AN EVALUATION OF KENYA'S SUPREME COURT ADVISORY OPINION REFERENCE NO. 2 OF 2012 ON THE ONE THIRD – TWO THIRD GENDER RULE

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ABSTRACT

This study sought to examine an evaluation of Kenya's Supreme Court advisory opinion reference no. 2 of 2012 on the one third-two third gender rule. Gender inequality has been a contemporary issue globally. It's effect on women contribution to national development agenda has been an area of concern for public service delivery in most countries. The objective of this study was to find out what the problem is in-terms of low numbers of women in political representation and possible solutions to ensure equality. The study was guided by the following questions; Does Article 81(b) as read with other provisions of the constitution required a progressive realization of the one-third gender rule or the same be implemented immediately during elections of 4th March 2013? Going by the Supreme Court`s decision, could it have been the purpose of the framers of the constitution to discriminate against women interest? and Compared to International law, is the majority decision flawed? The research looked into various laws applicable in this area. Data was collected from two sources which are primary sources and secondary sources. The primary sources involved observation of what is happening in the political arena and also the legislative branch of the government. The secondary sources involved looking at the Kenyan constitution, case laws, books, journals and other publications. In regard to the gender question, it is concluded that there is no evidence that the majority of the Supreme Court judges interrogated the state to find out what steps it had taken 2 years after the promulgation of the Constitution to secure gender representation rights. One could therefore say it was derelict of the Supreme court, having erroneously found for progressive realization, to fail to query the state to find out what specific benchmarks it had established and whether the state had met those benchmarks. Therefore the researcher recommends that the presence of women in political leadership is one of the most effective ways of ensuring their participation in the political decision making process for the good of women, children and the nation in general. The challenge therefore is for women to reach outside of their private lives and shape the nation.

Key Words: *evaluation, supreme court, advisory, gender and rule*

INTRODUCTION

The Kenyan Constitution is amongst the most liberal and progressive in the world[1]. It has been hailed elsewhere as creating a new country by requiring the judiciary and broader Kenyan society to transform[2]. The Supreme Court was presented with a novel opportunity to advance gender equity in the matter of the Principle of Gender Representation in the National

[1] KM Georgiadis, "*The Emerging Jurisprudence on the Right of Access to Information in Kenya*", Kenya Law Reports Website

[2] W Mutunga CJ (2012), Key note speech by the Chief Justice, Hon Dr Willy Mutunga at the commencement of the "Judicial Marches Week" Country wide on August 21,2012, KLR Bench Bulletin, Issue 20 July- December 2012

Assembly and the Senate. The Attorney General moved to the Supreme Court to seek an advisory opinion on two issues:

1) 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 one third gender rule or requires the same to be implemented during the general elections scheduled for 4th March,2013?
2) 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?[3]

This research paper will be focused on the first question. The Attorney General argued that it was not clear whether the two-thirds- one third gender equity rule was to be implemented immediately or progressively. He argued that as a result of the uncertainty of the language in the Constitution`s gender equity clauses, there was only one certainty: that by Article 97 1(b), the mandatory number of persons of the female gender who are to form part of the National Assembly's membership is 13.4 percent. It is in the Attorney General's opinion that nominations are the only way to comply with the prescribed equity fractions. This will have the effect of placing the common *mwananchi* under undue tax burden because the legislature will be unduly large. Upon weighing the circumstances the Attorney General commended an interpretation of the Constitution that supports a progressive realization of the gender equity principle in elective representation for the central legislative agencies.[4]

The subject of this advisory opinion is one of general public interest, thus on the occasion of mention on 8th November 2012, several bodies sought and were admitted to interested party status. They include; the Commission on the Administration of Justice (CAJ), the Independent Electoral and Boundaries Commission (IEBC), the Commission on the Implementation of the Constitution (CIC), and the National Gender and Equality Commission (NGEC). On the same occasion the following were admitted as ***amici curiae***; the Centre for Rights Education and Awareness (CREAW); the Katiba Institute; the Centre for Multi-party Democracy (CMD); FIDA-Kenya, the Kenya Human Rights Commission (KHRC), the International Centre for rights and Governance (ICRG) and Mr. Charles Kanjama, Advocate.[5]

The Attorney Generals stand is not agreeable to most of the interested parties and the *amici curiae* (An exception is to be made for IEBC which is willing to adopt any position conscientiously adopted by the court). They say that the implementation of the gender equity principle must take place immediately. CAJ is categorical that the present dilemma is to be blamed on the legislature, Mr. Otiende Amollo argues that Parliament was responsible for the removal of provisions implementing the requirements under Article 81(b). As proof of this,

[3] *Advisory Opinion Reference No 2 of 2012* eKLR paragraph 1
[4] *Advisory Opinion Reference No 2 of 2012* KLR paragraph 30
[5] Ibid paragraph 12

he states that the mechanism- proportional representation, using the counties as electoral colleges always existed in all drafts of the Constitution, from the Bomas Draft, the Wako Draft, the Harmonised Draft and the proposed Draft. The provisions only disappeared once the Parliamentary Select Committee on Constitutional review met with the CoE in Naivasha. Furthermore, Parliament has shot down constitutional amendments that would seek to implement the two-third gender principle. He is categorical that the implementation should be immediate. However, due to the inaction of Parliament, he seeks to introduce a compromise where Parliament shall enact legislation to promote the representation in parliament of women[6].

The Supreme Court has the jurisdiction to render an advisory opinion where it 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[7]. Lawyer Ahmednasir Abdullahi says an advisory opinion should be a rare tool in the court`s arsenal deployed only in the most deserving cases. He goes further to say that historically, the less the Supreme Court renders an advisory opinion, the more its stature grows[8]. The Supreme Court as a court of final judicial authority is to develop rich jurisprudence that respects Kenya`s history and traditions and facilitates its social, economic and political growth.[9] The highest court in the land however by a majority opinion found that there is no mandatory obligation resting upon the state to take particular measures, at a particular time, for the realization of the gender-equity principle save where a time frame is prescribed[10]. This leads to the question… Would it not be easy for the framers of the constitution to expressly state that Article 81(b) is subject to progressive realization? Section Article 81(b) says "not more than two-thirds of the members of elective public bodies shall be of the same gender. The use of the word shall is imperative in determining whether the two third gender rule is to be realized immediately or progressively.

STATEMENT OF THE PROBLEM

The majority decision of the judges on progressive realization is based on the underpinning that Kenya's constitution carries both specific normative prescriptions and general statement of policy and principle; the latter inspire the development of concrete norms for specific enforcement, the former can support the principle naturing into a specific enforceable right. Article 81(b) which stands generally as a principle, would only transform into a specific enforceable right after it is supported by a concrete normative position. The exact status of Article 81(b) as read with Article 177 dealing with membership of county assembly shows Article 81(b) has been transformed into a specific enforceable right. However examining Article 81(b) in context of Article 97 [on membership of the National Assembly] and Article 98 [on membership of the Senate], it has not been transformed into a full right as regard

[6] *The Constitution of Kenya* (2010) Article 100 "Promotion of representation of marginalized groups"
[7] *The Constitution of Kenya* (2010) Article 163(6) "Supreme Court"
[8] Ahmeednasir Abdullahi, `Senate deserves no mercy from the Supreme Court` *Daily Nation*, 16 November 2014, 18.
[9] *The Supreme Court act*, s 3(c)
[10] Supra n4 paragraph 61

composition of the National Assembly and Senate capable of immediate realization without certain measures being taken by the state. On the other hand, Chief Justice Willy Mutunga in his dissenting opinion favours a purposive interpretation of the constitution. He says that we should grow our own jurisprudence out of our own needs, without unthinking deference to that of our other jurisdictions and courts however distinguished. He favours substantive equality saying women have been discriminated against for a long time and if indeed the framers of the constitution intended the gender rule to be implemented progressively; would it not be easy for them to expressly state so? This research will evaluate both points of view.

RESEARCH OBJECTIVES

1. To increase knowledge in this area as it is a key issue affecting many jurisdictions
2. To find out what the problem is in-terms of low numbers of women in political representation and possible solutions to ensure equality

RESEARCH QUESTIONS

1. Does Article 81(b) as read with other provisions of the constitution required a progressive realization of the one-third gender rule or the same be implemented immediately during elections of 4th March 2013?
2. Going by the Supreme Court`s decision, could it have been the purpose of the framers of the constitution to discriminate against women interest?
3. Compared to International law, is the majority decision flawed?

RESEARCH METHODOLOGY

The research will look into various laws applicable in this area. Data will be collected from two sources which are primary sources and secondary sources. The primary sources will involve observation of what is happening in the political arena and also the legislative branch of the government. The secondary sources will involve looking at the Kenyan constitution, case laws, books, journals and other publications.

According to Article 2(6) of Kenyan Constitution; '*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."* This therefore means that the following will be applicable

1) Universal Declaration of Human Rights (UDHR)
2) CEDAW- Convention on Elimination of All Forms of Discrimination against Women
3) The African Charter on Human and Peoples Right`s (ACHPR)
4) Protocal to the African Charter on Human Rights on the Rights of Women in Africa- Maputo protocol
5) International Covenant on Civil and Political rights (ICCPR)
6) International Covenant on Economic, Social and Cultural rights (ICESCR)

GENDER EQUALITY

In a World Economic Forum report of 2005, gender equality is defined as "that stage of human social development at which the rights, responsibilities and opportunities of individuals will not be determined by the fact of being born male or female". The report is also quick to remove the misunderstandings that equate gender to women but rather it refers to both men and women, and to their status, relative to each other. If the millennium development goals are a guide as to what the key pillars of development are, then it is clear that without gender equality, there cannot be development. In a nutshell the millennium development goals state: Eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; combat HIV and AIDS and other diseases; ensure environmental sustainability and develop a global partnership for development. None of these goals can be achieved if there is no gender equality and if women lack symbolic power and social capital to participate equally with men.[11]

In 2005, The World Economic Forum undertook a study to establish the global gender gap. The study measured the extent to which women have achieved full equality with men in five critical areas of economic participation; economic opportunity, political empowerment, educational attainment, health and well being. Among the critical areas is political empowerment. Women have both a right and an obligation to active participation in political leadership. In addition to this human right and obligation, political analysts and researchers have noted that when women get into leadership and management, they bring a different perspective from men. It has also been noted that women`s leadership not only helps in building nations but it would also help to balance up the decision making processes which in most cases do not have women in mind. Such decisions as concern education, health, gender violence, women`s economic empowerment, peace, rights, dignity and democracy are usually of great concern to women.[12]

The 1995 Beijing Platform for Action emphasized that "women`s equal participation in decision making is not only a demand for justice or democracy, but can also be seen as a necessary condition for women`s interests to be taken into account. Without the perspective of women at all levels of decision making, the goals of equality, development and peace cannot be achieved." The Platform defined two strategic objectives: (a) ensure women`s equal access to and full participation in all power structures and decision making; and (b) increase women`s capacity to participate in decision making and leadership. The Convention on the Elimination of All Forms of Discrimination against Women in its Article 7, called upon state parties "to take appropriate measures to eliminate discrimination against women in the political and public life of the country".[13] In its resolution 1325 (2000) on women, peace

[11] Heinrich Boll Stiftung, East & Horn of Africa Region, *Perspectives on gender discourse: Enhancing Women's Political Participation* (2008) pg 2-3
[12] Ibid
[13] *Convention on the Elimination of All forms of Discrimination against Women* Art 7 (acceded to by Kenya on 9 March 1984)

and security, the Security Council also reaffirmed the importance of the equal participation and full involvement of women in all efforts for the maintenance and promotion of peace and security, as well as the need to increase their role in decision making.

KENYAN SITUATION

In the Kenyan context, the gender controversy has played out in at least four instances. The first instance involved the controversial presidential nominees to the office of the Attorney-General (AG), Chief Justice (CJ), Director of Public Prosecutions (DPP) and Controller of Budget. This was under former president Kibaki`s regime. The then President had controversially nominated Prof Githu Muigai to be the Attorney General (AG), Justice Alnasir Visram to be the Chief Justice (CJ), Mr Kioko Kilukumi to be the Director of Public Prosecutions (DPP) and Mr William Kirwa to be the Controller of Budget. These nominees were all of the male gender. Justice Musinga ruled that the nominations were unconstitutional since they breached Article 27(3) of the Constitution.[14]

The second instance involved Supreme Court appointees. The Judicial Service Commission (JSC) conducted relatively open and transparent nominations of persons to be appointed Supreme Court justices. The commission forwarded five names to the President for nomination in consultancy with the then Prime Minster (Raila Odinga). These were Njoki Ndung`u, Smokin Wanjala, Justices Jackton Ojwan`g, Philip Tunoi and Justice Mohamed Ibrahim. In total the Supreme Court would have seven judges the other two being the Chief Justice Willy Mutunga and Deputy Chief Justice Nancy Baraza. A petition was filed in court challenging the five nominations and seeking the correct interpretation, full tenure, meaning and effect of Article 27 of the Constitution of Kenya 2010 and the proper approach to the interpretation of the Constitution.[15] The petitioners alleged that JSC in making its recommendations to the President violated the Constitution and fundamental rights and freedoms of women in not taking into consideration the correct arithmetic or mathematics of the constitutional requirements on gender equity. The court opined that in exercise of its powers, JSC had a constitutional duty and administrative discretion and that in exercise of its constitutional duty JSC had no discretion other than to comply with the provisions of Articles 27 and 172 of the Constitution.

The court dismissed the petition stating that:

> *The purpose of Article 27(8) in our view, is to provide or place a future obligation upon the state to address historical or traditional injustices that may have been encounted or visited upon a particular segment of the people of Kenya. It is the responsibility of the government by designing policies and programmes and seeking the intervention of parliament through legislation to provide an appropriate and just remedy to an individual whose guaranteed rights or freedoms have been infringed or denied. We think that the rights under*

[14] *Centre for Rights Education and Awareness & 7 others v Attorney General* [2011] eKLR
[15] *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorrney-General & Another [2011] eKLR*

> *Article 27(8) have not crystallized and can only crystallize when the state takes legislative or other measures or when it fails to put in place legislative or other measures, programmes and policies designed to redress any disadvantages within the time set by the Fifth Schedule of the Constitution 2010.*[16]

The Government may proceed step by step and if a wrong is particularly experienced in a particular area, it is required to address it through policies, programmes and legislative process. It is the courts view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions. The court thinks that any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the state. To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two thirds principal is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle which can only be achieved through an enabling legislation by parliament.
The court in its estimation gives what is not intended by the drafters of the Constitution. This case was however important since it comprehensively dealt with the equality and freedom from discrimination provisions (Article 27) of the 2010 constitution. To some, it gave an authoritative and clear interpretation of the provisions. There are three aspects of the judgment that are debatable at various levels: the decision, decree or judgment itself; the reasoning, rationale or *ratio decidendi* and the *obiter dicta* (or by the way statements).

The courts need to continue working on clear guidance on interpreting controversial constitutional text, structure and history. In this case, the judges further provided an important test in interpreting the Constitution. They capture important principles of interpretation and construction including the judicial function in the process. They say the Constitution is a flexible and adaptable instrument; some of its provisions are highly specific giving judges unmistakable instructions. But others are no more than a broad outline which means that their construction is essential to fill in the details. The Constitution may be read restrictively sometimes but other times loosely. We must adopt a growth from the seeds which the drafters planted. We must be cautious because we cannot afford to wrap a poison in a bill of sweet and sonorous pontification in order to accede to the arguments of a particular party. Perhaps we should also avoid a route which can result in serious and dangerous inroads upon the limitations of the Constitution which can be achieved through policy, programs and legislative actions. The court added:

> *In interpreting the Constitution we must not be bewildered travelers lost in the woods, wandering in a circle thinking that it was a straight line. In our view the Constitution has a consistent and not contingent meaning. It does not mean one thing at one time and an entirely different thing at another time. In our understanding the provisions of the Constitution must be upheld when they*

[16] The Constitution of Kenya, Art 27 (8) " 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."

> *pinch as well as when they comfort. We would be second to none in extending help when such help is needed.*[17]

A third controversy which remains unsolved is the application of the gender rule in the composition of parliament. It has been argued that it would be difficult to design a formula that shall ensure that the National Assembly complies with the two-thirds gender rule as provided by Articles 27, 81 and 97. Article 97 restricts the membership of the National Assembly to 290 members whereas Article 81 states that not more than two-thirds of the members of elective public bodies should be of the same gender. There have been arguments that the constitution should be amended in order to formulate a workable design. An Amendment Bill, the Constitution of Kenya (Amendment) Bill 2011, was approved by the cabinet and tabled in parliament. The bill sought to amend Article 97 by allowing nomination of a 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. This would thus effectively mean that the number of members of the National Assembly will have no maximum. Those opposed to the move argued that Parliament should just devise a workable mechanism instead of rushing to amend the Constitution. The proposed amendment was supported by CIC which argued that the move might save the country from a repeat election in case the gender doctrine was not met in the 2012 general elections. They said that, "The amendment will prevent the possibility of a constitutional challenge on the composition of the National Assembly where the mandatory provisions of Article 81 (b) of the Constitution are not met"[18]. The Attorney-General stated that; "Failure to address the issue will see the country experience a constitutional crisis of unparalleled proportions and hence the need to address the rule."[19] The Attorney General thus moved to the Supreme Court as discussed in the previous chapter.

THE NATIONAL GENDER AND EQUITY COMMISSION

This is a constitutional[20] commission established by an Act of parliament in August 2011.It is a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59 (4) of the Constitution where parliament is to enact a legislation that may restructure the commission into two or more separate commissions. This commission therefore is the principal organ of the state in ensuring compliance with all the treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination

[17] Justice Mwera, Justice Mwilu and Justice Warsame in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others*v. *Attorney-General & another* [2011]. Cf. *Njoya & 6 Others* v. *Attorney General & 3 Others*, Miscellaneous CivilApplication No. 82 of 2004 (the *Njoya* case); the *Yellow Movement Case, Republic* v. *El Mann* [1969] E.A. 420 at page 360 (the *El Mann* case)

[18] *Nation* Reporter (2011) "Parliament can amend gender rule, says CIC" *Daily Nation* online, August 24, 2011, at http:// www.nation.co.ke/News/politics/Parliament+can+amend+gender+rule+says+CIC/-/1064/1224750/-/5tr7o9/-/index.
html

[19] *Standard Digital* (2012) "One third gender rule has Parliament baffled," September 25, 2012, at http://37.188.98.230/?a
rticleID=2000066915&story_title=one-third-gender-rule-has-parliament-baffled

[20] *The Constitution of Kenya*, Art 59

and relating to special interests groups including minorities and marginalized persons, women, persons with disabilities and children. It is therefore an important institution when it comes to protecting and serving the interests of women. Some of its other functions include; promoting gender equality and freedom from discrimination in accordance with Article 27 of the Constitution; to monitor, facilitate and advise on the integration of principles of equality and freedom from discrimination in all national and county policies, law and administrative regulations in all public and private institutions.[21]

CHIEF JUSTICE WILLY MUTUNGA'S DISSENTING OPINION

Chief Justice Willy Mutunga in his dissenting opinion says that the obligation of the Supreme Court is to cultivate progressive indigenous jurisprudence in the momentous occasions that present themselves to the court. Under Section 3 (c) of the Supreme Court Act (Act No 7 of 2011); it says the court is to develop rich jurisprudence that respects Kenya`s history and traditions and facilitates its social, economic and political growth." When the Chief Justice talks about "indigenous", he simply means that we should grow our jurisprudence out of our needs without unthinking deference to that of our other jurisdictions and courts however distinguished. In developing a rich jurisprudence and in interpreting the Constitution, the court will always take a purposive interpretation of the Constitution guided by the Constitution itself. An example has been articulated by the Supreme Court of Canada in *R v Big Drug Mart* (1985) in paragraph 116 of the ruling the court states,

> *The proper approach to the definition of the rights and freedoms guaranteed by the charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee. It was to be understood, in other words, in the light of the interests it was meant to protect…. To recall the Charter was not enacted in a vaccum and must therefore be placed in its proper linguistic, philosophical and historical contexts.*[22]

In *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) Lord Wilberforce summarized the justification of purposive approach by stating that; "*It was a generous interpretation….suitable to give individuals the full measure of the fundamental rights and freedoms referred to."*[23] Also in *S v Zuma* (CCT5/ 94) (1995) the constitutional court of South Africa agreed with the above decisions and emphasized that in taking the purposive approach, regard must be paid to the legal history, traditions and usages of the country concerned.

The Chief Justice says Article 260 of the Constitution does not see the word "shall" as a word requiring interpretation. The broad approach on how provisions of the Constitution are to be interpreted makes it abundantly clear that it is unwise to tie the interpretation of Article 81(b)

[21] *National Gender and Equality Commission Act*, 2011, s 8 (a&b)
[22] *R v Big Drug Mart* [1985]
[23] *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC319

to a single word. Dr. Willy Mutunga says it is this broad approach that will help him determine whether immediate or progressive realization of the right to the gender quota is envisioned. There is a legal argument articulated by one of the counsel that if progressive realization was intended, it would have been easy for them to so provide. This argument in the CJ's opinion is not conclusive. It is in his view that we need to look at the arguments around non-discrimination and national values as decreed by the Constitution; that political and civil rights demand immediate realization and a thorough treatment of historical, social, economic and political basis of the two-thirds gender principal as decreed by Section 3 of the Supreme Court Act.

Article 177 (1b) clearly provides for the one third-two third gender principle in regard to membership of county assembly. The CJ therefore sees no reason why a Constitution that decrees non-discrimination would discriminate against women running for parliament and the senate. He sees no constitutional basis for discrimination among women themselves as a consequence of the progressive realization of the two-thirds gender principal would entail. A Constitution does not subvert itself. Deciding that women vying for county representation have rights under the Constitution while their counterparts vying for parliament and the senate are discriminated against would result in that unconstitutional position. It is the CJ's position that this Article [Art 177(1b)], read with provisions of Articles 27 (4), 27(8) and 81(b) make it abundantly clear that the two thirds gender principle has to be immediately realized. The CJ is in favour of substantive equality which involves undertaking certain measures including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. An example is when after struggles for universal suffrage Kenyans succeeded in getting that rights enshrined in the Bill of Rights of the 1963 constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realization of the right to vote.

The CJ's dissenting opinion was therefore, that the answer to the Attorney General's first question is that the two-thirds gender principle be implemented during the General Election scheduled for 4th March 2013.

A CRITIQUE OF THE SUPREME COURT DECISION

A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law.[24] Consequently, in interpreting the Constitution, the letter and the spirit of the supreme law ought to be respected. To reach a proper interpretation, various parts of the Constitution ought to have been read as an integrated whole and no one particular provision destroying the other but each sustaining the other.[25] This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramouncy of the written Constitution.[26] A similar principle is enunciated in the United

[24] *Minister for Home Affairs v Fisher [1979]*
[25] *John Harun Mwau & Others v AG*
[26] *Tinyefuza v Attorney General [1997] UGCC3*

States Supreme Court case of *South Dakota v North Carolina* where Brewer J said that: " I take it to be an elementary rule of constitutional construction that… all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument…"

One great purpose of the various Articles of the Constitution cited in the advisory opinion was to attain gender equality in representation. Therefore the majority ought to have realized that it effectively neutered the positive prohibitions against gender equality by holding that there was no mandatory obligation resting upon the state to take particular measures, at a particular time, for the realization of the gender-equity principle. Also the decision effectively meant that women who decide to vie for county representation are assured of gender equity while those who aspire for higher things and vie for representation in Parliament are not.
Another issue is that there is no evidence that the majority interrogated the state to find out what steps it had taken 2 years after the promulgation of the constitution, to secure gender representation rights. One could therefore say it was derelict of the supreme court, having erroneously found for progressive realization, to fail to query the state to find out what bench marks it had established, and whether the state had met those bench marks. The gist of the matter is that the majority`s finding that, "there was no mandatory obligation resting upon the state to take particular measures, at a particular time for the realization of the gender equity principle" is a fallacy without basis in law. The approach by the courts majority leans towards the school of thought that regards some human rights, including gender representation a mere unenforceable principle of state policy.[27] The approach is defeatist and runs contrary to the principle that all human rights and fundamental freedoms are indivisible and interdependent.[28]

The Constitution of Kenya 2010 is incompatible with the school of thought that considers human rights as mere aspirational goals rather than enforceable rights. Either the constitution is nothing at all or it is a living document with specific and agreed obligations on human rights including gender representation. Moreover, the majority decision is painted in especially bad light when it is juxtaposed with a decision from the high court. In *Mitubell Welfare Society v AG* (2013), the high court said the right to housing is by consensus amenable to progressive realization. It however had the courage to say the following, "…the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the state feels ready to meet constitutional obligations. Article 21 and 43 require that there should be `progressive realization` of social economic rights implying that the state must begin to take steps (be seen to take steps towards realization of these rights)."[29]

[27] Nakuta J, The justiciability of social, economic and cultural rights in Namibia and the role of non-governmental organizations.
[28] ibid
[29] *Mitubell Welfare Society v AG [2013] eKLR*

AFFIRMATIVE ACTION

Affirmative action is literally the practice of "acting affirmatively" by taking positive, specific steps to overcome discrimination. In the Kenyan Constitution, affirmative action is defined as including any measure designed to overcome or ameliorate an inequality or the systemic denial or infringement of a right or fundamental freedom.[30] Article 27 (8) provides for affirmative action where the state is required to take legislative and other measures to ensure that not more than two-thirds of the members of elective or appointive bodies are of the same gender. Article 81 further reiterates the same rule should be applied in elective public bodies.

Affirmative action has its roots in discrimination as a remedy to it, and discrimination has its roots in perceptions that some people are subordinate and/or inferior beings. Hence, affirmative action is based on the principal that discrimination is harmful and not to be desired. Yet, instead of treating everyone equally, it gives an advantage to the people who have been discriminated against historically. And by so doing it appears to offend against the principle of equality itself. Hence it is controversial. The patriarchal propaganda that proclaims male-superiority as self evident is an ideology that has been cultivated for centuries and it's not as easy to change as it is to enact laws against it. Such laws are only the beginning of the long journey to equality for women, and to a truly equal society. It is important that we stay on this road to equality for all and women`s full participation in politics is the next step on the journey to equality for everyone in Kenya.

Equality is a desirable and ethical end, and affirmative action is the most ethical of means to attain this end. It is not enough to just open the door of opportunity for people who have been shut out. We also need to give them the resources to take advantage of the opportunities given to them. Though affirmative action is reversed discrimination, it is not unjust. To attain the desired end of equality for all, it is not enough to level the playing field and give everyone equal opportunity. It is more ethical to give weight to each individual`s interests. And it is the job of those who benefited to take affirmative action to give the disadvantaged in greater measure what they were historically denied. Women have historically been denied a leadership role or a public voice. So affirmative action is supposed to help get the women`s view point listened to.[31]

CRITICISMS OF AFFIRMATIVE ACTION

This conversation of the rationale for affirmative action is seen as insidious by many opponents. They claim that the injection of "diversity" or "representation" considerations generally reflects willingness to compromise on merit and qualifications. The minimum becomes acceptable rather than the best and the need to foster diversity or representation is quite possibly interminable, so that we will have affirmative action today, tomorrow, and

[30] *The Constitution of Kenya,* Art 260
[31] Okiah Omtatath Chapter 3: *Perspectives on gender discourse: Enhancing Women's Political Participation (2008)*

forever. This is unacceptable since from the outset, in the United States for example, affirmative action was articulated as a temporary measure that was necessary in order to level the playing field for disadvantaged minorities. And they conclude that state-sanctioned discrimination to engineer special interest and gender "representation" in various fields is not a good policy.

Critics also point out that the very modest benefits of affirmative action are usually concentrated on those already more fortunate, with little or no benefits to those who are truly disadvantaged. They argue that only a few of such programs can stand on the basis of their actual empirical consequences. Nor are their moral bases any more solid. Opponents also argue that minorities and women are not seen for their own accomplishments. It is often assumed that their progress is "because of affirmative action", not because of their own achievements.

Regarding political office, some argue that in Kenya there have never been separate salary scales for men and women in the public sector; nor has career advancement been a function of one`s sex. It is therefore preposterous for any group of individuals to present a different picture when it comes to politics. But such observations hardly tell the whole truth. Appointments at top levels in the public service, for example, require political connections. And politics depend on wholly different factors. And while it is true that women as individuals have made progress in securing their rights, the degree of hostility exhibited against them as a group is appalling.[32]

CONCLUSIONS

The Constitution of Kenya 2010 is incompatible with the school of thought that considers human rights as mere aspiration goals rather than enforceable rights. Either the Constitution is nothing at all or it is a living document with specific and agreed obligations on human rights including gender representation. Constitution making does not end with its promulgation, it continues with its interpretation. Sect 3(c) of the Supreme Court act provides that the court is to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth. Chief Justice Mutunga in his dissenting opinion acknowledges that the Kenyan Constitution fuses the legalistic approach with declarations of general principles and statements of policy. Such principles or policy signify a value system, and culture or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves. Where a Constitution takes such a fused form in its terms, a court of law ought to keep an open mind while interpreting its provisions.

In regard to the gender question, there is no evidence that the majority of the Supreme Court judges interrogated the state to find out what steps it had taken 2 years after the promulgation of the Constitution, to secure gender representation rights. One could therefore say it was

[32] Ibid

derelict of the Supreme court, having erroneously found for progressive realization, to fail to query the state to find out what specific benchmarks it had established and whether the state had met those benchmarks. The approach by the courts majority leans towards the school of thought that regards some human rights, including gender representation as a mere unenforceable principle of state policy. The approach is defeatist and runs contrary to the principle that all human rights are indivisible and interdependent.

Politics is very central in any nation and it is a known fact that if one wants to make a difference in their own lives and in the lives of the masses it is best to get involved in politics as it affects every aspect of life from the cradle to the grave. Most of the countries in the world have the best economic, social and political policies that have helped improve their citizens quality of lives are those that pride themselves of good leadership. Equality and freedom are rooted in the kind of government that a nation has. Power flows through political systems and people have to work within these systems to make a difference. There is no doubt that with good political leadership the world can be better place to live in and both men and women have a right and a responsibility to make this happen. Why should women participate actively in politics? What exactly do they bring to the political scenario?

First and the most important reason why women need to be involved in political leadership is the fact that it would be impossible to build a modern nation on the basis of *exclusion and inequality*. As a nation, we have come out of the age where diversity was treated with suspicion. It is well appreciated that different forms of political organizing is healthy for national unity. We have all come out appreciate diversity and that is why women must be given their opportunity to bring in their views and expertise into the political leadership of our nation. Involving women in political leadership will bring the diversity that would help us have politics that are not monopolistic, centralized and non competitive which leads to bad economies.

The first African America woman US Senator, Carol Moseley Braun noted that, "A society that taps the talents of 100% of its people is a stronger society, because it can pool on a broader talent pool, it leads to governance that is more reflective and representative.[33]
Courts in adjudicating Constitutional cases, inevitably face "political issues" requiring a choice between competing values and desires. A purposive interpretation would have required the Court to ascertain the meaning of Article 81 (b) by an analysis of the purpose of the guarantee. The court should have sought to interpret the provision in light of the gender interest it was meant to protect. The purposive interpretation required the majority to recall that the Constitution was not enacted in a vacuum and must therefore be placed in its proper linguistic, philosophic and historical context.[34] Additionally in taking this approach, the majority ought to have had regard to the legal history, traditions and usages of Kenya.

[33] Nyokabi Kamau, Perspectives on gender discourse ;Do women bring a different perspective into political leadership (2003)
[34] R v Big Drug Mart (1985) 1 S.C.R 295

RECOMMENDATIONS

In order to improve women's electoral performance, political participation and the representative character of parliament, women can undertake the following;

1. Consistent political participation and engagement in leadership activities and training to overcome women's low political socialization
2. Frequent attendance of social and political gatherings where political information is likely to be shared, as well as engaging in wide reading of any available political literature and media articles, with a view to beefing up ones "bank" of political information.
3. Develop fundraising skills to strengthen ones financial base for the political campaign
4. Start county building and informal campaigns five years before a subsequent election. This is with a view of mobilizing, building and sustaining loyalty of target voters towards self, thus lessening the challenge of the official one month electoral campaigning.
5. Develop political professionalism and power of incumbency retention rate. In this connection both women political incumbents and election losers must soldier on in electoral politics so as to acquire the necessary political experience and/ or to entrench themselves in various political structures. Women politicians therefore need to be more persistent and professional in their attitude towards politics and learn to accept electoral defeat as a temporary setback and a good learning experience rather than a permanent knock out.
6. Women candidates need to consistently participate in the affairs of any one party that they join and lobby within it for inclusion in key decision making positions of the party structure, with a view to curb their marginalization during critical moments of political party recruitment such as the nomination for general elections.[35]

The presence of women in political leadership is one of the most effective ways of ensuring their participation in the political decision making process for the good of women, children and the nation in general. The challenge therefore is for women to reach outside of their private lives and shape the nation.

BIBLIOGRAPHY

Ahmeednasir Abdullahi, `Senate deserves no mercy from the Supreme Court` Daily Nation, 16 November 2014, 18.

Aristotle, The Politics III. IX (London: Penguin 1962) 195-196

Black's Law Dictionary Ninth Edition

Elizabeth Powley, Rwanda; Women Hold up Half the Parliament.

[35] Supra n1

Gender and Law Theory, Doctrine, Commentary – Bartlett, Rhode, Grossman- Sixth Edition

Gender Rights and Wrongs: Critique of the Supreme Court Decision on the One third Gender Principle- Ochiel. J. Dudley

KM Georgiadis, "The Emerging Jurisprudence on the Right of Access to Information in Kenya", Kenya Law Reports Website

Mapping Best Practices: Promoting Gender Equality and the advancement of Kenyan Women – Dr Jacinta Muteshi. 2006

Nakuta J, The justiciability of social, economic and cultural rights in Namibia and the role of non-governmental organizations.

Perspectives on gender discourse: Women in politics: Challenges of democratic transition in Kenya- Henrich Boll Foundation, East and Horn of Africa Region 2003

Perspectives on gender discourse: Enhancing Women's political participation- Heinrich Boll Stiftung, East & Horn of Africa Region

United Nations "Report of the World Conference to view and appraise the achievements of the United Nations Decade for women: Equality, Development and Peace. New York, 1986.

W Mutunga CJ (2012), Key note speech by the Chief Justice, Hon Dr Willy Mutunga at the commencement of the "Judicial Marches Week" Country wide on August 21,2012, KLR Bench Bulletin, Issue 20 July- December 2012

LIST OF COVENANTS AND CONVENTIONS

Universal Declaration of Human Rights (UDHR)

CEDAW- Convention on Elimination of All Forms of Discrimination against Women

The African Charter on Human and Peoples Right`s (ACHPR)

Protocol to the African Charter on Human Rights on the Rights of Women in Africa- Maputo protocol

International Covenant on Civil and Political rights (ICCPR)

International Covenant on Economic, Social and Cultural rights (ICESCR)