

## **The two-third gender majority representation principle: Politics of gender and the “where next?”**

An article by Joan Birika

Stretching the length of time seems like a very attractive idea for Kenyan legislators today. About 21 weeks to an August 2015 legislative deadline<sup>1</sup>, consensus inside and out of Parliament has not been reached on a formula to ensure equitable gender representation in subsequent parliaments in line with Article 27(8) of the Constitution<sup>2</sup>.

Representatives of various lobby groups attended and presented their various formulae and strategies toward gender-equitable representation in national parliament<sup>3</sup> at the Heinrich Boell Stiftung’s Gender Forum on 26<sup>th</sup> March 2015.

### **27<sup>th</sup> August 2015: Five years since the Constitution**

The clamour for a solution before August 2015 is now in high gear. Legislative processes and timelines, which include public participation processes, are proving to be a real challenge to legislators and the feminist movement. Speaking at the forum, Grace Maingi, Executive Director of Uraia Trust candidly rouses, “Bills have been passed in record time in Kenya. The 2/3<sup>rd</sup> gender rule is not receiving due attention, there is no political will in Parliament.” Echoing her sentiment, Mr. Willis Otieno, an advocate and political analyst suggests that strategies should aim to create a governance crisis. “Make it profoundly uncomfortable for duty bearers to continue to keep silent. The Attorney General and Parliament (has) had sufficient judicial notice.”

Coinciding with the annual State of the Nation address by H.E the President at Parliament, the Gender Forum was disappointed to observe the total obscurity of the gender representation quagmire in the address.

The two-third gender majority representation principle is considered unequivocal in constitutional terms. In the lead of the debate toward the realization of the formula to guarantee its implementation are: a taskforce formed by the Attorney General in January 2015<sup>4</sup> housed under the National Gender and Equality Commission (NGEC); a human rights caucus of legislators in the National Assembly; a civil

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<sup>1</sup> A seven-judge bench of Kenya’s Supreme Court was requested in December 2012 to pronounce the attainability of gender-equitable parliamentary representation in the March 2013 general election (also known as the two-third gender majority rule). A majority of the Judges opined that 27<sup>th</sup> August **2015** was a more realistic date by which the Attorney General would have succeeded in moving the sitting parliament to legislate a formula for National Assembly and Senate.

<sup>2</sup> In 2010 a new constitution was promulgated. It enshrines principles of equality, human rights and non-discrimination in all spheres including electoral politics and appointive state positions.

<sup>3</sup> Kenya has a bi-cameral parliament comprising Senate (67 members) and National Assembly (349 members).

<sup>4</sup> The taskforce comprises representative from each of the following institutions: National Gender and Equality Commission (Convener and Secretariat), The Gender Directorate under the Ministry of Devolution and Planning, the Attorney General’s office, Office of the Registrar of Political parties, Commission on the Implementation of the Constitution, Parliament (Committees on the Implementation of the Constitution and on Justice and Legal Affairs), Kenya Women’s Parliamentary Association (KEWOPA) and FIDA-Kenya -representing civil society.

society lobby group led by Uraia Trust and various constitutional lawyers/political scientists working in cohorts or individually.

### **What's on the table?**

The mechanisms proposed are wide-ranging. Mr. Paul Kuria, representing the Gender Commission states that “Our proposal is to lift A177 mechanism to A97,98 – that is, to top up (from pre-registered party lists) the gender shortfall to achieve 2/3 rd gender majority rule in National Parliament.” Other proposals from other parties are as far reaching as re-formulation of Kenya’s electoral system to entrench a mixed member proportionate representation as is the case in Germany or South Africa; whilst others are calling for an increase of special women only electoral seats.

Refreshingly, despite divergent opinions on the single ‘magic-bullet’ formula, all interest groups are unanimous that a multiplicity of measures is needed. Whilst a constitutional amendment seems inevitable, lobbyists have placed duty institutions in the dock to prove their commitment and political will to enable and exemplify the inalienable right for women to participate in leadership. These include the electoral commission, the Executive, Parliament, the registrar of political parties and most importantly, political parties themselves.

Unfortunately, an egalitarian and magnanimous political party culture toward women’s inclusion is touted as impossible, given Kenya’s ‘adversarial’ first-past-the-post electoral system. “No political party will be benevolent enough to ensure women's inclusion. Political culture is focused on a candidate’s own contest” warns Mr. Willis Otieno, a lawyer and political/electoral analyst. Pundits opine that only punitive sanctions and attractive incentives, particularly those pegged to party financing, coupled with stringent monitoring might force parties into submission. “Strict and consistent monitoring of political parties is lacking. Electoral rules demand democratic nominations for special seat nominees. This has been totally disregarded,” Willis continues.

Affirmative action seats (special women only seats) are currently considered the most promising option. Its proof of viability lies in the remarkable outcome from the 2013 general election bringing an unprecedented 20.9 percentile of women in Senate and National Assembly from the former single digit levels<sup>5</sup>. In County Assemblies (newly formed under the Constitutionally enshrined devolved structure of government), at least 30% of members are women, most of whom have been nominated by political parties through women-only top-up lists to fill the gender representation shortfall after elections. This success informs the proposal from the A.G’s taskforce led by NGEK.

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<sup>5</sup> Senate has a total of 18 women; 2 nominated to represent special interest groups and 16 seats filled through women only party lists nominated by political parties in proportion to their elected Senators in accordance with Article 98 of the Constitution. National Assembly has a total of 69 women; 47 women only seats representing each County, 6 women representing special interests nominated proportionately by Political Parties and 16 women who were elected in constituency seats that are gender non-defined. The previous highest best outcome was in 2007 when 9.8% of women were elected into political office. The post-Constitution AA women seats however resulted in a decline in direct election of women in gender non-defined competitive seats, with only a 4.8% result in 2013.

### **Mischievous moves.**

On the other hand, Hon Kenneth Okoth, MP Kibra informed the forum that a petition has been handed to the Speaker and the Justice and Legal Affairs committee of Parliament to dismiss the relevance of A27(8). Ms. Daisy Amdany, speaking in response to this information is quick to warn that such a move reads of mischief. "The Bill of Rights can only be amended through a popular referendum." The forum was also reminded that a constitutional amendment can only seek to increase – never to reduce – on human rights gains.

The forum also heard that a draft bill proposing a popular initiative referendum toward the formation of a new set of electoral constituencies to be contested by women only, aiming to increase special seats for women, is in advanced discussion by a section of Parliament.

The options all present challenges and promises alike. Affirmative action (special women only seats) runs the danger of negative propaganda narratives by candidates to detract an un-informed electorate from voting for women in constituency seats. Hence, zebra listing of candidates by political parties would be the only chance women have to obtain a party ticket to contest the seat.

On the other hand, a referendum push would slide the two-third gender rule into sectarian interests hence drawing feminist lobbyists into unintended wide ranging political agenda. Whether this would prop the gender agenda or further disadvantage it would be a judgement call to be made by the flailing/fatigued women's movement. Further, the value proposition on women's leadership is under stricter scrutiny by the electorate hence a referendum push faces the real danger of retraction of gains for women's participation ostensibly under patriarchy informed rhetoric on the public wage bill.

### **Sniffing defeat?**

So with a tight deadline drawing near, and reflecting on the passage of time since the 2012 judicial advisory opinion, where next? Hon Okoth opines, "Based on precedent, an extension (to a constitutional legislative deadline) can only be given for 1 year. The Court is likely to be moved again. Time is too short to August."

Clearly, Parliament, the Attorney General as chief adviser to government, and the feminist and women's movement have their work cut out for them!