

**THE BLAME GAME?: Analysis of the 2/3 Gender Rule vis-a-vis the
role of the Legislature to give effect to the Gender Principle.**

Victor Kiptoo Chumba and Alganon Kamuyu

L.L.B University of Embu Law School, Kenya

Abstract

At its core, the Constitution of Kenya 2010 gives every citizen the democratic right to participate in their governance fully. The persons include both males, and females, minorities and marginalized groups, and persons with disabilities. Particularly, Article 81(b) of the Constitution provides that “the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender”. However, the primary challenge facing the realization of the principle has been how to actualize it in the Kenyan Parliament.

This paper highlights the historical context of the place of women in leadership positions in Kenya. It also discusses the challenges faced in implementing the rule and [the journey of the two-thirds principle toward its implementation](#) by the legislation. The paper also examines whether Parliament's obligation is to enact legislation toward fulfilling the principle as stated by the [High Court's decision](#).

Introduction

Despite Kenya's political space being criticized for marginalizing women with regard to gender-mainstreaming and female empowerment discourse in Kenya, the marginalization of women still remains a relevant topic of concern in the modern world. Truly, examining the history of Kenya's political development highlights how women have been excluded based on gender from local and national leadership. Wanjiku Kabira, in her book, [Time for harvest: women and constitution-making in Kenya](#), has expounded on the historical chronology of the position of women in the Kenyan legal system, where she gives prominence to the constitutional benefits with respect to the political empowerment of women in Kenya. She contends that one must understand the [grassroots struggles and participation of women](#) in constitution-making to show an appreciation of women in the legal system. Thus, codifying the Two-thirds gender rule in the Constitution of Kenya 2010 was instrumental in appreciating the multidimensional nature of women's struggles for an advanced political voice.

The Legal Framework

Essentially, post-2010 has been instrumental for women's empowerment in Kenya. It is majorly attributed to the enactment of the new Constitution on the 27th of August 2010. The new Constitution sought to alter the view that [women were incapable of leading by advancing gender equality and equity at both the local and national levels](#). Therefore, the 2010 Constitution imposed a moratorium on the constitutional legality of gender bias because the previous [constitutional regime did not forbid sex-based discrimination](#).

To critically understand the political empowerment of women, one needs to analyze the extent to which the [Constitution of Kenya promotes and advances equality and equity](#). Article 27 provides for an indomitable right to equality. While comprehensive in its provisions, the Constitution conceives equality to include “the full and equal enjoyment of all rights and fundamental freedoms” irrespective of gender or marital status.

Of grave significance to this paper are [Articles 27\(6\) and 27\(8\)](#). The former provides that “*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*” while the latter states that, “*In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*”

The right to equality and equal political representation is also provided for as part of the national values and principles of governance. Article 10(2) states, “*The national values and principles of governance include—equity, equality and protection of the marginalized groups.*” In this view, the provision of legislative quotas is intended to promote equality and equity in democratic politics and governance and promote the political rights of women who have historically been marginalized and exempted from Kenya's political sphere.

The Constitution has expressly provided for equitable gender representation with regard to County Assemblies. Particularly, Article 177(1) provides for special seats necessary to ensure that no more than two-thirds of the membership of the assembly shall be of the same gender. Accordingly, county assemblies meet the threshold for the two-thirds gender rule

by design since the Constitution requires them to fill special seats with female members until the two-thirds gender rule is achieved.

Despite various provisions of the law providing for the implementation of the two-thirds gender rule, the same is yet to be fully realized. Particularly the 2013 general elections, which were meant to test the gender equality provision by promising a higher proportion of female representation, recorded low participation of women in elective positions. The failure to enact legislation giving effect to the rule led Chief Justice David Maraga (as he was then) to give an advisory opinion to the president to dissolve the Parliament with regard to Article 262(7) of the Constitution.

It is important to note that several bills have been brought to Parliament with the aim of achieving a two-thirds gender rule in the Parliament, [but unfortunate to state that all the bills failed to be enacted](#). Particularly, Aden Duale introduced a Constitution of [Kenya Amendment Bill No 4 of 2015](#), which is widely called the Duale Bill. The Bill sought to increase the number of special seats necessary to ensure that no more than two-thirds of the members of the Senate and National Assembly are of the same gender. The special seats were to be determined after the general elections' results were declared. The Bill similarly sought to introduce a “sunset clause”, which wanted to have gender top-up nominations lapse after 20 years from the time the first general elections are held after the amendment is implemented. However, the sunset provision was considered troublesome if the barriers to women's election had not been removed by the time it ran out. However, establishing term limits raises questions about their legality because they infringe on the will of the people. Despite attempts to pass the Bill, it was rejected after it was tabled and debated in the National Assembly.

The Chepkonga Bill was also tabled and brought to Parliament to implement the principle. The Bill aimed to alter Article 81(b) of the Constitution by inserting progressive implementation in the provision. It majorly placed emphasis on electing women through civic education, capacity building, and facilitating the participation of political parties to achieve the two-thirds gender principle. [The Bill was, however, rejected](#) as it subverted from the Supreme Court Advisory opinion, which had stipulated the deadline for the implementation of the two-thirds gender rule.

The Blame Game on Parliament

Many [political analysts and scholars](#) have debated whether it is the role of Parliament to enact and give effect to the two-thirds gender principle as argued by the judiciary [through its advisory opinion](#). Despite the efforts by Parliament to formulate bills to give effect to the principle, there is no express provision in the Constitution of Kenya 2010 that mandates Parliament comply with the rule. The Constitution in Articles 177 and 197, however, expressly provides for the creation of special seats to ensure compliance with the gender principle with respect to Members of the County Assembly.

Admittedly, if the Kenyan people so desired for the principle to be passed, they would have expressly given Parliament the duty to pass such legislation as they did with regard to the Members of the County Assembly in Article 177 and 197.

Article 27 of the Constitution obliges the state to take measures to ensure a two-thirds principle in all elective and appointive positions. The provision clearly provides for the state as a body, not Parliament as an institution. Accordingly put therefore, there is no express command by the Constitution on Parliament as a body to enact the two-thirds gender rule as regards Members of Parliament. To lend further support to this view, the two-thirds gender rule for members of Parliament is not a piece of legislation contemplated by Article 261(1) of the Fifth Schedule of the Constitution. In actuality, the pertinent Fifth Schedule does not mention any legislation that must be passed by Parliament pursuant to article 27 of the Constitution and for which [Parliament has been so harshly criticized](#).

It is further argued that the state, as provided for in Article 27, can also refer to the electorate, who are the citizens. Thus, it is the obligation of the people, in the exercise of their democratic right through elections, to give effect to the gender principle by ensuring they elect representatives to ensure compliance with regard to elective positions.

Conclusion

The implementation and realization of the two-thirds gender rule is no walk in the park. As much as the people of Kenya want the principle to be fully realized, legislation should be enacted to expressly expound on the provisions providing for gender representation to avoid ambiguities that undermine the spirit of the Constitution. Moreover, the position of

Parliament should clearly be stated with regard to their role in enacting and giving effect to the two-thirds gender rule.

Victor Chumba is a law student at the university of Embu passionate about constitutional law and alternative dispute resolution. He is committed to using his education and experience to make a positive impact on society. He believes that constitutional law and alternative dispute resolution are essential tools for ensuring justice and resolving conflicts in a fair and efficient manner. With his passion, dedication, and expertise, he is well-equipped to make a lasting impact in these areas.

