

THE WALLS WE CAN'T SEE

Public Policy Lethargy on Women's Political Participation in Kenya

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Unpacking the Gender Rule and the Supreme Court Advisory Opinion of December 2012: Quotas Options for the Representation of Women in Kenya

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Key Points

Gender quotas, either in political parties or as part of state electoral systems are one of the more prominent and highly effective ways of redressing gender imbalance in national legislatures.

There are three major types of quotas used to increase women's representation in electoral politics:

- Party quotas are voluntary measures adopted by political parties to increase female candidates
- Reserved seats set aside a certain number of seats for women
- Legislated candidate gender quotas require all political parties to nominate a minimum percentage of female candidates.^b

The legal and constitutional framework that underpins Kenya's position on quotas are derived from

- The National values and principles of government including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised
- The Bill of Rights
- Various articles of the Constitution

There is sufficient constitutional support for the use of gender quotas to realize the two-thirds gender rule.

Summary

Kenya's position on gender equity is protected in law and through the constitution in the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*^a, holding that the two-thirds gender principle was progressively realisable. The majority of the court, with Mutunga CJ dissenting, returned the verdict that legislative measures for realizing the one-third-to-two-thirds gender principle under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be in place by 27th August, 2015. That has passed.

This paper argues for the use of quotas as an option for the implementation of the gender principle in representation of women in Kenya. The first part discusses the origin and justification of quotas while the second part outlines the quota options available to Kenya.

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WHY QUOTAS?

The realisation that votes for women do not necessarily lead to the increasing acceptance of women and other marginalized groups in the predominantly masculine political arena has led to an increasingly refined and profound critique of the political system by many marginalized groups. Such groups demand that all members of the society, regardless of gender, race or ethnicity, should be treated equally.^c

The feminist critique of democracy focuses on the gap between what democracy theoretically advocates and the actual absence of all groups in the exercise of political control. Specifically, feminists state that women are continuously under-represented in decision-making positions, and lack equal rights and opportunities to participate in formal politics alongside men.

This marginalization of women in politics actually weakens democracies as the voices of at least half of the population go unheard.^d Gender quotas, either in political parties or as part of state electoral systems are the most prominent and highly effective ways of redressing gender imbalance in national legislatures.

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Defined as “fixed number or percentage of minority group or women needed to meet the requirements of affirmative action”^e, a gender quota is a measure created to counter discrimination, created with the intention of recruiting enough women into political positions to ensure that they are not merely token actors in the political arena.

Gender quotas try to overcome the obstacles which lead to the under representation of women in politics, as well as to rapidly increase the number of women in politics.^f Quotas require that women constitute a certain number or percentage of the members of an institution or a body.^g As Professor Nzomo acknowledges, gender quotas are overwhelmingly positive for women's representation.^h

The justification of gender quotas lies on several grounds including gender justice and equality, women's greater propensity to represent women's interests, and symbolic value.ⁱ Gender quotas are considered to be part of a new equality policy representing a new shift from “equal opportunity” to “equality of results.”^j The shift recognizes that provision of equal opportunity by for instance allowing women to vote does not in itself result in an increased number of women legislators.

There are three major types of gender quotas as an affirmative action measure in elections:

1. Reserved seats quotas

Reserved seats are often created by reforms to the constitution or occasionally by electoral law creating separate rolls for women, designate separate districts for female candidates, or distribute seats for women based on each party's proportion of the popular vote.^k

Reserved seats today come in many different types, some excluding, others including, the election of women, rather than appointment, to fill these seats.^l

Reserved seat quotas guarantee a minimum number of women in elected office but differ from party and legislated candidate quotas as they mandate a minimum number of female legislators instead of simply setting a percentage of women among other political candidates.^m

The provision for forty seven women members of the National Assembly county representatives in Article 97(1)(b) is an example of a reserved seat quota including the election of women. On the other hand, the provision in Article 98(1)(b) of twelve women members to be nominated by political candidates according to their strengths is a clear example of reserved seat quotas that include appointive mechanisms.

2. Legislated candidate gender quotas

Legislated candidate quotas, are created by law to require a certain minimum of women among the candidates presented in all party lists for the election. These quotas are adopted by national parliaments either through constitutional or electoral law reform. They are similar to party quotas in that they address party selection processes but differ in that they are anchored in laws requiring that all parties must nominate a certain proportion of female candidates.ⁿ

Nevertheless, legislative quotas apply only to the proportion of candidates, not to the ultimate proportion of women elected to parliament. Legislative quotas thus ensure that political parties are committed to finding suitable women candidates, and may include incentives to support them or legal sanctions for non-compliance.

Since these provisions are mandatory, they essentially require that national parliaments recognise "gender" as a political category.^o

Legislative quotas thus ensure that political parties are committed to finding suitable women candidates, and may include incentives to support them or legal sanctions for non-compliance.^p

They are a broader processes of reform focused on changing the language in constitutions and electoral laws rather than the content of individual party regulations.^q

Given their status as laws, legislative quotas are distinctive in that they impose sanctions for noncompliance and are subject to some degree of oversight from external bodies.

The effective implementation of legislative quotas depends upon multiple factors, including how statutory mechanisms are implemented, the level of the gender quota specified by law, whether the rules for party lists regulate the rank order of women and men candidates, whether party lists are open or closed, and also the penalties associated with any failure to comply with the law.

These policies prove least effective when the laws are designed as symbolic window-dressing more than as de facto regulations; the regulations specify that a certain proportion of women have to be selected for party lists, but they fail to specify their rank order so that female candidates are listed at the bottom.^r

3 Voluntary Party Quotas

Voluntary quotas are measures introduced by political parties internally as a result of the party's policy documents and practices or because of the 'goodwill' of the party leadership.^s Consequently, the party is not bound by any legislation to implement the quota which is an internal policy. Policies as a rule of thumb are but general statement of aspirations which an institution party wishes to commit, or has committed itself to.^t

Constitutional and Legal Framework

The representational provisions as provided in the Constitution and especially Articles 27(6 & 8), 81(b) and 100, have fundamentally altered the existing political rules of engagement and threaten to disrupt the gendered power distribution in a manner that may negatively impact on the vested political interests of some of the current male power holders.^u

The following section highlights the constitutional base upon which gender quotas, amongst other affirmative action measures, may be grounded.

Under Article 2(5) of the Constitution, any statute ratified by Kenya, forms part of the laws of Kenya. Kenya has adopted the Universal Declaration of Human Rights (UDHR) which guarantees the full range of rights – civil, political, economic, social and cultural. Additionally, Kenya

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has ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the African Charter on Human and People's rights (ACHPR), as well as the Protocol to the African Charter on Human Rights on the Rights of Women in Africa- Maputo Protocol.

In particular, the CEDAW in Article 2(a) requires that states "undertake . . . to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation . . . and to ensure, through law and other appropriate means, the practical realizations of this principle."

But more importantly, Kenya has in addition, ratified the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR). The former Covenant entails a comprehensive mix of civil and political rights which Kenya has agreed to "respect and to ensure". Article 3 of both the ICCPR and the ICESCR obligates states "to ensure the equal rights of men and women to the enjoyment of all . . . rights" under the treaty. All these treaties have significant provisions sufficient to cover the subject of discrimination in representation.

At the County level, only 82 women were elected out the 1450 members of the county assembly.

Additionally, the national values and principles of governance in Article 10 bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. The National values and principles of government pertinent to this matter include: human dignity, equity, social justice, inclusiveness, equality, human rights,

non-discrimination and protection of the marginalised. Further, the Bill of Rights safeguards "equality and freedom from discrimination," in Article 27, in particular sub-Article 3 which declares that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." Article 27(8) imposes upon the State the obligation to redress gender disadvantage by taking legislative and other measures to implement **the principle** that not more than two-thirds for the members of elective or appointive bodies shall be of the same gender."

This principle is re-echoed in Article 81(b) of the Constitution which provides the electoral system shall comply with the principle that not more than two-thirds for the members of elective or appointive bodies shall be of the same gender.

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Article 97(1) prescribes as membership of the National Assembly: (a) 290 members elected in single-member constituencies; (b) 47 elected women representatives from each county; (c) 12 special interest-group members nominated by the political parties; (d) the Speaker. At the same time, Article 98(1) sets out the prescribed membership of the Senate: (a) 47 elected members representing each county; (b) 16 women nominated by the political parties; (c) 2 members – a man and a woman, representing the youth; (d) 2 members – a man and a woman, representing persons with disabilities; (e) the Speaker.

Article 100 of the Constitution, provides that:

“Parliament shall enact legislation to promote the representation in Parliament of –

- (a) women;*
- (b) persons with disabilities;*
- (c) youth;*
- (d) ethnic and other minorities; and*
- (e) marginalized communities.”*

On the critical role of political parties, Article 91(1) (f) requires every political party to respect and promote human rights, and fundamental freedoms, and gender equality and equity. Parliament has since enacted the Political Parties Act, 2011 and established the political parties' fund. One of the purposes of the fund under section 25 is to promote gender representation.

There is a consensus that political parties play a vital role, whatever the quota system under consideration. In almost all political systems, no matter the electoral regime political parties and not the voters are the real gatekeepers to elective offices. Therefore party nomination practices should be kept in focus.^v

The other critical institution in the attainment of the gender principle is the Independent Electoral and Boundaries Commission established under Article 88(1). Administered by the Independent Electoral and Boundaries Commission Act, 2011, the constitutional role of the Commission includes the regulation of the process by which political parties nominate candidates to office.

As shown in the preceding survey of the constitutional and legislative framework, there is sufficient constitutional support for the use of gender quotas to realize the two-thirds gender rule. The important place of political parties as well as the IEBC has also been highlighted. We therefore proceed to the recommendations based on the findings already made.

RECOMMENDATIONS ON THE IMPLEMENTATION OF GENDER QUOTAS

1. Legislated Candidate Quotas

We propose the use of legislated candidate quota through an amendment of the electoral law or regulations to make it mandatory for every registered political party to nominate women candidates for election in at least one-third of all the constituencies in which the political party is contesting the elections.

In the case of nomination of candidates for election to the National Assembly, no more than two-thirds of all the candidates nominated by political parties to contest the constituency elections in each county should be of the same gender.

The distribution of the seats throughout the country will ensure that political parties do not render the quota nugatory by nominating women candidates to contest the elections in hostile areas with little popularity and consequent chances of winning the elections.

We propose that the same quota should apply to the nomination of candidates for election to represent the wards in each constituency, alongside Article 177(1)(b).

As a safeguard, the IEBC should, through its constitutional powers to regulate the nomination of candidates by political parties to elective positions, ensure that political parties present candidates' lists which comply with the rule in compliance with the two-third gender rule for all elective positions.

To further enforce this legal candidate quota, we propose an amendment to section 25(2) of the Political Parties Act, 2011 to disqualify any political party from accessing the political parties fund, if the party does not comply with the two-third principle in the nomination of candidates for elective positions in the National Assembly, Senate and County Assemblies.

We further propose an amendment to Section 21 of the Political Parties Act to include non-compliance to the two-thirds gender principle as grounds for de-registration of the political party.

A similar mechanism should be adopted to attain the representation of marginalized groups under article 100 of the Constitution.

2. Electoral rotational reserved seat quota

An Act of Parliament or suitable electoral regulation should group the 290 constituencies into clusters of four, where one constituency is delineated as a special constituency, on a rotational basis. As an affirmative action, political parties fielding candidates for elections within the special constituencies must nominate candidates of the identified under-represented gender. However, independent candidates of the same or opposite gender would be free to contest the elections in these constituencies.

The rotational reserved seat quota will enhance the representation of women nationally, including those from marginalized groups. This measure alone is likely to guarantee the election of at least. Considering affirmative action is a temporary measure, this mechanism has an inbuilt time frame for review after 20 years. The rotational mechanism will not create additional seats to the current total of 290 Constituency MPs in the National Assembly, and will not, therefore, increase the current parliamentary wage bill. Valid questions have been raised about the efficacy of the rotational reserved seat quotas especially in view of Article 38 of the Constitution which guarantees the right to political participation.

Our view and answer to that is simple. We start from the approach that the proper interpretive approach to the Constitution of Kenya is the theory of a holistic interpretation stated by the Supreme Court in **The Matter of the Kenya National Human Rights Commission**.^w This means the contextual analysis of a constitutional provision, alongside and against other provisions, while considering the Constitution's history, the issues in dispute, and the prevailing circumstances. This approach leads to a broad and purposive interpretation of the constitution and employs the rule of a harmonious reading of the Constitution in **Tinyefuza v AG**.^x

Applying the holistic approach, we believe that the political rights in Article 38 of the Constitution can be harmonized with the right to one-third gender representation in Articles 27 and 81(b) by requiring political parties as constitutionally ordained organs of political participation and state funded entities to present, as an affirmative action measure, only women candidates for election in the special constituencies while allowing male contestants to run as independent candidates without state of political party support.

We hold the view that affirmative action measures permitted by the constitution itself cannot be the kind of "unreasonable restrictions" on political participation forbidden by Article 38(3). This approach is consistent also with the duty in Article 91(1) (f) requiring political parties to respect and promote human rights, and fundamental freedoms, and gender equality and equity

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CONCLUSION

The gender principle in representation of women is achievable. It's no longer a matter of if, but when. As demonstrated above, the existing constitutional and legislative framework is adequate to support any affirmative action the State takes to achieve the principal. Kenya can experiment with the specific quota recommendations made in this paper. There is no need to amend any part of the constitution to achieve this. The IEBC has a critical role to play in this process, so do political parties; their constitutional role in promoting gender equality must never be forgotten.

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- w* [2014] eKLR at para. 26
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