? How would the sovereignty of the people be secured against a possible governance vacuum?

The court observed that whilst Article 27 (6) states: “To give full effect to the realization of the rights guaranteed under this Article, the State shall 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”, the task expressed is “to give full effect” and the rights in question are civil and political in nature. This makes the full realization of the rights incapable unless the state takes “certain specified measures.” The position consequently taken by the court is that ***unspecified measures*** can only be taken in

stages, over a period of time, and by means of positive and good-faith exercise of governance discretion¹¹.

The court proceeded to examine Article 81 (b) in the context of Article 97 [on membership of the National Assembly] and 98 [on membership of the Senate], then came to the conclusion that it has not been transformed into a full right, as regards the composition of the National Assembly and Senate, capable of direct enforcement. Thus, in that respect, **Article 81(b) is not capable of immediate realization**, without certain measures being taken by the State. Article 81(b) is also not capable, in the court's opinion, of replacing the concrete normative provisions of Articles 97 and 98 of the Constitution: these two Articles prescribe in clear terms the composition of the National Assembly and the Senate. For Articles 97 and 98 to support the transformation of Article 81(b) from principle to right a legislative measure [as contemplated in Article 27(8)] would have to be introduced, to ensure compliance with the gender-equity rule, always taking into account the terms of Articles 97 and 98 regarding numbers in the membership of the National Assembly and the Senate¹².

This was juxtaposed with Article 81 (b) as read with Article 177¹³ whereby the former transforms into a

¹¹ Paragraph 64, Supreme Court Advisory Opinion No. 2 of 2012.

¹² Paragraph 65, Supreme Court Advisory Opinion No. 2 of 2012.

¹³ Constitution of Kenya, Article 177 (1) (b); the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender

specific, enforceable right since it is supported by a concrete normative provision (the latter) leading to the conclusion that as regards the composition of county governments, Article 81(b) has been transformed into a specific, enforceable right.

The court rendered a majority opinion that legislative measures for giving effect to the one-third-two-thirds gender principle under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by **27 August 2015**.

3.2 Petition 182 of 2015

The parties involved in the case were:

**CENTRE FOR RIGHTS EDUCATION & AWARENESS
(CREAW).....PETITIONER**

VERSUS

THE HON ATTORNEY GENERAL1ST RESPONDENT

**THE COMMISSION ON THE IMPLEMENTATION OF THE
CONSTITUTION (CIC)2ND RESPONDENT**

**KENYA WOMEN PARLIAMENTARY ASSOCIATION
(KEWOPA).....1ST INTERESTED PARTY**

CENTRE FOR MULTIPARTY DEMOCRACY.....2ND INTERSTED PARTY

The petitioner contended that in order to give effect to the Supreme Court's Advisory Opinion¹⁴ as well as the respective constitutional and legal provisions, certain legislative actions, possibly with a bearing on constitutional amendments, were required to be taken by 27th August 2015. They observed that the counting days to the date set by the Supreme Court, the 27th of August 2015, and legislative measures are yet to be taken to bring into force the two thirds gender representation rule in the National Assembly and Senate. The blame for this failure was laid on the respondents.

It was the petitioner's assertion that Article 261(4) of the Constitution imposes on the 1st respondent, in consultation with the 2nd respondent, the constitutional obligation to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament enact the legislation within the stipulated period. They averred that from the date of the Advisory Opinion on 11th December 2012, and indeed from the date of promulgation of the Constitution on 27th August 2010, the 1st and 2nd respondents are yet to prepare the relevant Bill for tabling before Parliament for implementation of Articles 27(8) and 81(b) of the Constitution. They contended that there is therefore a threat of violation of the Constitution, and they seek the following orders from the Court:

- a. A declaration that to the extent that the 1st and 2nd Respondent have this far failed, refused and or

¹⁴ Supreme Court Advisory Opinion No. 2 of 2012

neglected to 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 11th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified”.

b. A declaration that the foregoing failure, refusal and or neglect by the 1st and 2nd 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 11th December 2012 in Reference Number 2 of 2012.

c. An order of mandamus directed at the 1st and 2nd Respondents directing them to within such time as this court shall direct prepare the relevant Bill 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 11th December 2012 in Reference Number 2 of 2012.

d. Costs of or incidental to this Petition.

e. Such other order or relief as this court may deem just or expedient.

The respondents on the other hand opposed the petition on two grounds:

- ❖ For the 1st respondent, the Office of the Attorney General established under Article 156 of the Constitution, submitted that the petition was premature as the 27th of August 2015 had not yet arrived, and Parliament had the mandate to extend the time for enacting any legislation required under the Constitution. It was also the AG's¹⁵ contention that his office had taken reasonably practicable steps to enable Parliament enact the requisite legislation.
- ❖ The 2nd respondent, the **Commission for the Implementation of the Constitution** took the position that it had no obligation under the Constitution for the enactment of the requisite legislation, and it was its case therefore that it was improperly joined in the petition. Its case was that the petition should have been filed against Parliament; that Article 261(4) is not justiciable; that the petition was premature, and finally, that CIC was not subject to the control or authority of any person.

According to the petitioner, this petition is about the realization of three provisions of the Constitutions. These are Article 81(b) which provides, with respect to the representation of the people, the principle that “not more than two-thirds of the members of elective

¹⁵ Attorney General

public bodies shall be of the same gender.” The second is Article 27(8) of the Constitution which provides that the state shall take legislative and other measures to put in place the principle that not more than two thirds of elective and appointive bodies shall be of the same gender. The third is Article 100 which requires the enactment of legislation to provide for representation of marginalized groups.

The core of the petitioner’s case lies in the hope that the Constitution must be construed to give effect to the intention of the drafters. It observes that Article 27(8) is in the Chapter on the Bill of Rights, and in this regard, it relies on the provisions of Article 259 of the Constitution which provides for the manner in which the Constitution should be interpreted, chief among its provisions, at Article 259(a), being that the Constitution shall be interpreted in a manner which promotes the values, purposes and principles of the Constitution, and at Article 259(b), that it shall be interpreted in a manner that advances the rule of law and human rights.

The petitioner further submits that the respondents failed in exercising their constitutional mandate as per Article 261 (4)¹⁶. They contend that the court has the jurisdiction to issue an order of mandamus to compel the respondents to

¹⁶ For the purposes of clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified.

exercise their statutory power as they are legally bound to originate the requisite bills.

It is the petitioner's view that the petition was precipitated by the failure of the respondents to prepare for presentation to Parliament the necessary Bill which thereby threatens the violation of Article 81(b) and 27(8) of the Constitution. The petitioners invoke Article 258 that gives a party the right to come to court to claim that the Constitution is threatened with violation therefore rebutting the respondent's claim that the proceedings were brought pre-maturely.

The petitioner further submits that it has established that the respondents have failed the test of reasonableness with respect to the preparation of Bills for presentation to Parliament for implementation of Article 81(b); that inevitably, these Bills will have an impact on articles 97 and 98, which requires a minimum of 90 days for the readings before Parliament; and that the Court should make remedial interventions and issue an order of mandamus to re-energize the AG and CIC to perform their mandate¹⁷.

KEWOPA, the 1st interested party, supports the filed petition. It observes that there were, on the date of hearing of the petition, only 85 days left to the 27th of August 2015 rendering it impossible to comply with the timelines for bringing a Bill before Parliament. It was submitted further that since the Advisory Opinion was rendered in 2012, the AG and CIC have not taken any steps to execute their mandate, and have not given an adequate explanation for the failure. KEWOPA further

¹⁷ Paragraph 27 of Petition 182 of 2015

submits that the Supreme Court Advisory Opinion binds the respondents and in particular sought to change the gender rule from a principle to a right. It further observed that the Constitution found it fit to increase the participation of women in Kenya's democratic processes, a position that the respondents do not dispute. The way forward as espoused by KEWOPA was the ultimate reliance to Paragraph 79 and 80 of the Opinion¹⁸ which indicates that a party can move the High Court for appropriate orders. KEWOPA asked the Court to grant the orders that the petitioner was seeking.

CMD, the 2nd interested party, submitted that the issue in this petition revolves around Article 100 which requires legislation to be put in place to ensure representation of women and other groups. CMD agrees with the petitioner that the Advisory Opinion is to the effect that the gender rule, as read with the human rights provision in Article 27(8) and Article 81(b), should be implemented by 27th August 2015, and action for its implementation should be taken by the AG and CIC. CMD noted that it was the AG when faced with the principle of gender equity upon being pushed by NGECC¹⁹ prior to the 2013 elections sort for the Opinion at the Supreme Court which in turn gave its view that Kenyan women have been marginalized and should no longer be marginalized and pronouncing itself that the gender equity rule be implemented within 5 years. This meant the respondents could not argue that the 27th of August 2015 had not yet arrived. CMD supports its assertions by submitting that the threat of violation continues to exist

¹⁸ Supreme Court Advisory Opinion of 2012

¹⁹ National Gender and Equality Commission

at the time as no Bills have been brought before the Court to show compliance.

According to the Attorney General, the question before the Court is the realization of the two thirds gender principle under Article 27(8) of the Constitution. His position is that the petitioner and interested parties have misconstrued the two thirds gender principle, which is not in respect of women but is an affirmative action principle for the benefit of any gender, and that at the moment, it is women who are disadvantaged but a time may come when the men are disadvantaged.

The AG while appreciating the binding nature of Supreme Court Advisory Opinion, he submits that they are only supposed to be treated as authoritative statements of law and not capable of implementation as decision(s) of other courts²⁰.

The counsel for the AG opined that steps had been taken towards achieving a legislative framework on the two thirds gender rule. The steps included the setting up of a technical working group (TWG) on 3rd February 2014 which later presented a report to the AG on 17th February 2015 which outlined the options available towards achieving the two-thirds principle. A cabinet memorandum was issued evidenced by letter dated 16th March 2015 as well as the refined proposal by the TWG on amendments to the constitution to entrench the gender principle submitted on 18th May 2015 among other initiatives by parliament to entrench the gender

²⁰ Paragraph 93 of Supreme Court Constitutional Application No. 2 of 2011

principle as detailed in the affidavit that was sworn by Ms. Mbarire for KEWOPA²¹.

It was the AG's submission that his office was engaged in generating consensus on the gender principle; that the process of generating consensus is entrenched in the Constitution under the principle of public participation; and it was his submission that the petitioner and interested party should support the government's initiative rather than engage the government in Court.

The AG closed by submitting that an order of mandamus was not appropriate in the matters raised to be issued and prayed that the petition should be dismissed.

Findings and Conclusion

The court found that the petitioners were entitled to the prayers they had sought. The court restated the binding nature of the constitution and by citing Article 2(1) which is emphatic that "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government" *and at Article 3(1)* "Every person has an obligation to respect, uphold and defend this Constitution.'

The court proceeded to hold that the AG, in Consultation with CIC, is under a constitutional duty to prepare, for tabling before Parliament, legislation to effect the gender equity rule and thereafter, should Parliament fail to act, then any Kenyan may invoke the provisions of Article 261(5)-(7).

The court continues to note that the AG and CIC must first act to prepare and present the necessary Bill(s) to

²¹ Paragraph 39 of Petition 182 of 2015

Parliament. They cannot pass the responsibility to others, as CIC sought to do, under the provisions of Article 119 of the Constitution, which makes provision with respect to petitions to Parliament. The constitutional obligation under Article 261(4) and the Fifth and Sixth Schedule with respect to the implementation of the Constitution lies squarely upon them.

The court found the petition had merit and issued the following declarations and orders:

a. It is hereby declared that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to 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 11th December 2012 in Reference Number 2 of 2012, they have violated their obligation under article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified”.

b. It is hereby declared that the foregoing failure, refusal and or neglect by the 1st and 2nd 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 11th December 2012 in Reference Number 2 of 2012.

c. An order of Mandamus be and is hereby issued directed at the 1st and 2nd 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 11th December 2012 in Reference Number 2 of 2012.

In closing, the court implores parliament to consider the question of extension of time with respect to the two third gender principle in accordance with the provisions of Article 261(2) should they find it difficult to pass the legislation before the set date of 27th of August 2015.

3.3 PETITION 371 OF 2016

PETITIONERS:

1. CENTRE FOR RIGHTS EDUCATION AND AWARENESS
2. COMMUNITY ADVOCACY AND AWARENESS TRUST (CRAWN TRUST)

RESPONDENTS:

1. SPEAKER OF THE NATIONAL ASSEMBLY
2. SPEAKER OF THE SENATE
3. HON. ATTORNEY GENERAL

AND

1. KENYA HUMAN RIGHTS COMMISSION..... INTERESTED PARTY
2. FEDERATION OF WOMEN LAWYERS- KENYA (FIDA). INTERESTED PARTY

AND

3. NATIONAL GENDER AND EQUALITY COMMISSION.... AMICUS CURIAE
4. LAW SOCIETY OF KENYA.....AMICUS CURIAE

The petition²² sought **to determine whether parliament had failed in its mandate to enact the necessary legislation to give full effect to the constitutional provisions on two-thirds gender rule and if the right to equality and fair representation of the people had been contravened.** It was filed on the premise that parliament had passed the constitutionally set deadlines for passing of the necessary legislation with regards to the procedure as outlined in the fifth schedule as read with Article 261 of the Constitution. The court citing Article 27(3), 27(8), 100 among others found that parliament had failed in discharging its obligation to observe, respect, protect, promote and fulfil the right of men and women to equality. Consequently, **the petition succeeded** and it was **ordered** that:

- A declaration issued that the National Assembly and the Senate had failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender.
- Parliament and A.G take necessary steps *to ensure that the required legislation is enacted within **A PERIOD OF SIXTY (60) DAYS*** starting 29th March 2017; and

²² Read the full judgement here: <http://kenyalaw.org/caselaw/cases/view/133439/>

- **If Parliament fails** to enact the said legislation within the said period of **SIXTY (60) DAYS** from the date of the order, the Petitioners or any other person shall be at liberty to petition the Honourable the Chief Justice to advise the President to **dissolve Parliament**.

3.4 Petition 19 of 2017

PETITIONER: KATIBA INSTITUTE

RESPONDENT: INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

The main objective of the petition²³ was to seek orders to compel the IEBC to enforce the two-thirds gender rule by rejecting nomination party lists which do not comply with the rule.

The petition was presented with the realization that the two-thirds gender legislation had not been passed yet and with elections fast-approaching, the need to ensure the next (12th) parliament satisfies the constitutional demand that – not more than two-thirds of the members of elective public bodies shall be of the same gender.

The **petition was successful** as it was **ordered** that:

²³ Read the full judgement here:

<http://www.katibainstitute.org/wp-content/uploads/2017/04/JUDGMENT.pdf>

- Political parties are bound by the two-thirds gender rule provisions in the constitution therefore their nomination process for MPs must comply.
- Affirmed the responsibility of the IEBC in the regulation of the process by which parties nominate their candidates.
- Directed the IEBC to **reject any nomination list** of a party that doesn't comply with two-gender rule.
- Political parties to undertake measures to formulate rules and regulations for purposes of actualizing the two-thirds gender principle for the nomination of Members of Parliament **within SIX MONTHS (6)** from the date of the judgment being **20th April 2017**; IEBC to devise an administrative mechanism to ensure that the two-thirds gender principle is realized among political parties during the nomination exercise for parliamentary elections.

NB: The Order does not apply to the August 8 Elections.

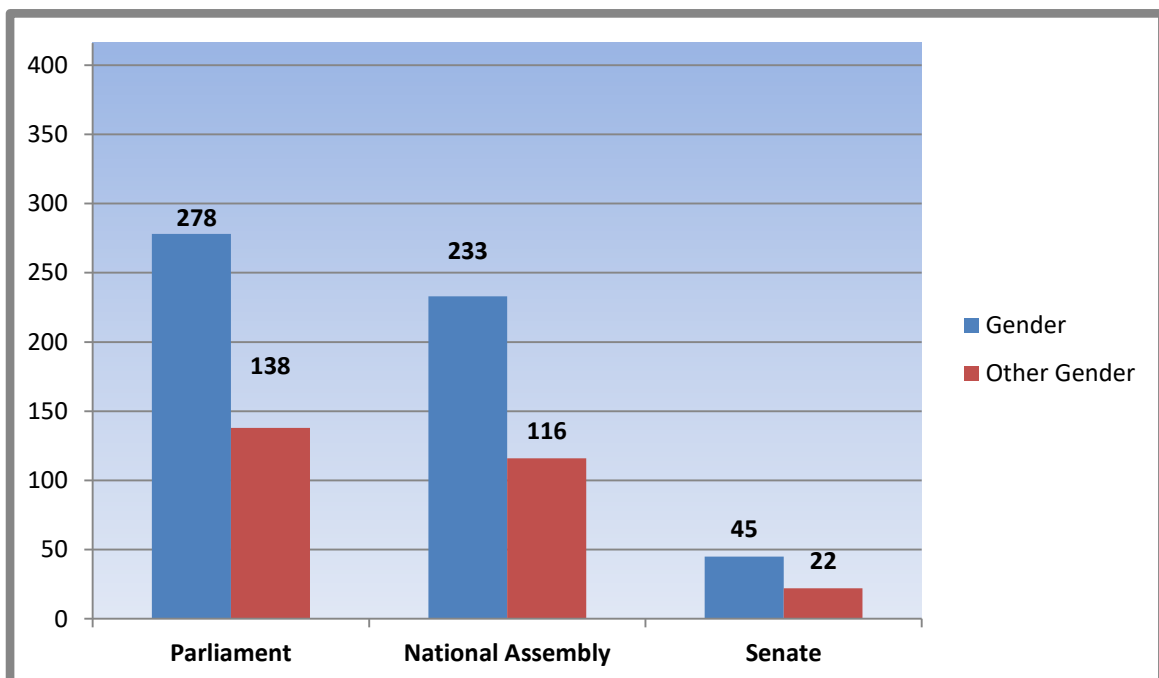
4.0 Conclusion

This paper shows the concerted efforts taken by different organisations both in government and civil society organisations geared towards the actualization of the two-thirds gender rule both in law and in practice in order to give effect to the constitutional provisions.

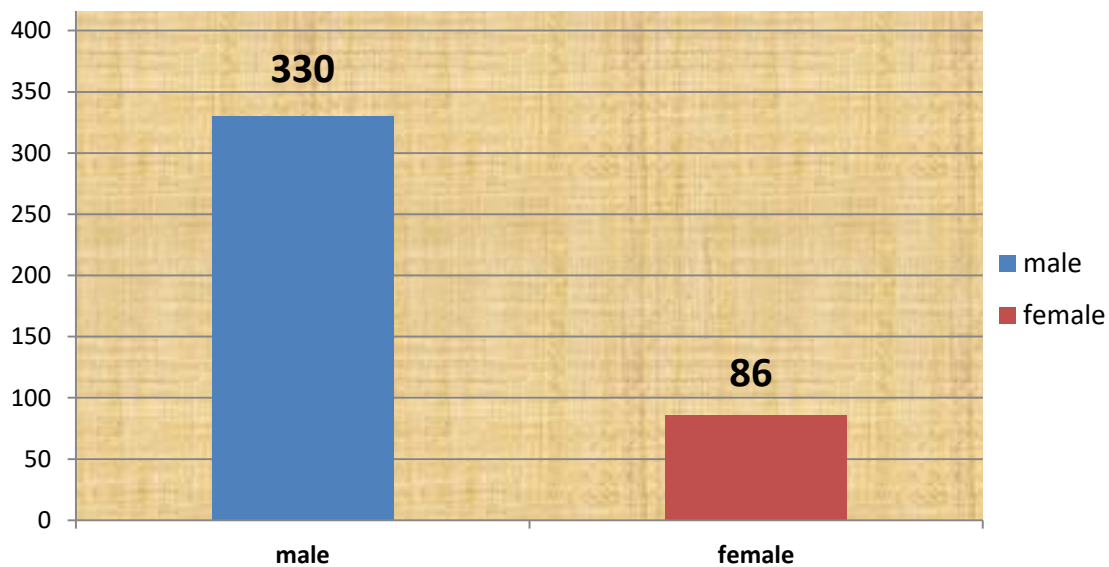
It is apparent that several processes have been effected, though not fruitful, to find the mechanism for the two-thirds gender rule to be implemented at the national level. This therefore means that more has to be done for the rule to be implemented to avoid a legal conundrum as to the validity of parliamentary business in the 12th parliament. This is drawn from the fact that the elected 12th parliament has not fulfilled the two-thirds gender principle in regards to its constitution.

4.1 Annexes

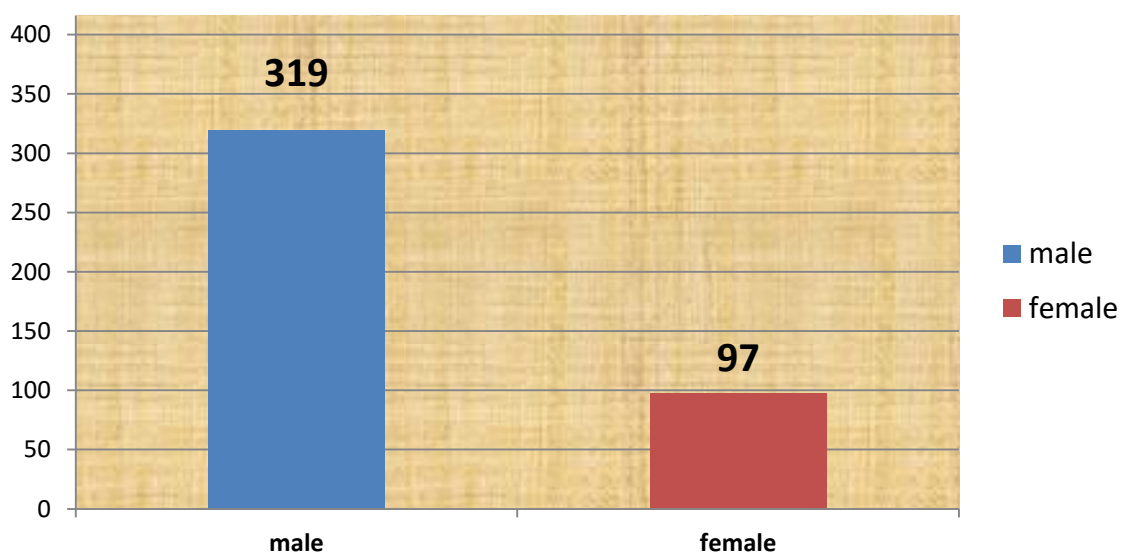
IDEAL COMPOSITION OF PARLIAMENT AS PER THE TWO-THIRDS GENDER PRINCIPLE



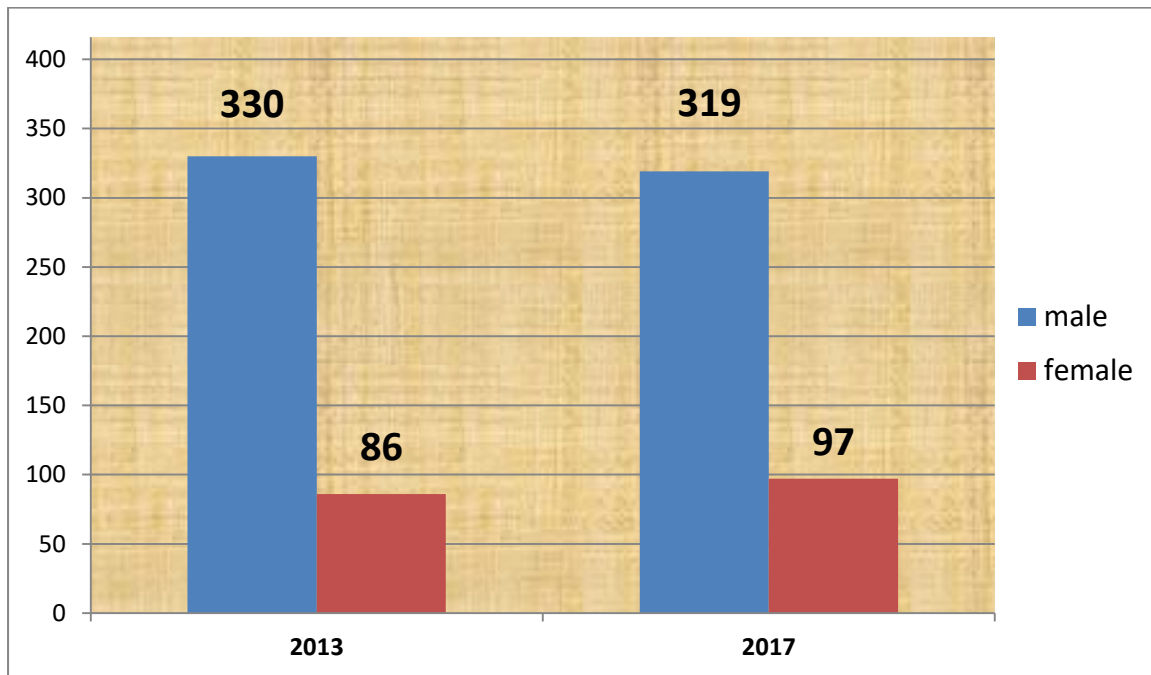
National Assembly and Senate 2013



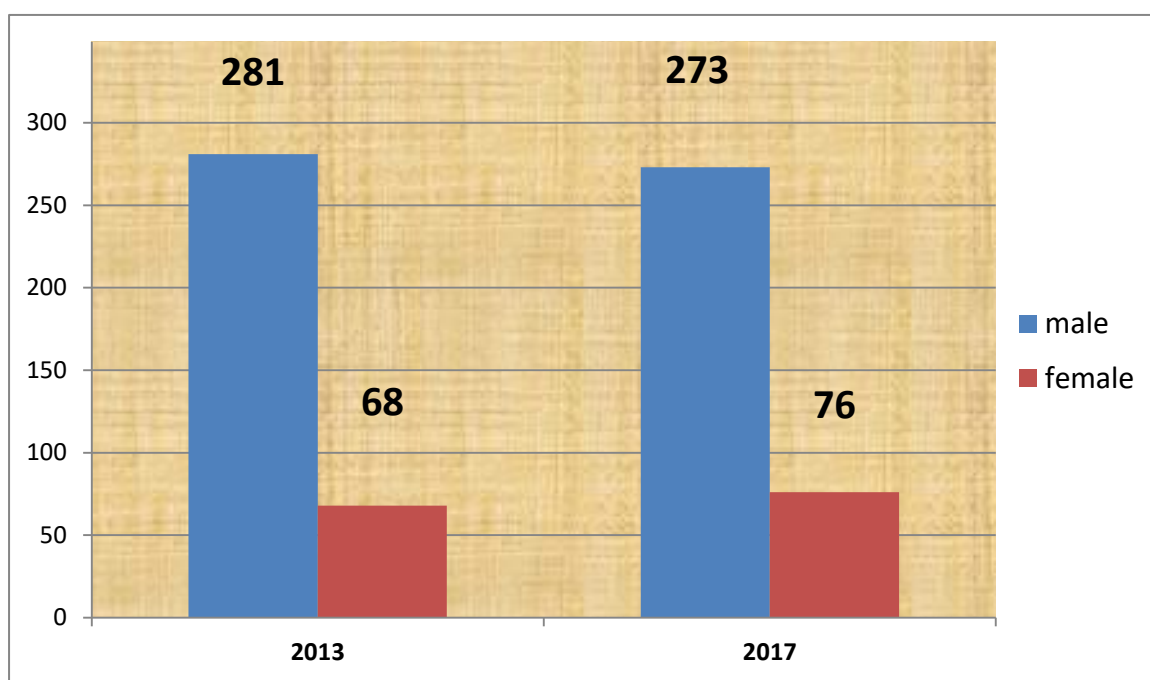
National Assembly and Senate 2017



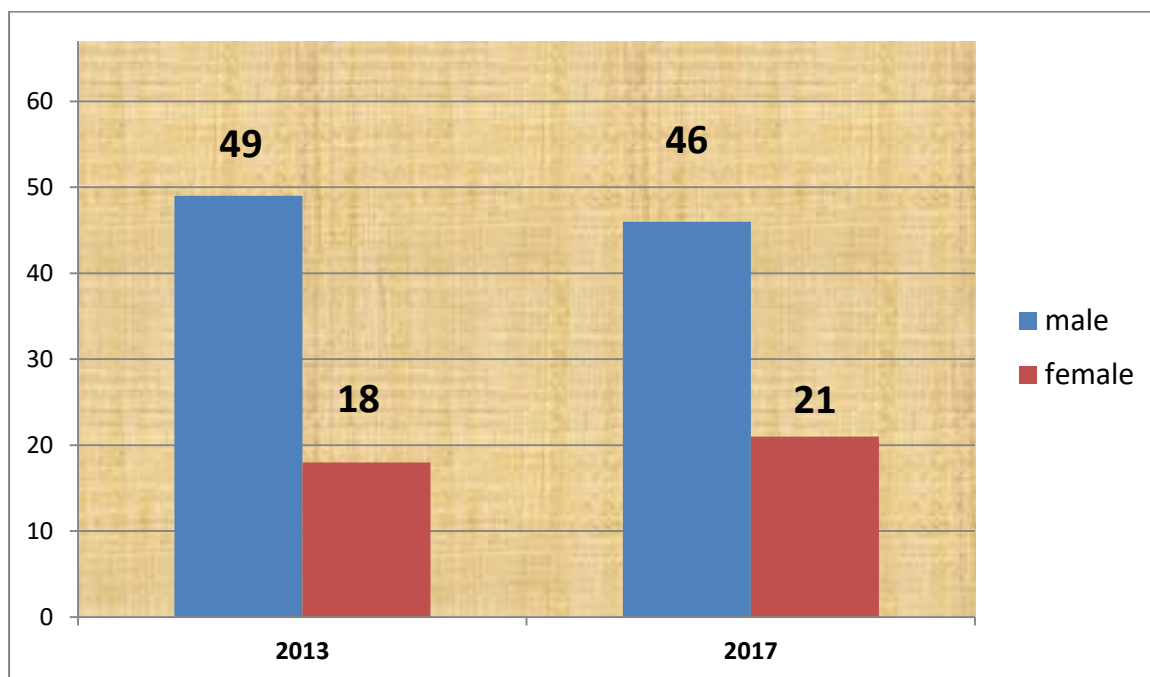
NATIONAL ASSEMBLY AND SENATE MEMBERSHIP COMPARATIVE ANALYSIS (2013 & 2017)



National Assembly Membership Comparative Figures (2013 & 2017)



Senate Membership Comparative Figures (2013 & 2017)



DISCLAIMER:

This information is intended as a general overview and discussion of the Two-thirds gender rule. The information provided here was accurate as of the date of posting. The information is not intended to be, used as, a substitute for taking legal advice in any specific situation. Kenya Women Parliamentary Association is not responsible for any actions taken or not taken on the basis of this information.