Elections Observation Group

CREDIBLE, PEACEFUL, FREE AND FAIR ELECTIONS

REVISITING KENYA'S POST 2010 ELECTORAL SYSTEM:

A CALL FOR REFORMS

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10 YEARS ANNIVERSARY OF WATCHING THE BALLOT

Elections Observation Group

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~Canon Gathaka

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ABBREVIATIONS

AG:	Attorney General
CAJ:	Commission on the Administration of Justice
CIC:	Commission on the Implementation of the Constitution
CIC:	Constitution Implementation Committee
CMD:	Centre for Multi-party Democracy
ELOG:	Elections Observation Group
FIDA:	Federation of Women Lawyers
CKRC:	Constitution of Kenya Review Commission
CoE:	Committee of Experts
COK:	Constitution of Kenya
CREAW:	Centre for Rights, Education and Awareness
CRAWN:	Community Advocacy and Awareness Trust
CWRs:	County Women Representatives
IEBC:	Independent Electoral and Boundaries Commission
KHRC:	Kenya Human Rights Commission
KNCHR:	Kenya National Commission on Human Rights
LSK:	Law Society of Kenya
MCA:	Member of County Assembly
MP:	Member of Parliament
NGEC:	National Gender and Equality Commission
PWDs:	Persons with Disabilities

EXECUTIVE SUMMARY

Kenya's post 2010 electoral system is the product of major constitutional and legal reforms designed to make it more inclusive and participatory. The Constitution of Kenya 2010 is deliberate in transforming the electoral system and making it, in general, more proportional in representation and participation. This is a significant shift from the post-independence party system, and the subsequent multi-party democracy predicated upon the majoritarian or winner-take-all electoral system. However, despite the constitutional design that permits the shift towards a more proportional form of representation, the electoral system is predominantly majoritarian.

At the level of conceptualization and organization of the political wing of government, the Constitution ordains a presidential representative democracy founded on the majoritarian requirement of conferment of *"popular mandate"* upon the President. However, the electoral system that produces representatives to the bicameral Parliament (Senate and National Assembly) and the County Assemblies combines both aspects of the majoritarian system, and a variation of proportional representation. The composition of the Senate is through direct election of 47 Senators through the single-member constituencies, and indirect election through closed party lists for the 20 special seats. Similarly, the membership to the National Assembly is elected directly in the 290 single-member constituencies, and 47 single-gender constituencies (counties); and indirectly through closed party lists for the 12 special seats.

The membership to the County Assemblies are also elected directly through the 1450 single-member electoral units (wards), and indirectly through the closed party lists for the special seat members. The structure of the houses of representatives (Parliament and County Assemblies) is a deliberate constitutional design intervention intended to mitigate the problems of first-past-the-post or winner-take-all majoritarian electoral system, that has historically excluded women, youth, persons with disabilities, ethnic minorities and marginalized communities from political and public offices.

The architecture and design of the Constitution that is permissive and inclusive is not an abrupt maneuver or a pleasant happenstance in our constitutional framework. It is the outcome of decades of reform conversations consolidated in several constitutional reform reports. For instance, the Constitution of Kenya Review Commission (CKRC) in their Final Report approved at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005, recognized the need for legal reforms and social change if Kenya was to overcome the prejudices that make it difficult for the marginalized groups to participate in politics. Similarly, the Committee of Experts on Constitutional Review in their Final Report published on 10th October 2010, provided the justification why they recommended changes in composition of Parliament noting that, *"the new Parliament would be instrumental in fulfilling the requirements of good governance, equality and participation."*

While the constitutionalisation of *"identity politics"* has improved representation and participation of marginalized groups in public elective offices, experience from the 2013 and 2017 Kenyan general elections shows that full compliance with the constitutional threshold of representation of women, youth, persons with disabilities, ethnic minorities and marginalized communities in Parliament as well in political parties is still elusive.

ELOG commissioned this Research therefore to undertake a comprehensive review of the electoral system, and propose new legislative and policy reform interventions intended to drive the conversation of consolidation of identity politics or proportional representation from the minimum threshold towards the constitutional target. The Terms of Reference for this Research: undertake a general study of electoral systems and highlight their importance in a representative democratic governance; undertake a comparative analysis as well as single case studies of appropriate electoral systems and consequent systems of governance as practiced in other jurisdictions and the contexts in which they are practiced (sampling from commonwealth and developing democracies); undertake a detailed study of Kenya's electoral system since independence and the impact it has had on the credibility of electoral outcomes; highlight trends on electoral systems from the 1990s and highlight lessons that Kenyan can learn to inform the on-going debate on electoral reforms; and drawing from the best practices, propose practical recommendations on which electoral system and governance framework would work for Kenya given Kenya's socio, cultural economic and political context.

The Report is divided into eight parts: Part I provides the context of the review and reform conversation. It reproduces a brief historical account to the lead up to the changes introduced by the Constitution. It is important to put a finger on the pages of history of constitution making and the foundational justification for the reforms ushered in by the Constitution. This is important for identifying, safeguarding and deepening the Constitution's commitment to improved electoral system and processes. Part II is a brief reflection on Kenya's struggle with identity politics. This Section identifies reasons accounting for the exclusion of the marginalized groups such as women, youth, persons with disabilities, ethnic minorities

and marginalized communities from elective public offices.

Part III focuses on the post-2010 shift in the law. The Report interrogates the post 2010 shift in the law that provides the justification for an electoral system that is increasingly proportional. The Constitution has established the framework and threshold for proportional representation, and anticipates momentum towards achieving the constitutional target. Part IV provides a detailed review of the legal framework underpinning the Kenya's electoral system. Part V reviews judicial decisions relating to the electoral system. Whenever called upon, the judiciary has interpreted the Constitution in a progressive manner that has provided both the clarity and the momentum for implementation of the necessary laws intended to improve representation of marginalized groups. Part VI provides a comparative insights and lessons from South Africa. The Kenyan Constitution is identical to the South African Constitution in many ways. South Africa's electoral system therefore offers comparative lessons that could inform the reform conversations in Kenya.

Part VIII provides the justification for reforming Kenya's electoral system following the pathway ordained by the Constitution–deepening proportional representation. Part VIII provides reform proposals taking into account the historical context and the prevailing political, social and economic context.

The Report recommends a Mixed Member Proportional Representation that balances the majoritarian system and the proportional system of representation. The Report observes that the proper approach is to deepen the discourse on proportional representation, and not to weaken or take it away.

The Report recognizes the problem of heavy tax burden of as a result of a large Parliament and County Assemblies. It also recognizes the global trend in reorganizing electoral systems: for instance, South Africa and Italy have implemented proportional representation while keeping the size of Parliament relatively low. For example, South Africa with a population of nearly 60 million and an advanced economy has a National Assembly that ranges from 350 to 400 members. Italy, on the other hand, voted in September 2020 to slash the size of Parliament by one-third to save public money. The Report therefore recommends a reduction of the size of Parliament as the give a way without compromising on the constitutionally sanctioned proportional representation of marginalized groups. The recommendations, rationale and the consequential constitutional amendments are as follows:

1. RECOMMENDATIONS

1.1. Composition of the National Assembly

i) The National Assembly should consist of–

a. 210 members elected directly by the voters through the single-constituency system using the majoritarian system

b. The number of special seat members elected indirectly for proportional representation to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender

1.2. Composition of the Senate

ii) The Senate should consist of–

c. 47 members elected directly by the voters in the 47 counties using the majoritarian system

d. The number of special seat members elected indirectly for proportional representation to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender

2.0. THE RATIONALE

2.1. The Structure of the National Assembly

I. The proposal to adopt the Mixed Member Proportional Representation System for the National Assembly is well within the existing constitutional framework of creating a balance between the majoritarian system and the proportional system of representation. (Articles 81, and 97 of the Constitution)

II. The proposal to elect some of the Members of the National Assembly directly by the voters through the single-constituency system using the majoritarian system is consistent with the constitutionally ordained governance framework of a presidential representative democratic republic. (Articles 1(1) &(2), 4(1) of the Constitution)

III. The proposal to elect some of the Members of the National Assembly indirectly is consistent with the constitutionally ordained requirement for proportional representation and identity politics (ensuring representation of marginalized groups, persons with disabilities and the youth while complying with the requirement that no more than two-thirds of the membership of the National Assembly are of the same gender).

IV. The proposal to elect some of the Members of the National Assembly indirectly for proportional representation is consistent with the political and historical context of Kenyan elections. Kenya's patriarchal society and the predominant male culture almost always relegates women to the periphery of political and decision making processes, and elective public offices. Similarly, historical exclusion of women from productive spaces means that women have had lesser economic opportunities and less money to match the financial muscle of most male candidates in an election dominated by expensive election campaign financing.

V. The proposal to reduce the number of Members of the National Assembly elected directly by the voters using the majoritarian system, from 290 to 210 is consistent with the idea of reducing the tax burden on voter by cutting the number of representatives without weakening democracy or undermining the Constitution's core commitment of proportional representation and making all voices count.

VI. The proposal to reduce the number of elected Members of the National Assembly is also consistent with the global trend of slashing the size of Parliament. Italy voted in September 2020 to reduce the size of Parliament by a third. Comparatively, South Africa with a population of over 58 million and one of the largest economies in Africa, has a Parliament that consists of no more than 400 elected Members of the National Assembly.

VII. The proposal to abolish the 47 county women representatives and the current system of nomination of 12 Members of the National Assembly is for the reason that there is no rational justification to retain the extra seats when the composition of the National Assembly under the Mixed Member Proportional Representation System provides a fair system of representation of all voices.

2.2. The Structure of the Senate

I. The proposal to adopt the Mixed Member Proportional Representation System for the Senate is within the existing constitutional framework under of creating a balance between the majoritarian system and the proportional system of representation. (Articles 81 and 98 of the Constitution)

II. The proposal to elect some Senators directly by the voters through the single-constituency system using the majoritarian system is consistent with the constitutionally ordained governance framework of a presidential representative democratic republic. (Articles 1(1) &(2), 4(1) of the Constitution)

III. The proposal to elect some Senators indirectly is consistent with the constitutionally ordained requirement for proportional representation and identity politics (ensuring representation of marginalized groups, persons with disabilities and the youth while complying with the requirement that no more than two-thirds of the membership of the National Assembly are of the same gender).

IV. The proposal to elect some Senators indirectly for proportional representation is consistent with the political and historical context of Kenyan elections.

V. The proposal to abolish the current system of nomination of 16 women Senators, and 4 special interest Senators is for the reason that there is no rational justification to retain the extra seats when the composition of the Senate under the Mixed Member Proportional Representation System provides a fair system of representation of all voices.

3.0. CONSTITUTIONAL AMENDMENTS

The proposed changes to the structure of Parliament can only be effected through constitutional amendments. As it is, Articles 97 and 98 of the Constitution provide for the composition of the National Assembly and the Senate, respectively.

In respect to the National Assembly, the Constitution fixes the number of elected members of the National Assembly at 290 members, each elected by the registered voters of single member constituencies. The Constitution further establishes 47 single gender constituencies for women, each county constituting a single member constituency. The Constitution also creates 12 seats for nominated Members. In respect of the Senate, the Constitution the Constitution establishes the number of elected Senators at 47, each elected by the registered voters of the counties, each county constituting a single member constituency. The Constitution also provides for 16 nominated women Senators, and a further 4 nominated special seat Senators.

To alter the electoral units and abolish the seats of the 47 county women representatives, and the current system of nomination of 12 Members of the National Assembly; and to abolish the seats of the 20 nominated Senators a referendum is necessary. Article 255(1) of the Constitution provides that if the proposed amendment to the Constitution relates to sovereignty of the people and functions of Parliament, then the amendment shall be enacted subject to approval by the people in a referendum.

PART I: THE CONTEXT

The Constitution of Kenya 2010 is organized around the ideology of inclusion. The Constitution is deliberate that all voices must count in political and decision making processes. This ideology is not an abrupt maneuver or a pleasant happenstance in our constitutional design. Rather, it is a reflection of the quest for change and renovation of the past governance framework where citizens participated in governance based on rumors and guesswork. Kenya's representative democracy, traceable to the post-independence one-party system, to the multi-party democracy and up to the lead up to the promulgation of the Constitution of Kenya 2010, was largely concerned with organizing government at the ballot, with little concern as to whether elections produced a fair representation of voices. The idea that the electoral system and process ought to produce a more inclusive and representative outcome was not recognized in law or practice.

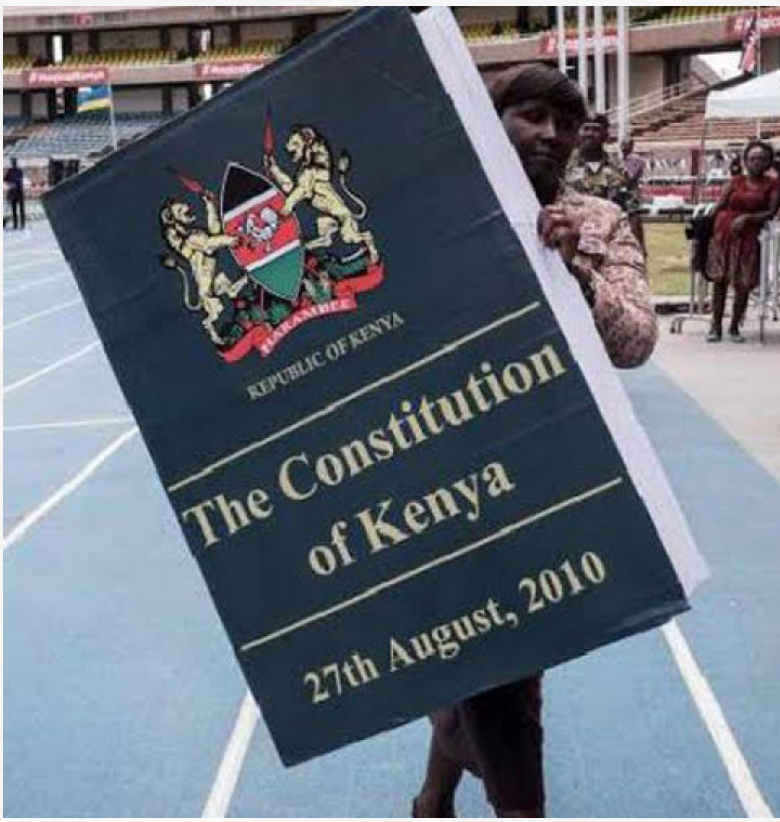
A historical inquiry into Kenya's post-independence and pre-2010 electoral system and processes reveals that the country was steeped in the tradition of first-past-the-post or winner-take-all electoral system. This means that only one candidate could be declared a winner based on a simple majority– the highest tally of valid votes cast. Looking at the general socialization of patriarchy and the predominant male culture, with the consequence that women were almost always relegated to the periphery, coupled with other factors that influenced election outcome such election campaign finance, electoral violence, and corruption, there is little to wonder as to why the electoral system and process produced more men than women. The electoral system relegated women to the periphery of political and public offices. The youth, persons with disabilities, ethnic minorities and marginalized communities were equally excluded from any meaningful representation and participation in political and decision making processes.

However, the promulgation of the Constitution of Kenya 2010 ushered in a new dawn, with the promise of revival and renewal. The Constitution is our article of faith–it replaced the old governance framework with a new system of governance to reflect the understanding that a more inclusive and participatory approach to governance is a necessary requirement in the quest for national renewal and improved technique of governance. The Constitution designed and ordained a paradigm shift in the electoral system and processes intended to deliver the promise of an inclusive and representative system of governance.

Ten years after the promulgation of the Constitution, and two general elections under the new Constitution, questions emerge as to whether the Constitution's transformative potential has been realized in as far as making all voices count is concerned. The simple and straightforward answer is no. Whereas the Constitution signaled a shift in the electoral system and processes, a review of the outcome of the 2013 and 2017 general elections reveals a false start on the realization of the constitutional target of inclusion and making all voices count. This is partly attributable to the less permissive electoral laws that do not advance the Constitution's core commitments. Further, there is a serious disjunction between the Constitution's core values and the prevailing political culture. Whereas the Constitution presupposes that its transformative superstructure will be implemented in the context of a matching culture of compliance, evidence from the elective public offices shows that the constitutional promise of inclusion and fair representation of voices may be a dream deferred.

Is there hope for renewal and realization of the Constitution's core commitment to a more inclusive and participatory electoral system and processes? **The answer is yes.** The Constitution has established the framework from which all the necessary legislative and policy interventions may be made to ensure inclusion and participation of all voices.

This brief historical context sets the stage for a more incisive analysis of Kenya's electoral system, assessing its weaknesses and proposing reforms areas to make it more robust and inclusive as was intended.



PART II: IDENTITY POLITICS

1.0. INTRODUCTION

Kenya has held presidential, parliamentary and local government elections every five years since independence in 1963 in accordance with the repealed Constitution of Kenya, 1969 as amended. For most of the independence period the country operated a one party system of government. This was brought to an end in 1992 when the country reverted to multiparty democracy following an amendment to the relevant section of the presidential and National Assembly Elections Act.

The first general election served as the perfect in¬dicator of the subordinate niche women were expected to occupy in Ken¬ya's electoral politics for decades to come. Indeed, despite the female population being the majority, albeit slightly, at 50.44%, the history of women disenfranchisement ashamedly started with the birth of the Republic. At independence, there was not a single female MP in the first legislature in 1963. Since then, the numbers have only been marginally improving: 4.1% female representation in Parliament in 1997, 8.1% in 2002 and 9.8% in 2007. As the table below demonstrates, women have continued to perform dismally in elections until the promulgation of the new Constitution. The table below provides the statistical outlook of the composition of Parliament since independence to date.

Table 1: National Assembly

Parliament	Date	Constituencies	Women Elected	Nominated Members Total	Nominated Members Women
1st Parliament	1963-1969	158	0	12	0
2nd Parliament	1969-1974	158	1	12	1
3rd Parliament	1974-1979	158	4	12	2
4th Parliament	1979-1983	158	5	12	1
5th Parliament	1983-1988	158	2	12	4
6th Parliament	1988-1992	188	2	12	0
7th Parliament	1992-1997	188	6	12	1
8th Parliament	1997-2002	210	4	12	5
9th Parliament	2002-2007	210	10	12	8
10th Parliament	2007-2013	210	16	12	6
11th Parliament	2013-2017	290	16	12	5
12th Parliament	2017-2022	290	23	12	6

Table 2: Senate

Parliament	Date	Counties	Women Elected	Nominated Members Youth/Total	Nominated Members Women
11th Parliament	2013-2017	47	0	2	2
12th Parliament	2017-2022	47	3	2	1

The reasons accounting for women's (and marginalized groups such as youth, persons with disabilities, ethnic minorities and marginalized communities) exclusion from high¬er elective offices are discussed the subsections below:

1.1. Patriarchal Culture

The republic emerged from a deeply patriarchal society run by council of elders with no significant input from women. In patriarchal society–the rule of fathers–male domination was institution¬alized in in all spheres of private and public life. In a patriarchal society, women were allocated duties such as cooking, washing, and other domestic chores which belonged to the private and reproductive spheres. On the other hand, men were allocated duties in the public and productive spheres, including making decisions in the public sector. Society defined the adult male as the ultimate decision-maker, controller of material resources and controller/user of women and children's productive and reproductive capacities. This meant that men as a class had power over women as a class, resulting in an oppressive and exploitative gender rela¬tions.

Patriarchy therefore had a strong influence on women candidate emergence. Systematic exclusion from the productive spheres meant that women had limited access to financial resources to support an election campaign. Even where they did have the money, negative cultural stereotypes meant that the public domain was an exclusively ale territory. The pervasive reality of male domination thus explains the historical gender imbalance in political leadership.

1.2. Electoral Violence

Elections in Kenya are habitually marked by violence since the restoration of the multi-party system in 1991. Further, it has been globally established that women and children suffer disproportionately from electoral violence. The culture of electoral violence thus creates a climate of fear upon female than male candidates. Threats to life, family or family effectively demoralizes and discourages women would have otherwise emerged as candidates to compete for political positions.

Further, lack of adequate political socialization for leadership that mani¬fests itself in women's exclusion from strategic political information and gen¬eral inability in the art of public oratory and populist campaigning; and wom¬en's marginality in mainstream party hierarchy and hence inability to shape rules of engagement which are defined and organized around male norms and values.

1.3. Gender Neutral Laws

The repealed Constitution of Kenya, 1969 as amended, at first glance, displayed the language of non-discrimination and inclusion. For instance, Section 70 of the Repealed Constitution stated thus: Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, or resi¬dence, or other local connection, political opinions, colour, creed or sex but subject to respect to the rights and freedoms of others and for the public interest. While this

provision on the face of it promoted equity, the failure by the Constitution to recognize the historical marginalization of women, and make special equitable provisions to cushion women from electoral and political vagaries meant that the law in fact reinforced de facto discrimination.

Gender neutral laws, in the context of a patriarchal society, resulted in gender discrimination. Lack of gender sensitive laws that take into account the historical and societal context and prejudices meant that women were systematically marginalized and actively suppressed in all spheres of public life.

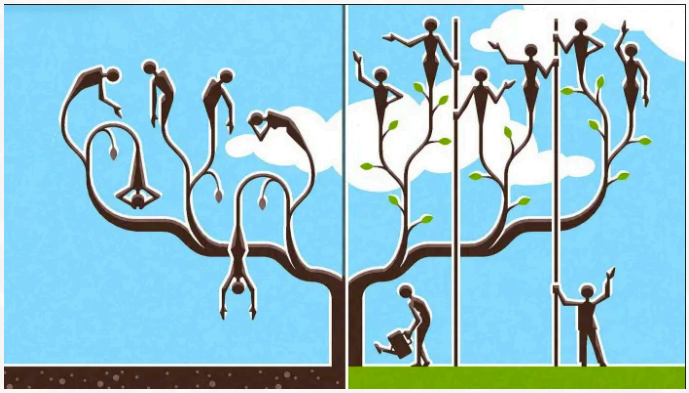
1.4. First Past the Post Contest

Kenya's first-past-the-post electoral system or winner takes all, in a predominantly patriarchal society made it difficult to achieve women inclusion in elective offices. The system was less equitable compared to the proportionate member

representation that provides for inbuilt *"gender top up"* mechanisms. Political contest requires an enormous outlay of social capital, yet the processes of economic, cultural, and political capital accumulation still favor men more than women, regardless of men's ethnic, religious, or class divisions. In addition, the first-past–the-post electoral system produced an overly adversarial and violence-prone political contest, which often favors men who can hire and retain violent gangs and run nocturnal campaigns to the detriment of women candidate.

1.5. Economic Exclusion

Kenya's deeply patriarchal society effectively means that women have been systematically excluded from the productive spaces and confined to the reproductive spheres. As a consequence, men have been the ultimate decision-makers and controller of material resources. As a result of this economic advantage, men have had greater economic opportunities and have been able to mobilize financial resources the expensive political campaigns. For instance, a glimpse into the IEBC gazetted 2017 general elections campaign finance regulations that outlined spending limits for different elective positions reveals that Kenya's election campaigns are very expensive and unaffordable for most women candidates.



Through the spending limits published by IEBC, presidential candidates were allowed to spend upto Kshs.5 billion in the campaigns. Candidates running for Governor in Nairobi were allowed to spend up to Kshs. 433 million in election campaigns. Since money is used to support candidate emergence, it simply means that men with more money had a better chance at reaching voters than women. Further, the negative influence of money in Kenya's elections is also well documented. Money has been used to alter public choice processes. This means that voters are lured with money as big money spenders move voters away from issue based campaigns.

Although Parliament suspended the implementation of the election campaign finance regulations, it was not because the ceilings were astronomical. Rather, it was because there was confusion on the implementation period since the law required candidates to open campaign finance accounts and set up expenditure committees eight months to the election, yet nominations had not been conducted, thus making it a practical and legal impossibility to enforce regulations.

1.6. Undemocratic Nominations

Party primaries or nominations in Kenya are often marred with corruption, bribery, and rigging. Most of the time, the outcome is predetermined by the party hierarchy dominated

by men. The belief that each party must field strong candidates is often interpreted to mean preference of men over women aspirants. The idea that men are more likely to withstand difficult campaign terrains while self-funding their campaigns as well as bank rolling party activities effectively locks out women aspirants, regardless whether the women competitors have been able to reach the voters. Similarly, direct nominations almost always benefit men than women. Further, internal party dispute resolution mechanisms are dominated by men who most of the time have already been coopted into the philosophy of male domination. It for these reasons that women candidates who endure the challenges to trounce male opponents at the primaries are often considered "tough" or "iron ladies" further reinforcing the perception that electoral contests are not for women.

2.0. CONCLUSION

The struggle for inclusion, representation and participation of marginalized groups such as women youth, persons with disabilities, ethnic minorities and marginalized communities in elective public offices formed one of the defining aspects of the Constitution of Kenya 2010. The Constitution sought to correct the historical exclusion of marginalized groups from elective public offices by designing a new framework with a threshold for representation while working towards the constitutional target of fair representation.

During the constitution review process, the need for legal and policy reforms to set the threshold for representation and participation of marginalized groups was a recurring theme. For example, the Constitution of Kenya Review Commission (CKRC) in their Final Report approved at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005, recognized the need for legal reforms and social change if Kenya was to overcome the prejudices that make it difficult for the marginalized groups to participate in politics.

Similarly, the Committee of Experts on Constitutional Review in their Final Report published on 10th October 2010, provided the justification why they recommended changes in composition of Parliament noting that, "the new Parliament would be instrumental in fulfilling the requirements of good governance, equality and participation."

The next section therefore examines the paradigm shift in the Constitution designed to correct the historical problems related with Kenya's electoral system that relegated marginalized groups to the periphery of political and decision making processes.

PART III: THE POST 2010 SHIFT

1.0. INTRODUCTION

Kenya's pre-2010 electoral system was based on a single member constituency based on geographical boundaries. The single member constituency also known as the ***"First-Past-the-Post," or "Winner-Take-All,"*** means that in an electoral contest, the candidate who emerges with the highest tally of valid votes cast is declared the winner. Under the First-Past-the-Post electoral system, a candidate running for President had to satisfy three requirements to be elected President, namely: a candidate had to win the most votes in a nation-wide count, secure at least 25% of the vote in five of any eight provinces, and also win the parliamentary seat in their own constituency.

However, the winning candidate was not required to win with an absolute majority of the valid votes cast, meaning 50% + 1 of the valid votes cast. For instance, in the 1992 and 1997 presidential elections, the incumbent President Daniel arap Moi of the ruling Kenya African National Union (KANU) won the presidential vote with less than half of the total votes cast – 37% and 40%, respectively.

In the National Assembly elections, Members of Parliament were similarly elected by the First-Past-the-Post system in each of the 210 single-member constituencies. In addition to these elected seats, 12 MPs were allocated to parties in proportion to their elected seat total. This means that if a constituency had 19 candidates, the successful candidate was the one who won the most of the valid votes cast. Again, the winning candidate was not required to win an absolute majority of the valid votes cast. This system returned results that contradicted the critical ingredient of majoritarian requirement of conferment of "popular mandate," because the leading candidate could be declared the winner with less than half of the total valid votes cast.

The architecture and design of the Constitution has now changed and enhanced the threshold for the winning candidate in presidential elections to require the winning candidate to have an absolute majority of the total votes cast of 50% + 1 of the valid votes cast. In addition, the winning candidate must garner at least 25% of the valid votes cast in more than half of the counties to be declared a winner.

At the parliamentary election, the Constitution has significantly altered the electoral system to make it more inclusive and participatory in a deliberate attempt to mitigate the problem of First-Past-the-Post electoral system. The constitution has established a bicameral parliament, that is, the Senate and the National Assembly. Although the bicameral parliament was designed to support the concept of devolved government, it has beneficial aspects to electoral system.

The Senate comprises of 47 Senators elected from the counties in what may still be considered as First-Past-the-Post to the core because the winning candidate is the one who garners the highest tally of valid votes cast. However, there is the additional requirement that 16 women Senators be nominated through closed party lists by political parties in proportion to their elected seat total. Similarly, the Constitution requires 4 Senators of opposite gender to be nominated through closed party lists by political parties in proportion to

their elected seat total to represent the youth, and persons with disabilities. Already, the Constitution is responding to the problem of identity politics by renovating and mitigating against the problem of First-Past-the-Post electoral system.

The National Assembly, on the other hand, comprises of 290 Members elected from the constituencies in a decidedly First-Past-the-Post contest because the winning candidate is the one who garners the highest tally of valid votes cast. There is no requirement that the winning candidate should garner an absolute majority of the valid votes cast. For instance, in the 2013 and 2017 parliamentary elections in Langata Constituency, the winning candidate was declared elected having garnered only 32% and 49% of the total valid votes cast. However, there is the additional requirement that 47 women representatives be elected to the National Assembly from single gender constituencies, being the counties. In addition, 12 Members are nominated through closed party lists by political parties in proportion to their elected seat total to represent the youth, and persons with disabilities. The design and composition of the National Assembly therefore marks a significant shift in correcting identity politics which was a niggling challenge in the First-Past-the-Post electoral system.

At the County Assemblies, the composition of the Assembly comprises of Members of County Assembly (MCAs) elected from each ward in another First-Past-the-Post electoral contest. However, the Constitution provides for such 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. There is the additional requirement of further nomination to ensure representation of marginalized groups, persons with disabilities and the youth to be nominated through closed party lists by political parties in proportion to their elected seat total.

Looking at the composition of the County Assemblies, the National Assembly and the Senate, it can be argued with a degree of certainty and evidence that the Constitution has reformed the electoral system and signaled the shift from the First-Past-the-Post to electoral system to what may be considered as a variation of the Mixed Member Proportional Representation. It is therefore incorrect to characterize Kenya's electoral system as strictly First-Past-the-Post to the core. Appreciating this shift is very necessary for any reform proposals because the case for reforms must be anchored on the need to deepen the philosophy of inclusive (identity) politics using the existing constitutional framework. Part IV of this report therefore provides a more incisive analysis of the shift in the legal framework underpinning Kenya's electoral system.

2.0. ELECTORAL SYSTEM AND ELECTORAL PROCESS DEFINED

It is important to distinguish the electoral system from the electoral process. An electoral system means the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. On the other hand, the electoral process refers to the management and administration of the whole electoral system. The electoral process consists of all activities designed to ensure that the electoral system functions in a manner which truly reflects the people's will. The components of the process include: the right to vote and stand as candidates; compilation of a register of voters; nomination of candidates; timing of elections; accessibility of voting arrangements; the electoral rules set to ensure free and fair elections; election campaigns and control of expenses; system of voting and counting of votes; supervision of the conduct of political parties and disqualification or penalties for candidates or political parties; smooth and dignified succession to office, system of settling electoral disputes; and election observation.

The electoral system must be well understood by voters if it is to facilitate their effective and meaningful participation in the electoral process. Complicated electoral system may disenfranchise many potential voters, especially the illiterate. The choice of an electoral system should also take into consideration the cost of running the system. If the cost is too high and out of a country's reach, the electoral system may plunge the country into chaos. The system must also take into consideration the uniqueness of the country's political system and history, social and demographic structure, ethnic diversity, education, cultural, religious diversity, the civil society structure, the economy, and so on, in its basic design and operation.

2.1. Types of Electoral Systems

Electoral systems vary. The most common ones include:-

2.1.1. Majoritarian System

The majoritarian system is also known as First-Past-the-Post

(FPTP) or Winner-Take-All System (WTA). The candidate who obtains the highest number of votes cast in an election, compared with his/her competitor, wins the seat and thus becomes the representative of the constituency. The winner needs to get only most of the votes and not necessarily an absolute majority. It is called FPTP simply because only one candidate can be declared the winner. First-Past-the-Post system is often based on a single member constituency based on geographical boundaries.

The single member constituency means that in an electoral contest, the candidate who emerges with the highest tally of valid votes cast is declared the winner. In the context of County Assembly, National Assembly and Senate elections, the electoral units are the wards, constituencies and counties respectively. It does not matter the number of candidates vying for office, only the candidate with the highest tally of valid votes cast is declared winner. Similarly, in the context of the gubernatorial and presidential elections, the candidate with the highest tally of valid votes cast is declared the winner. The electoral unit for gubernatorial election is the county, while the whole country becomes one big single constituency for purposes of the presidential election.

2.1.2. Proportional Representation (PR) System

In the proportional representation (PR) system, parliamentary seats are located proportionately to the votes cast for each party that wins seats in the Legislature. The idea at both the constituency and parliamentary levels is to ensure that the results reflect more closely the voters' wishes. The basic principle underpinning the system is that a party should receive seats in proportion to its share of the total vote. Typically, at the constituency level, there would be several Members of Parliament from each (large) constituency. Thus, if a party wins 10% of the votes in a Parliament of 100 seats, the party will be awarded 10 seats. Or where there are 5 members in a constituency, if a party wins 40% of the votes, it gets 40% of the seats, to be allocated to the top two candidates on its constituency list. At the national level, therefore, the make-up of Parliament would reflect the national support for the various parties.

The most commonly used variant of PR is the Party List Proportional Representation, in which people vote for a party rather than a candidate and the parties receive parliamentary seats in proportion to their overall share of the national vote. Thus, each party wishing to participate in the elections draws up its list of candidates up to the number of seats to be filled. The names on the list are arranged in order of preference. If the party wins only five seats, the first five party candidates on the list become the party's representatives in parliament. In this system, the party machinery draws up the list from among members.

2.1.3. Mixed Member Proportional Representation (MMPR) System

The MMPR system combines the features of the First-Past-the-Post System and the Party List Proportional Representation System in order to benefit from the advantages of both systems. In principle, one round of ballots is cast for candidates on a plurality basis and then a percentage of the legislative seats are allocated on the basis of a PR formula that reflects the strength of various political parties in an electoral contest.

The advantage of the MMP is that while it retains the proportionality benefits of PR systems, it also ensures that elected representatives are linked to geographical electoral units (wards, constituencies and counties). The system results in representatives linked with parliamentary seats determined by the election outcomes of both components, and creates room for a compensatory factor to counter the effect of dis-proportionality in plurality systems. Thus the MMP aims to broaden representation (through the PR component), retain accountability of elected representatives (through the plurality component) and, given its inclusiveness, can make a considerable contribution to political stability. Equally important, the MMP system may enhance representation of women, youth, persons living with disabilities, and the marginalized communities in the legislature, provided there is political commitment, and deliberate measures are put in place by the political leadership.

A historical inquiry into Kenya's political and electoral context reveals that Kenyans prefer to elect their representatives to Parliament and now County Assemblies directly at the ballot. Similarly, Kenyans prefer to elect the President directly at the ballot. It is this unique political history that informed the decision of drafters of the Constitution of Kenya 2010 to retain the aspect of the majoritarian system while also mitigating against the challenges of the Winner-Take-All System by proposing a variation of the Party List Proportional Representation System to produce what may correctly be identified as a shift towards the Mixed Member Proportional Representation. The next section therefore explores the post-2010 legal framework undergirding Kenya's electoral system.

PART IV: THE LEGAL FRAMEWORK

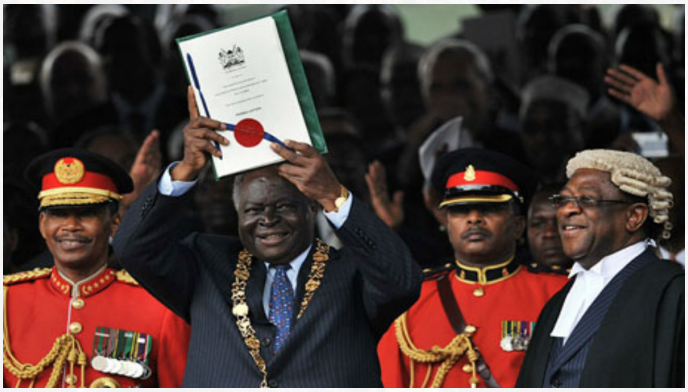
1.0. INTRODUCTION

There are a plethora of laws underpinning Kenya's electoral system. These laws include the Constitution of Kenya 2010; Independent, Electoral and Boundaries Commission Act No. 9 of 2011; Elections Act No. 24 of 2011 as amended by the Elections Laws (Amendment) Act of 2016 and the Elections Laws (Amendment) Act of 2017; Political Parties Act No. 11 of 2011 as amended by the Political Parties (Amendment) Act of 2016; and the Elections (General) Regulations 2012, as amended by the Elections (General) (Amendment) Regulations 2017.

Other electoral laws that are inextricably linked to the electoral system but undergird the electoral process include the Election Offences Act No. 37 of 2016; Leadership and Integrity Act No. 19 of 2012; Public Officer Ethics Act No. 4 of 2003; Public Service (Values and Principles) Act No. 1A of 2015; Data Protection Act No. 24 of 2019; and Election Campaign Financing Act No. 1 of 2017.

The purpose of this Section therefore is to examine the laws that define how votes are cast and translated into seats won by political parties and candidates, and the overall design framework of representation and participation of the people in a republican or participatory democracy.

1.1. The Constitution of Kenya, 2010



A review of the Constitution shows that the Constitution endorses a predominantly majoritarian electoral system consistent with the practice of conferring "popular mandate" to the President in a presidential democracy such as Kenya. However, the constitution is deliberate that representation in in the bicameral Parliament (Senate and National Assembly) and the County Assemblies should, in general, result in some level of proportional representation. Thus an understanding of the constitutional design is to strike a balance between the majoritarian system and proportional representation system is critical in deepening the Constitution's core commitment of making all voices count in political and decision making processes.

Article 81 of the Constitution outlines the general principles for Kenya's electoral system. The Constitution provides that the electoral system shall comply with, among others, the following principles: freedom of citizens to exercise their political rights; not more than two-thirds of the members of elective public bodies shall be of the same gender; fair representation of persons with disabilities; universal suffrage based on the aspiration for fair representation and equality of the vote; and free and fair elections which are by secret ballot; free from violence, intimidation, improper influence or corruption.

Article 88(4) of the Constitution establishes the Independent Electoral and Boundaries Commission (IEBC) and mandates it, among other functions, to monitor compliance with the provisions of the Elections Act in relation to nomination of candidates. Article 90(1) provides the foundational basis for proportional representation. It establishes special seats in the Senate and the National Assembly, as well as the County Assemblies and provides the formula for allocation of party list seats (special seats) as follows: "Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98(1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists." The Constitution mandates IEBC to ensure that each party list alternates between male and female candidates in the priority in which they are listed, and to ensure the lists reflect regional and ethnic diversity.

Articles 97 and 98 of the Constitution establish the composition and membership of Parliament. Article 97 of the Constitution provides that the National Assembly consists of two hundred and ninety (290) members, each elected by the registered voters of single member constituencies; forty-seven (47) women, each elected by the registered voters of the counties, each county constituting a single member constituency; twelve (12) 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 the Speaker, who is an ex officio member. The National Assembly therefore comprises of three hundred and forty-nine (349) elected and special seat members. This means that at least one hundred and seventeen (117) members of the National Assembly must be of opposite gender in compliance with Article 81(b) of the Constitution.

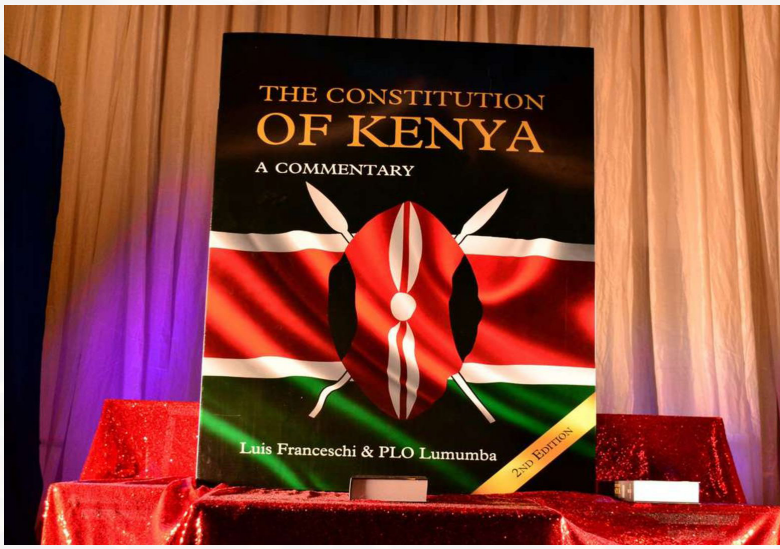
Article 98 of the Constitution provides that the Senate consists of forty-seven (47) members each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen (16) women members who shall be nominated by political parties according to their proportion of elected members of the Senate in accordance with Article 90; two (2) members, being one man and one woman, representing the youth; two (2) members, being one man and one woman, representing persons with disabilities; and the Speaker, who shall be an ex officio member. The Senate thus comprises of sixty seven (67) elected and special seat members. This means that at least twenty three (23) Senators must be of opposite gender in compliance with Article 81(b) of the Constitution.

Article 100 of the Constitution requires the promotion of representation of marginalized groups in Parliament, and directs Parliament to enact the implementing legislation. The Constitution identifies marginalized groups as: women; persons with disabilities; youth; ethnic and other minorities; and marginalized communities. Parliament is yet to enact the necessary legislation to implement Article 100.

However, with respect to the representation of women in Parliament, pursuant to Articles 81(b) of the Constitution, a number of Bills have been introduced in Parliament. These include: Constitution of Kenya (Amendment) Bill No 4 of 2015 by Hon. Aden Duale; Constitution of Kenya (Amendment) Bill No 50 of 2015 by Hon. Samuel Chepkonga; and Constitution of Kenya (Amendment) Bill No 143 of 2015 by Senator Judith Sijeny. Save for Hon. Chepkonga's Bill which provided for progressive implementation of legislation to ensure that the two-thirds gender principle is achieved, all the other Bills propose varying, though largely similar, formulae for the immediate attainment of the principle under Article 81(b). All these Bills, however, collapsed after Parliament failed to marshal the threshold of at least the two-thirds majority of the members present and voting to pass the constitutional amendment bills.

In the case of County Assemblies, Article 176 of the Constitution provides that there shall be a county government for each of the forty-seven (47) counties, consisting of a county assembly and a county executive. Article 177(1) of the Constitution provides that a county assembly consists of: members elected by the registered voters of the wards, each ward constituting a single member constituency; 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; the number of members of marginalized groups, including persons with disabilities and the youth; and the Speaker, who is an ex officio member.

Unlike the case of Senate and National Assembly where the Constitution deferred the formula for realization of the two-thirds gender principle to legislation to be enacted by Parliament, the Constitution provides a formula for implementation of the two-thirds gender principle in the County Assemblies. Article 177(2) of the Constitution provides the special seat members in each County Assembly shall be nominated by political parties in proportion to the seats received in that election in that county by each political party,



in accordance with Article 90. The filling of special seats in the County Assemblies shall be determined after declaration of elected members from each Ward.

In the case of presidential elections, the Constitution ordains the majoritarian system in a winner-take-all contest consistent with the practice of conferring "popular mandate" to the President in a presidential democracy.

Article 138 of the Constitution outlines the procedure for election of the President. Article 138(4) provides that a candidate shall be declared elected as President if the candidate receives more than half of all the (valid) votes cast in the election; and at least twenty-five per cent of the (valid) votes cast in each of more than half of the counties. The Constitution stipulates that if no candidate is elected, a fresh election shall be held within thirty (30) days after the previous election and in that fresh election the only candidates shall be:

the candidate, or the candidates, who received the greatest number of votes; and the candidate, or the candidates, who received the second greatest number of votes. The candidate who receives the most votes in the fresh election shall be declared elected as President.

Comparatively, the threshold for the winning presidential candidate is higher than what the repealed Constitution of Kenya, 1969 as amended, provided. The repealed Constitution required a simple majority, meaning the candidate who emerged with the highest tally of valid votes cast was declared the winner. Although the Constitution has enhanced the threshold for the winning presidential candidate, being an absolute majority of 50% + 1 vote of the valid votes cast, the electoral system that produces the President is still emphatically majoritarian.

The idea of special seats in Parliament and the County Assemblies, therefore, is designed to mitigate the problem of majoritarian system by incorporating a variation of proportional representation. The allocation of special seats in Kenya is founded on the idea of inclusion and participation that finds the pride of place in other provisions of the Constitution. For instance, Article 10 of the Constitution provides for the national values and principles of governance which include inclusiveness, non-discrimination and protection of the marginalized. Article 27 provides for equality and freedom from discrimination. In particular, Article 27(3) of the Constitution provides 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(4) further provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religions, conscience, belief, culture, dress, language or birth.

Article 27(6) requires the State, in order to give full effect to the realisation of the rights guaranteed under Article 27, to 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. Article 27(8) of the Constitution further requires that in addition to the measures under Article 27(6) of the Constitution, 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.

1.2. Political Parties Act

Section 23 of the Political Parties Act establishes the Political Parties Fund. Section 24 of the Act provides that the sources of the Fund shall include such funds not being less than zero point three percent (0.3%) of the revenue collected by the national government. Section 25 distributes the Fund as follows: ninety five per cent (95%) of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and five percent (5%) for the administration expenses of the Fund.

However, a political party is not be entitled to receive funding from the Fund if: the party does not secure at least five per cent (5%) of the total number of votes at the preceding general elections; or more than two-thirds of its registered office bearers are of the same gender. The total number of votes secured by a political party is computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies.

Section 26 of the Act provides that the moneys allocated to a registered political party from the Fund shall be used for purposes compatible with democracy including: promoting the representation in Parliament and in the County Assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities; and promoting active participation by individual citizens in political life.

Accordingly, political parties are required by the Constitution and the Political Parties Act to embrace, among others, inclusiveness and to comply with the two-thirds gender principle at all levels.

1.3. Elections Act

Section 34 of the Elections Act provides that election of members for the National Assembly, Senate and County Assemblies for party list seats (special seats) shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution. A political party which nominates a candidate for election under the special seats shall submit to IEBC a party list that complies with the terms set out in the Constitution. The party lists submitted to IEBC shall be in accordance with the constitution or nomination rules of the political party concerned. The party lists submitted shall be valid for the term of Parliament.

Section 36(4) of the Elections Act provides that within thirty (30) days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

The allocation of special seats to the Senate and the National

Assembly by IEBC must be proportional to the number of seats won by the party, while election to the special seats in the County Assemblies shall be in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

1.4. Election (General) Regulations 2012 (as amended)

Section 36 of the Elections Act sets out the procedures relating to the allocation of special seats. It provides for the number of candidates to be included in the party lists for the respective special seats. Regulation 54 (1) requires each political party to submit to the IEBC a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and sections 34, 35, 36 and 37 of the Act.

Regulation 54(8) further requires IEBC to publish the final party list in at least two newspapers with nationwide circulation. This is ensure transparency and accountability, and access to information.

1.5. Independent, Electoral and Boundaries Commission Act

Section 4 of the IEBC Act empowers IEBC to, among other functions, regulate the process by which political parties nominate candidates for elections. Similarly, IEBC is mandated to monitor and ensure compliance with the provisions of the Elections Act in relation to nomination of candidates. IEBC is also responsible for approving nomination rules by political parties.

As already pointed out, political parties are required by the Constitution and the Political Parties Act to embrace, among others, inclusiveness and gender equality. Political parties are also funded by the tax payers' money to promote representation of women and marginalized groups in Parliament. IEBC therefore a constitutional mandate to ensure that political parties nominate and present to the Commission the list of candidates nominated for elections that comply with the two-thirds gender principle. In the event of non-compliance by a political party, IEBC has the power to reject the party list and to require the omission to be rectified.

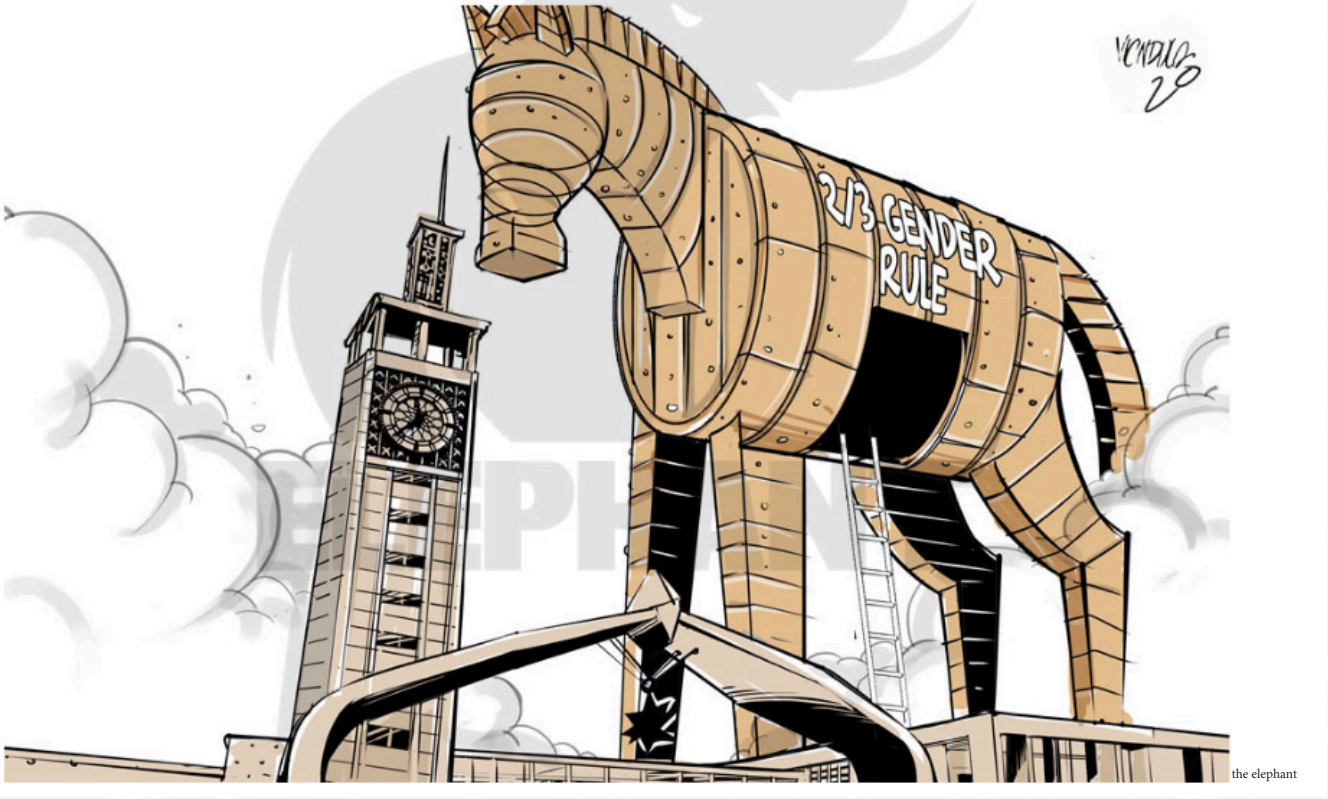
Similarly, IEBC has the power to enforce Article 90 of the Constitution by ensuring that each political party participating in a general election submits party lists for the special seats that alternate between male and female candidates in the priority in which they are listed.

2.0. CONCLUSION

The legal framework underpinning Kenya's electoral system privileges a balance between the majoritarian system and the proportional representation system. The constitutionalisation of "identity politics" is a defining aspect of the electoral system, and a reflection of Kenya's political history and constitution making process. The principle of gender equality and representation of marginalized groups, persons with disabilities and the youth was a dominant theme in the conversation around deconcentration of state power during the constitution making process.

The Constitution of Kenya Review Commission (CKRC) in their Final Report approved at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005, recognized the need for legal reforms and social change if Kenya was to overcome the prejudices that make it difficult for women to participate in politics. Similarly, the Committee of Experts on Constitutional Review in their Final Report in which their recommended changes in composition of Parliament noted that, *"the new Parliament would be instrumental in fulfilling the requirements of good governance, equality and participation."* Accordingly, the Committee of Experts retained the 47 seats set aside for women in the National Assembly in the Revised Harmonized Draft Constitution because *"these seats were important in establishing a minimum threshold towards the constitutional target."*

The historical and political dimensions of Kenya's electoral past have now been consolidated and translated into the legal framework defining the electoral system. Accordingly therefore, it is accurate to observe that the Constitution and electoral law establishes a framework for a mixed member proportional representation system to mitigate the problem of majoritarian system.



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PART V: JUDICIAL INTERVENTIONS

1.0. INTRODUCTION

The Kenyan judiciary has had occasions to pronounce itself on various questions relating to or impacting on the electoral system. A review of these decisions offers illuminating insights on the burden of implementation of the Constitution's transformative agenda. The Constitution revamped Kenya's electoral system replacing the first-past-the-post, winner-take-all majoritarian electoral system under the repealed Constitution of Kenya, 1969 as amended, and modifying it by introducing a new framework for an electoral system that is intended, to produce, in general, a more proportional representation. The Constitution also provided a timelines for enactment of key legislations necessary to implement the intended shift.

However, the Constitution hoped that state and public officers responsible for implementing its transformative framework would be men and women fully coopted into the reform philosophy. The Constitution did not anticipate that reformers, defenders, and implementers of the Constitution would mutate into active usurpers and violators of the very Constitution. The reality, however, is that enactment and implementation of key legislations necessary to drive proportional representation (of marginalized groups) from the minimum threshold towards the constitutional target, is all but stalled. In the circumstances, the courts have been invited to make judicial pronouncement on some of the questions relating to enactment and enforcement of these key legislations and provisions of the Constitution, respectively. This section undertakes a review of select court decisions.

1.1. Supreme Court Advisory Opinion on Whether to Implement the Two-Thirds Gender Principle Immediately or Progressively

Brief Facts of the Case: ***Supreme Court Advisory Opinion No. 2 of 2012***

This was an Application filed by the Attorney General at the Supreme Court in relation to the implementation of the two-thirds gender principle. The Advisory Opinion of the Court was sought on the issue of: Whether Article 81(b) of the Constitution that provides for the two-thirds gender principle requires progressive realization of the enforcement of the two-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013. In short, the Supreme Court was invited to tell Kenyans whether the two-thirds gender principle would apply immediately after the first general election under the Constitution of Kenya, 2010, or not. And if not, when would it be implemented?

The central area of concern was that there was no guarantee that the number of nominated women from the lists of nominees provided by the political parties will ensure that at least one-third of the members in each House will be of one gender. Further, if the two-thirds gender threshold was not

achieved at the ballot, there would be problem of correcting the deficit since the number of members of the National Assembly and the Senate is fixed by the Constitution. It was thus necessary to seek the Supreme Court's Opinion ahead of the 4th March 2013 general elections.

Since the Advisory Opinion was one of general public interest, several bodies sought and were admitted to interested-party status. These included 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). Similarly, 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 and International Centre for Rights and Governance (ICRG) were admitted as amici curiae (friends of the court).

The Decision

After listening to the parties, and reflecting on whether the two-thirds gender principle was to be implemented immediately or progressively, the Court arrived at the conclusion that the principle would be realized progressively. However, the Court stated that the legislative measures for giving effect to the two-thirds gender principle should be taken by 27 August, 2015.

1.2. High Court Petition Requiring the Attorney General to Prepare the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: ***Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR***

This Petition was filed by CREAW in 2015 ahead of the looming August 27th 2015 deadline by which Parliament ought to have taken necessary legislative measures to implement the two-thirds gender principle. The Petitioner challenged the failure by the Attorney General and the Commission on the Implementation of the Constitution (CIC) to publish a Bill to be considered and passed by Parliament in order to bring into force the two-thirds gender representation rule in the National Assembly and Senate.

The Petitioner argued that under Article 261(4) of the Constitution, the Attorney General, in consultation with CIC, had the constitutional obligation to prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament pass the legislation within the stipulated period. The Petitioner argued 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 A.G and CIC were yet to prepare the relevant Bill for tabling before Parliament for implementation of the two-thirds gender principle.

As a consequence of the failure by the A.G. and CIC, the Petitioner argued that there was therefore a threat of violation of the Constitution. To avert the violation, the Petitioners sought orders from the Court that:

a. A declaration that to the extent that the Attorney General and the Commission on the Implementation of the Constitution had failed to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of the two-thirds gender principle;
b. A declaration that the said failure was a threat to a violation of the Constitution and the Supreme Court Advisory Opinion; and
c. An order compelling the Attorney General and the Commission on the Implementation of the Constitution to prepare the relevant Bill for tabling before Parliament.

The Decision

The court agreed with the Petitioners that there failure on the part of the Attorney General and the Commission on the Implementation of the Constitution, and directed them to prepare the relevant Bill for tabling before Parliament. The court took note of the fact that there had been various processes undertaken in the previous year which ought to culminate in legislation for presentation to Parliament for consideration. With this in mind, the Court directed that the relevant Bill be prepared and submitted to Parliament within forty (40) days from the date of judgment.

1.3. High Court Petition Challenging the 11th Parliament's Failure to Pass the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: ***Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR (Petition No. 371 of 2016)***

This Petition was filed by the Centre for Rights Education and Awareness (CREAW), Community Advocacy and Awareness Trust (CRAWN TRUST), Kenya Human Rights (KHRC), Kenya National Commission on Human Rights (KNCHR), Federation

of Women Lawyers (FIDA Kenya), Law Society of Kenya (LSK), and the National Gender and Equality Commission (NGEC). The Petition challenged the failure by Parliament to pass the necessary legislation give effect to the two-thirds gender representation rule in the National Assembly and Senate.
At the core of the Petition were orders against Parliament as follows:

a. A declaration that the National Assembly and the Senate had failed in their constitutional duty to enact legislation necessary to give effect to the two-thirds gender principle;
b. An order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice;
c. An order that if the National Assembly and the Senate fail to enact legislation, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament;
d. A declaration that the failure by Parliament to enact the legislation amounted to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution;
e. A declaration that in any event, unless the two-thirds gender law is enacted and implemented before the general elections scheduled for 8th August 2017, resultant National Assembly and Senate, if non-compliant with the two-thirds gender principle would be unconstitutional.

The Decision

The court agreed with the Petitioners that Parliament had failed in its duty to enact legislation necessary to give effect to the two-thirds gender principle. The court therefore directed Parliament and the Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of the judgment, and to report the progress to the Chief Justice.

1.4. Appeal at the Court of Appeal Challenging the High Court Judgment that Found that the 11th Parliament had Failed to Pass the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: ***Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR***

The Appeal was filed by to challenge the High Court judgment in Petition No. 371 of 2016 that found that Parliament had failed to pass the necessary legislation give effect to the two-thirds gender representation rule in the National Assembly and Senate. At the core of Parliament's Appeal was that Parliament had in fact passed the law. The law that Parliament referred to was the Political Parties (Amendment) Act that amended Section 25 of the Political Parties Act to provide that political parties that incorporated women in party decision making organs would receive additional funding. According to Parliament this was an incentive to political parties to comply with the two-thirds gender principle.

The Decision

The Court of Appeal dismissed the Appeal and upheld the finding by the High Court that Parliament had failed in its constitutional and legal obligation to pass the two-third gender law.

1.5. High Court Petition Challenging the 12th Parliament's Constitutionality for Failing to Comply with the Law on Composition on the Two-Thirds Gender Principle

Brief Facts of the Case: ***Centre for Rights Education & Awareness (CREAW) & 3 Others v Speaker of the National Assembly & 3 Others [2017] eKLR, Petition No. 397 of 2018***

This Petition was filed by the Centre for Rights Education and Awareness (CREAW), Community Advocacy and Awareness Trust (CRAWN TRUST), and was later consolidated with a similar Petition filed by the Federation of Women Lawyers (FIDA Kenya). The Petition challenged the constitutionality of Parliament insofar as its composition was concerned. The Petition argued that the composition of Parliament did not meet the two-thirds gender principle as such was properly constituted as to be able to transact parliamentary business.

According to the Independent, Electoral and Boundaries Commission (IEBC), following the 8th August 2017 General Elections, out of a total of 290 Members of National Assembly elected at the Constituency level, only 23 are women. In addition to the 23, there are 47 women County Representatives who were elected to the National Assembly. Further, there are 6 women Members nominated to fill half the twelve (12) slots reserved for Members nominated by parliamentary political parties to the National Assembly.

At the Senate, out of the 47 elected Senators, only 3 women were elected at the ballot. A further, 16 women Members have been nominated by parliamentary political parties represented at the Senate. Similarly, 1 woman Member

has been nominated to represent the youth, and 1 woman Member nominated to represent persons with disabilities.

However, to meet the two thirds gender principle, the National Assembly requires one hundred and seventeen (117) Members to be of the opposite gender. So with the current count of twenty three (23) elected women Members of the National Assembly, forty seven (47) County Women Representatives, and six (6) women members to be nominated to fill half the twelve (12) slots reserved for members nominated parliamentary political parties, the total House count is seventy six (76). This creates a shortfall of 41 women in the National Assembly.

In the Senate, the threshold for the one-third-to-two-thirds gender-principle is twenty three (23) members of either gender. Three (3) women members were elected at the ballot, sixteen (16) women members to be nominated by parliamentary political parties, one (1) woman member to be nominated to represent the youth, one (1) woman member to be nominated to represent persons with disabilities. Thus the count for the Senate will be twenty one (21), creating a shortfall of two (2).

Accordingly, the Petition seeks orders against Parliament as follows:

a. A declaration that the composition of the National Assembly and the Senate has failed to meet the constitutional threshold of the not-more-than two thirds gender principle.
b. A declaration that the failure by Parliament to meet the not-more-than two thirds gender principle amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution.
c. An order directing Parliament to pass the necessary legislation to implement the two-thirds gender principle.
d. Any other or further orders that this court may deem fit to grant to meet

The Decision

At the time of publication of this Report, the Petition was pending hearing and determination.

1.6. High Court Petition Seeking to Compel Political Party List of Candidates for Elections to Comply with the Two-Thirds Gender Principle

Brief Facts of the Case: ***Katiba Institute v Independent Electoral and Boundaries Commission, Petition No.19 of 2017***

This Petition was filed by Katiba Institute against IEBC. The core argument by the Petitioner was that there was no obligation imposed on political parties to comply with the two-third gender rule in their nominations ahead of the general elections. As a consequence, the Petitioner sought orders as follows:

a. A declaration that political parties are bound by the constitutional provisions on two-thirds gender principle, and hence any action taken by them, including nomination process for candidates for members of Parliament, must comply with those provisions;
b. A declaration that IEBC is duty bound to ensure that nominations carried out by political parties meet the requirements of the two-third gender principle;
c. A declaration that IEBC is duty bound to reject any nomination list of a political party for its candidates for the 290 constituency based elective positions for members of National Assembly and 47 county based positions for the member of the Senate that do not comply with the two-third gender rule;
d. A order that IEBC to accept and process the nomination for inclusion as candidates to 290 constituency based elective positions for members of National Assembly and 47 county based positions for the member of the Senate for the 2017 general election from only those nomination list of political parties that meet the two-third gender rule.

The Decision

The court agreed with the Petitioner that political parties are bound by the two-thirds gender principle, and hence their nomination process for candidates for members of Parliament, must comply with the principle. Accordingly, the court directed political parties to take measures to formulate rules and regulations for purposes of complying with the two-thirds gender principle during nominations for the 290 constituency based elective positions for members of National Assembly and 47 county based positions for the member of the Senate. The Court also ruled that IEBC has the power to reject party lists that do not comply with the two-thirds gender requirement. This order takes effect in the 2022 general elections.

2.0. CONCLUSION

The courts have done well in providing clarity on the questions relating to proportional representation of marginalized groups. One of the greatest wins from the courts is the order that binds political parties to nominate candidates for all elective positions in Parliament and the County Assemblies in compliance with the two-thirds gender principle. However, lack of political goodwill remains a niggling challenge in the quest for proportional representation.

PART VI:

SOUTH AFRICAN EXPERIENCE

1.0. INTRODUCTION

South Africa's Constitution and constitution making process provided important insights and lessons to Kenya's constitutional review process which culminated into the Constitution of Kenya 2010. Indeed, architecture and design of the Constitution of Kenya 2010 is partly attributable to the design framework of the Constitution of the Republic of South Africa, 1996. Some of the shared features in the two constitutions are the cooperative or devolved governments, bicameral parliament, robust Bill of Rights, and ascendant judiciary. In terms of the electoral system, Kenya borrowed a variation of South Africa's electoral system while preserving its historical presidential representative democracy. A review of the South Africa's electoral system therefore offers illuminating insights that could provide useful lessons in the present public discourse on reforming Kenya's electoral system.

2.0. OVERVIEW

South Africa's electoral system utilizes a mixed-member electoral system. South Africa is a parliamentary democracy, with parliamentary institutions at both the national and provincial levels. At the national level, it has a bicameral parliament, consisting of a ninety (90) seat Upper House, the National Council of the Provinces (NCOP), and a four hundred (400) seat Lower House, the National Assembly. Parliament selects the head of state and government, the president, who then appoints the cabinet. Parliament can dismiss the president and/or cabinet through a vote of no confidence. At the municipal level, the South Africa's national electoral system utilizes a mixed-member electoral system, with ward-level seats elected according to plurality in single-seat districts, and municipality-wide multi-seat districts elected through closed-list proportional representation (PR).

3.0. STRUCTURE OF PARLIAMENT

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Section 42 of South Africa's Constitution provides that Parliament consists of the National Assembly and the National Council of Provinces. Both the National Assembly and the National Council of Provinces share the legislative mandate. The Constitution creates an important functional distinction between the National Assembly and the National Council of Provinces. The National Assembly is elected to represent the people, and to ensure government by the people. It does this by electing the President, and oversighting the Executive. In contradistinction, the National Council of Provinces represents the Provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

3.1. Composition of the National Assembly

Section 46 of South Africa's Constitution provides that Parliament consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that, among other, ***"results, in general, in proportional representation."*** However, the Constitution reserves the formula for determining the number of members of the National Assembly to legislation to be enacted by Parliament. Section 57A of South Africa's Electoral Act of 1998 outlines the system of representation in the National Assembly, in particular to the list of candidates; the allocation of seats; the designation of candidates from lists as representatives in those seats; and the filling of vacancies. Section 114 of the Electoral Act provides that the formula referred in Section 46(2) of the Constitution is set out in Schedule 3 to the Act.

Schedule 3 provides the formula for determining the number of members of the National Assembly. The composition of the National Assembly is determined by awarding one seat for every 100,000 of the population with a minimum of 350 and a maximum of 400 seats, taking into account available scientifically based data and representations by interested parties. The Independent Electoral Commission (IEC) is responsible for determining the number of seats.

Schedule 1A to the Act provides a detailed explanation of the system of representation to the National Assembly outlined in Section 57A of the Electoral Act. The system of representation requires the registered parties contesting an election of the National Assembly to nominate candidates for such election on lists of candidates prepared in accordance with the Electoral Act. The seats in the National Assembly are filled as follows:

i. One half of the seats from regional lists, submitted by the respective parties, with a fixed number of seats reserved for each region, as determined by the Commission,

for every election of the Assembly, taking into account available scientifically based data in respect of voters and representations by interested parties.

ii. The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.

The lists of candidates submitted by a party must together not contain more names than the number of seats in the National Assembly, and each such list must denote the fixed order of preference, of the names as the party may determine.

3.1.1. Formula for filling the one half of the seats to the National Assembly through regional lists

A party's lists of candidates must consist of both a national list and a list for each region; or a list for each region, with such number of names on each list as the party may determine, but must not contain more names than the number of seats in the National Assembly.

One half of the seats of the National Assembly filled from the parties' regional lists are allocated per region to the parties contesting an election, as follows:

1. A quota of votes per seat must be determined in respect of each region by dividing the total number of votes cast in a region by the number of seats, plus one, reserved for such region.
2. The result plus one, disregarding fractions, is the quota of votes per seat in respect of a particular region.
3. The number of seats awarded to a party in respect of a particular region is determined by dividing the total number of votes cast in favour of such party in a region by the quota of votes per seat for that region.
4. Where the result of the calculation referred to in paragraph (iii) above yields a surplus of seats not absorbed by the number awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties in respect of the relevant region, and any seat or seats in respect of that region not awarded in terms of paragraph (iii) is awarded to the party or parties concerned in sequence of the highest surplus.
5. The aggregate of a party's awards in terms of paragraphs (iii) and (iv) in respect of a particular region indicates that party's provisional allocation of the seats reserved for it under the "one half of the seats of the National Assembly that must be filled from the parties' regional lists" for that region.
6. The aggregate of a party's provisional allocations for the various regions in terms of paragraph (v), indicates its provisional allocation of the seats reserved for it under the "one half of the seats of the National Assembly that must be filled from the parties' regional lists" for all regions.
7. The allocation of seats in paragraphs of paragraphs (v) and (vi) becomes the final allocation of such seats to the various parties.

On the aggregate, one half of the National Assembly is filled by allocation of seats to the various parties based on the parties' regional lists for all regions.

3.1.2. Formula for filling the one half of the seats to the National Assembly through the national lists

The one half of the seats in the National Assembly to be filled from the national lists submitted by the respective parties is allocated to the parties contesting an election, as follows:

1. A quota of votes per seat must be determined by dividing the total number of votes cast nationally by the number of seats in the National Assembly, plus one, and the result plus one, disregarding fractions, is the quota of votes per seat.
2. The number of seats to be awarded to a party for the purposes of paragraph (iv) must, subject to paragraph (iii), be determined by dividing the total number of votes cast nationally in favour of such party by the quota of votes per seat determined in terms of paragraph (i).
3. Where (the result of) the calculation in terms of paragraph (ii) yields a surplus not absorbed by the number of seats awarded to a party concerned, such surplus competes with other similar surpluses accruing to any other party or parties, and any seat or seats not awarded in terms of paragraph (ii), must be awarded to the party or parties concerned in sequence of the highest surplus, up to a maximum of five seats so awarded: Provided that subsequent awards of seats still remaining unawarded must be made in sequence to those parties having the highest average number of votes per seat already awarded in terms of paragraph (ii) and this paragraph.
4. The aggregate of a party's awards in terms of paragraphs (ii) and(iii) must be reduced by the number of seats provisionally allocated to it in terms of provisional allocation of the seats reserved for it under the "one half of the seats of the National Assembly that must be filled from the parties' regional lists" for all regions.

3.2. Composition of the National Council of Provinces

Section 60 of South Africa's Constitution provides that the National Council of Provinces is composed of a single delegation from each province consisting of ten (10)

delegates. The ten delegates are: four (4) special delegates consisting of the Premier of the province and three other special delegates; six (6) permanent delegates appointed by the provincial legislature. In other words, the National Council of Provinces is elected indirectly (seconded) by the provincial legislatures.

4.0. STRUCTURE OF PROVINCIAL LEGISLATURES

South Africa has nine provincial legislatures, which range in size from eighty (80) seats in KwaZulu-Natal to thirty (30) seats in Free State, Mpumalanga, and Northern Cape. Provincial legislatures select provincial premiers, who select provincial cabinets, called executive councils. Provincial legislatures can dismiss executive councils and premiers through no-confidence votes.

Section 103 establishes the 9 provinces thus: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga Northern Cape, and North West. The provinces form the second tier of government. Section 104 of the Constitution establishes the Provincial Legislatures, with the legislative authority identical to Kenya's legislative authority of the Counties under the Fourth Schedule of the Constitution of Kenya, 2010. Section 105 of the Constitution provides that a provincial legislature consists of between 30 and 80 members, being women and men elected as members in terms of an electoral system that, among other, ***"results, in general, in proportional representation."*** A provincial legislature is elected for a term of five years.

Section 57A of South Africa's Electoral Act of 1998 outlines the system of representation in the provincial legislatures, in particular to the list of candidates; the allocation of seats; the designation of candidates from lists as representatives in those seats; and the filling of vacancies. Section 114 of the Electoral Act provides that the formula referred in Section 105(2) of the Constitution is set out in Schedule 3 to the Act.

Schedule 3 provides the formula for determining the number of members of the Provincial Legislatures. The composition of the Provincial Legislatures is determined by awarding one seat for every 100,000 of the population whose ordinary place of residence is within that province, with a minimum of 30 and a maximum of 80 seats, taking into account available scientifically based data and representations by interested parties. The Independent Electoral Commission (IEC) is responsible for determining the number of seats.

5.0. PROCEDURE FOR ELECTION OF THE NATIONAL ASSEMBLY AND PROVINCIAL LEGISLATURES

Elections for the National Assembly and the provincial legislatures occur concurrently every five years since 1994. Voters cast two ballots: one for the National Assembly and one for their provincial legislature. Concurrent elections, while the practice, are not constitutionally mandated. Election terms for the National Assembly are five years, but presidents can call for early elections if the National Assembly is dissolved prior to that. The NCOP is filled through indirect election via the nine South African provincial legislatures; its primary purpose is to represent provincial interests in national government. Each provincial legislature sends ten delegates, including the provincial premier.

The voters elect the National Assembly using a two-tier compensatory proportional representation system, with closed party lists. Parties submit ranked lists of candidates to the Independent Electoral Commission (IEC). Parties have complete discretion over their lists, and internal party procedures for generating lists vary. Most consult with local branches to gather preferences, but party leadership retains a veto in all major parties. Parties advertise the lists– which can include hundreds of names– prior to the election, but ballots do not include candidate names. Instead they feature the party name, symbol, and sometimes a photo of the leader. Voters cast one party vote and seats are allocated proportionally to parties according to the proportion of national votes won using the Droop quota with largest remainders (LR-Droop).

In the seat allocation process, parties can submit up to ten lists: a national list (which is optional) and nine regional lists (one for each province). In the regional tier, 200 total seats are distributed over nine provincial multi-seat constituencies proportional to provincial population. These provincial allocations are distributed to parties proportionally based on their provincial vote totals in the national election using LR-Droop. Parties then allocate their seats to members based on the regional list for that province. The seats a party allocates

from its regional lists are then summed across provinces and compared to the allocation of seats it is due based on its total national result. Any difference is topped up using the national list for the party.

The use of the two-tier list system affects how seats are distributed within parties, allowing more candidates to be seated from regional lists in provinces where the party has performed better, but does not alter the overall proportionality of the system as it is completely compensatory and the total number of seats a party receives reflects its performance in the national election. The system therefore acts as if it is one national district with a magnitude of four hundred. Large district magnitude, with no legal threshold for gaining representation, makes South Africa's electoral system one of the most proportional in the world.

The provincial electoral system also employs closed-list proportional representation, with LR-Droop. Parties submit provincial lists to the IEC along with their national and regional-to-national lists. Election terms are five years, but elections can be called early if the provincial parliament is dissolved. Provincial ballots resemble national ones, with party names, symbols, and images of leaders.

6.0. MUNICIPALITIES

South Africa has a third tier of government known as municipalities. The municipalities form the most local tier of government in South Africa. South African has 207 municipalities which fall into three categories. Metropolitan municipalities (category A) are large cities with high population densities and complex, developed economies. These include Cape Town, Durban, Pretoria, and Johannesburg. Local municipalities (category B) are smaller towns and surrounding rural areas. Most South African municipalities fall into category B. District municipalities (category C) combine and coordinate several local municipalities into a regional aggregation to capture economies of scale in service delivery. All category B local municipalities nest into overarching 44 district municipalities, and these two levels share responsibilities and authority for a particular area.

South Africa Municipal councils govern each type of municipality and range in size from three seats (in small local councils) to over two hundred (in large metros). Elections for councils occur every five years. Metropolitan and local municipalities employ mixed-member proportional (MMP) electoral systems, filling half the seats through single-seat plurality ward races, and the other half through municipality-wide closed-list proportional representation. Voters cast two ballots in metro or local elections: one for a ward councilor and one for a municipal-level closed party list. Independent candidates can run in ward races, but not for PR seats. The Droop quota for the PR race is determined by dividing the total number of all party votes in the PR and ward races by the number of seats in the council (PR and ward) not filled by independent candidates and adding one.

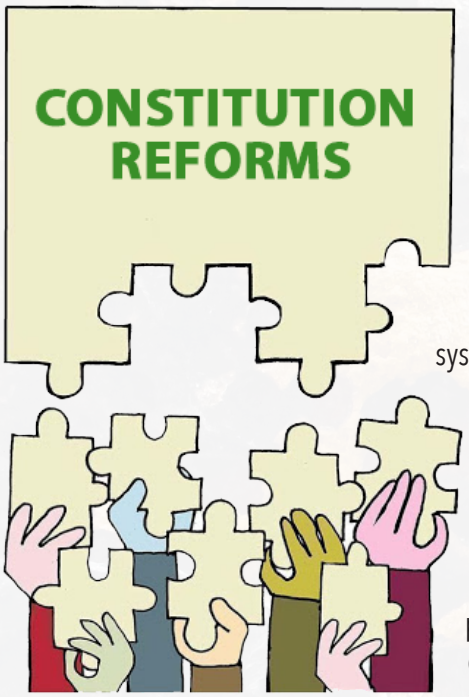
7.0. CONCLUSION

Although South Africa's electoral system seems complex and tedious, it is recognized as one of the most permissive in the world–combining a parliamentary system with an extreme form of proportional representation. Kenya's electoral system, however, compensates for its lack of perfect proportionality by mitigating the problem of majoritarian dominance with the fusion of identity politics–requiring representation of marginalized groups, persons with disabilities and the youth.

The Kenya's Constitution also demands enhanced representation of women by requiring that more than two-thirds of the members of elective public bodies shall be of the same gender. It is instructive to note that while South Africa is a parliamentary system, Kenya's constitutional framework ordains a presidential representative democracy. The point of convergence and the lessons for learning is that the conversation around proportional representation can only be deepened and not weakened.

PART VII: THE REFORMS

1.0. INTRODUCTION



Although the post-2010 constitutional and legal framework on elections have significantly altered and improved Kenya's electoral system, from a purely First-Past-the-Post electoral system to a more inclusive variation of the mixed proportional representation model, the problem of identity (inclusive and participatory) politics is yet to comprehensively addressed.

Experience from the 2017 general election reveals two problems at the presidential and parliamentary elections. At the presidential level, the outcome of the fresh presidential election following the nullification of the presidential election results by the Supreme Court, documents the limitation of the enhanced threshold that the winning candidate in presidential elections garner an absolute majority of the 50% + 1 of the valid votes cast. The 50% + 1 of the valid votes cast produced an outcome in which the winning candidate emerged victorious with a less than 40% of the total number of the registered voters, effectively undermining the critical ingredient of majoritarian requirement of conferment of "popular mandate." But this may be partly attributable to low voter turnout and is outside the scope of this Report's reform conversation.

The second problem is that despite the constitutional innovation of requiring 16 women to be nominated to the Senate through closed party lists by political parties in proportion to their elected seat total, and a further 4 Senators of opposite gender to be nominated through closed party lists by political parties in proportion to their elected seat total to represent the youth, and persons with disabilities, the problem of underrepresentation of all voices still persist. Similarly, at the National Assembly, the additional (new) requirement that 47 women representatives be elected to the National Assembly from single gender constituencies, being the counties; and a further 12 Members be nominated through closed party lists by political parties in proportion to their elected seat total to represent the youth, and persons with disabilities has not mitigated the problem of identity politics and disproportional representation.

The focus of the reform conversation lies in renovating Kenya's electoral system with a view of improving inclusion and enhancing proportional representation of all voices in the Senate and the National Assembly.

2.0. REFORM CONTEXT

Whatever constitutional and legislative interventions designed to correct the problem of disproportionate representation must be understood in the context of Kenya's underlying twin problem of patriarchy and campaign money that pre-existed the Constitution 2010, and which the Constitution has been unable to address. These are:

2.1. Patriarchy

The problem of patriarchy has been outlined in detail in the previous sections of this Report. But it is important to highlight the reality of patriarchy–which makes it difficult for women to get elected into leadership positions– which contradicts the constitutional requirement of proportional representation of all voices. This tension plays out more clearly in the implementation of the Article 81(1) of the Constitution that binds the electoral system to comply with the not more than two thirds gender principle that requires composition of the Senate and the National Assembly to be at least one third of either gender.

The two thirds gender principle means that the National Assembly, at the minimum, requires one hundred and seventeen (117) women MPs. But with the 12th Parliament (National Assembly) comprising of twenty three (23) elected women, forty seven (47) elected County Women Representatives, and six (6) nominated women, the total House count is seventy six (76), creating a shortfall of 41 women in the National Assembly.

Similarly, in the Senate, the threshold for the two thirds gender principle means that at least twenty three (23) Senators must be women. As it is, only three (3) women Senators were elected, sixteen (16) women

nominated, and two (2) women nominated to represent the youth and persons with disabilities. Thus the women count at the Senate is twenty one (21), creating a shortfall of two (2).

The failure to implement the two thirds gender principle now threatens dissolution of Parliament. In September 2020, the Chief Justice issued an Advisory to the President to dissolve Parliament for failing to enact necessary legislation to implement the two thirds gender principle in accordance with the Constitution and the Supreme Court Advisory Opinion No. 2 of 2012, and the High Court Judgment in Petition No.371 of 2016 (the Mativo Judgment). In 2012, the Supreme Court issued an advisory giving Parliament up to five (5) years, calculated from the date of promulgation of the Constitution, to pass the two thirds gender law. This period lapsed on 27th August 2015, yet Parliament had not enacted the law. Instead Parliament invoked Article 261(2) of the Constitution which permitted Parliament to extend the period for passing any legislation necessary to implement the Constitution by a further one (1) year.

However, by 27th August 2016, Parliament had not yet passed the necessary legislation. On 16th September 2016, a section of women rights organizations filed a Petition at the High Court seeking to compel Parliament to pass the necessary law. It is this Petition No. 371 of 2016, in which Justice John Mativo ruled that Parliament had failed in its constitutional duty to pass the two thirds gender law. The Judge further directed Parliament to the law within a period of sixty (60) days, failure to which the Chief Justice would advise the President to dissolve Parliament in accordance with provisions of Article 261(7) of the Constitution. Parliament failed yet again to comply with the orders of Justice Mativo, thus triggering the Chief Justice's Advise to the President to dissolve Parliament.

The Chief Justice rendered his advise more than three (3) years after Parliament failed to pass the two thirds gender law, raising constitutional interpretation questions whether it is the offending 11th Parliament that ought to have been dissolved or the serving 12th Parliament that is now the target of the Chief Justice's advisory. While these questions are pending determination in two fresh constitutional petition filed by 2 active citizens, and the Parliamentary Service Commission, the problem of underrepresentation of women may be explained, in part, in terms of the failure to pass the facilitative law, and partly in terms of Kenya's patriarchal society and the predominant male culture which effectively relegates women to the periphery of political and decision making processes.

2.2. Election Campaign Finance

The use of money in elections carries the potential of altering public choice processes. Excessive use of money may create a

compulsion for corruption, and this can improve the chances of a candidate winning an election. Put differently, in the context of Kenya's deeply patriarchal society where women have been systematically excluded from the productive spaces, men are more likely to outspend women candidates in election campaigns, and therefore more likely to be elected.

Article 88(4) (i) of the Constitution anticipated the problem of excessive use of money in election campaign and set out as part of the mandate of the IEBC to regulate of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. Similarly, Article 81(e) of the Constitution sets out the general principles for the electoral system to include, especially, free and fair elections which are free from violence, intimidation, improper influence or corruption.

The Constitution ordains an egalitarian approach to the use of money in elections by controlling the influence of money in election outcomes. Although money This Money is necessary in helping candidates to emerge–otherwise how do you know a candidate is running if they are not spending to reach the voter–a balance is needed to mitigate on the problem of excessive use of money which creates a compulsion for corruption. To this end, Parliament enacted the Election Campaign Financing Act 2013 to give the IEBC the statutory basis for setting contribution limits for candidates and political parties participating in an election.

Section 12 (1) of the Act requires IEBC, at least twelve months before a general election, to publish by notice in the Gazette, limits on total contributions; contributions from a single source; paid-up media coverage; and loan forming part of a contribution, which a candidate, political party or referendum committee may receive during the expenditure period. The single source contributions should not exceed twenty percent (20%) of the total contributions received by the receiving candidate. This is intended to control the possibility of one donor "owning" the candidate and creating the problem of

quid pro quo corruption if the candidate wins.

However, election campaign finance is yet to be regulated despite the fact that Kenya has held two general elections under the Constitution of Kenya 2010. By the time of the 2013 general election, no statutory guidelines had been enacted to give finer details on how the IEBC was to discharge this mandate. Statutory interventions came in in 2013 after the general election of that year. However, in 2017, the Election Campaign Financing (ECF) Act had not been operationalized for reason that the Regulations had not been approved by the National Assembly, and even they had been approved, there were legitimate concerns enforcing the EFC Act would not have necessarily produced the egalitarian outcome the Constitution had hoped to achieve–creating a balance of equity and fairness in electoral contests.

A perusal of the IEBC Gazettement on Spending Limits on 2017 Elections (Gazette Notices No. 6307 and No. 6309) reveals that IEBC was generous in setting the ceiling of the total contributions to candidates. According to the Gazette Notice, allowable contribution by a political party to its campaign financing account, which is also the contribution limit, was Ksh. 15 billion while a single source contribution to a party was Ksh. 3 billion. Allowable contribution limit by a presidential candidate to their campaign financing account, which is also the contribution limit, is Ksh. 5.3 billion. Parties and candidates could choose to self-fund without the need of fund raising. Contribution limit to a gubernatorial, senatorial, County Woman Representative seats was set at a maximum of Ksh. 433 million. An aspiring Member of the National Assembly could spend up to Ksh. 33.4 million while a contestant for a Member of the County Assembly (MCA) seat is allowed up to Ksh. 10.3 million.

The spending limits prescribed by IEBC are out of touch with the reality of most voters. For instance, why would a candidate be permitted to spend over Kshs. 30M to be elected as an MP of a poor constituency like Kibra? The ceiling Kshs. 30M has the potential of distorting the election outcome in a poor where most voters live on less than two dollars a day. Further, an MP earns about Kshs. 50M in the 5 year term, so spending more than half of that money on election campaign creates a terrible compulsion for corruption–it means MPs will be more concerned about fund raising for the next election than service delivery.

3.0. CONCLUSION

As long as Kenya's elections remain expensive and unaffordable, representation of women, youth, persons living with disability and the marginalized in the National Assembly and the Senate, as well as the County Assemblies will remain a mirage. As such conversations on reforming Kenya's electoral system must aim to correct or mitigate the twin problem of patriarchy and excessive use of money in election campaigns.

PART VIII: RECOMMENDATIONS

1.0. INTRODUCTION

The key reform issues necessary to make Kenya's electoral system and representation more inclusive, effective and meaningful must first recognize the disjunction between the law and the reality of Kenya's electoral context. It is this historical context should inspire the framing of solutions to renovating Kenya's electoral system. Ultimately, the constitutional framework of inclusion of all voices must influence the reform proposals and recommendations.

The Constitution ordains Kenya's system of governance as a pure presidential system. The Constitution requires the President to be elected directly at the ballot with an absolute majority of the total valid votes cast, meaning 50% + 1 of the valid votes cast. In addition, the President must have garnered at least 25% of the valid votes cast in more than half of the counties. For purposes of presidential election, the Constitution constitutes the entire country into one huge geographical electoral unit in what is decidedly First-Past-the-Post contest designed to confer the President the ***"popular mandate."*** As such, it is not possible to restructure Kenya's electoral system as to remove First-Past-the-Post system in its entirety without altering the critical ingredient of majoritarian requirement of conferment of "popular mandate" upon the President.

However, the Constitution also outlines the general principles of undergirding Kenya's electoral system. Article 81 provides that the electoral system shall comply with the following principles: freedom of citizens to exercise their political rights; not more than two-thirds of the members of elective public bodies shall be of the same gender; fair representation of persons with disabilities; universal suffrage based on the aspiration for fair representation and equality of the vote; and free and fair elections which are by secret ballot; free from violence, intimidation, improper influence or corruption. This means that in terms of parliamentary and county elections, the Constitution anticipates that the problems related to the majoritarian system will be mitigated to produce an egalitarian and inclusive representation.

Articles 97 and 98 of the Constitution further deepen the ideology of inclusion which is designed to mitigate the problems First-Past-the-Post contest. The requirement that 16 women be nominated to the Senate, and a further 4 Senators of opposite gender be nominated seat total to represent the youth, and persons with disabilities is a deliberate constitutional design to strike a balance between the majoritarian system and the proportional system. Similarly, at the National Assembly, the additional (new) requirement that 47 women representatives be elected to the National Assembly from women only electoral units, being the counties; and a further 6 Members be nominated to represent the youth, and persons with disabilities is a strong signal that the Constitution demands balance in fairness in Kenya's electoral system.

In total, the Constitution provides the framework for renovation

and improvement of Kenya's electoral system to make more inclusive and participatory. The constitutional signposts point towards a mixed member proportional system for Parliament and the County Assemblies. However, the Article 177 is definitive and conclusive insofar as composition of the County Assemblies is concerned. It provides for gender ***"top-ups"*** to ensure that no more than two-thirds of the membership of the Assembly are of the same gender. It also makes provisions for inclusion of marginalized groups, persons with disabilities and the youth. The recommendations provided in the next section therefore relate to improving the electoral system in relation to composition of Parliament.

2.0. RECOMMENDATIONS

2.1. Composition of the National Assembly

The National Assembly should consists of–

a. 210 members elected directly by the voters through the single-constituency system using the majoritarian system
b. The number of special seat members elected indirectly for proportional representation to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender

2.2. Composition of the Senate

The Senate should consist of–

c. 47 members elected directly by the voters in the 47 counties using the majoritarian system
d. The number of special seat members elected indirectly for proportional representation to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender

3.0. THE RATIONALE

3.1. The Structure of the National Assembly

i. The proposal to adopt the Mixed Member Proportional Representation System for the National Assembly is well within the existing constitutional framework under of creating a balance between the majoritarian system and the proportional system of representation. (Articles 81, and 97 of the Constitution)

ii. The proposal to elect some of the Members of the National Assembly directly by the voters through the single-constituency system using the majoritarian system is consistent with the constitutionally ordained governance framework of a presidential representative democratic republic. (Articles 1(1) &(2), 4(1) of the Constitution)

iii. The proposal to elect some of the Members of the National Assembly indirectly is consistent with the constitutionally ordained requirement for proportional representation and identity politics (ensuring representation of marginalized groups, persons with disabilities and the youth while complying with the requirement that no more than two-thirds of the membership of the National Assembly are of the same gender).

iv. The proposal to elect some of the Members of the National Assembly indirectly for proportional representation is consistent with the political and historical context of Kenyan elections. Kenya's patriarchal society and the predominant male culture almost always relegates women to the periphery of political and decision making processes, and elective public offices. Similarly, historical exclusion of women from productive spaces means that women have had lesser economic opportunities and less money to match the financial muscle of most male candidates in an election dominated by expensive election campaign financing.

v. The proposal to reduce the number of Members of the National Assembly elected directly by the voters using the majoritarian system, from 290 to 210 is consistent with the idea of reducing the tax burden on voter by cutting the number of representatives without weakening democracy or undermining the Constitution's core commitment of proportional representation and making all voices count.

vi. The proposal to reduce the number of elected Members of the National Assembly is also consistent with the global trend of slashing the size of Parliament. Italy voted in September 2020 to reduce the size of Parliament by a third. Comparatively, South Africa with a population of over 58 million and one of the largest economies in Africa, has a Parliament that consists of no more than 400 elected Members of the National Assembly.

vii. The proposal to abolish the 47 county women representatives and the current system of nomination of 12 Members of the National Assembly is for the reason that there is no rational justification to retain the extra seats when the composition of the National Assembly under the Mixed Member Proportional Representation System provides a fair system of representation of all voices.

3.2. The Structure of the Senate

i. The proposal to adopt the Mixed Member Proportional Representation System for the Senate is within the existing constitutional framework under of creating a balance between the majoritarian system and the proportional system of representation. (Articles 81 and 98 of the Constitution)

ii. The proposal to elect some Senators directly by the voters through the single-constituency system using the majoritarian system is consistent with the constitutionally ordained governance framework of a presidential representative democratic republic. (Articles 1(1) &(2), 4(1) of the Constitution)

iii. The proposal to elect some Senators indirectly is consistent with the constitutionally ordained requirement for proportional representation and identity politics (ensuring representation of marginalized groups, persons with disabilities and the youth while complying with the requirement that no more than two-thirds of the membership of the National Assembly are of the same gender).

iv. The proposal to elect some Senators indirectly for proportional representation is consistent with the political and historical context of Kenyan elections.

v. The proposal to abolish the current system of nomination of 16 women Senators, and 4 special interest Senators is for the reason that there is no rational justification to retain the extra seats when the composition of the Senate under the Mixed Member Proportional Representation System provides a fair system of representation of all voices.

4.0. CONSTITUTIONAL AMENDMENTS

The proposed changes to the structure of Parliament can only be effected through constitutional amendments. As it is, Articles 97 and 98 of the Constitution provides for the composition of the National Assembly and the Senate, respectively.

In respect of the National Assembly, the Constitution fixes the number of elected members of the National Assembly at 290 members, each elected by the registered voters of single member constituencies. The Constitution further establishes 47 single gender constituencies for women, each county constituting a single member constituency. The Constitution also creates 12 seats for nominated Members. In respect of the Senate, the Constitution the Constitution establishes the number of elected Senators at 47, each elected by the registered voters of the counties, each county constituting a single member constituency. The Constitution also provides for 16 nominated women Senators, and a further 4 nominated special seat Senators.

To alter the electoral units and abolish the seats of the 47 county women representatives, and the current system of nomination of 12 Members of the National Assembly; and to abolish the seats of the 20 nominated Senators require amendments to the Constitution, and approval by the people in a referendum.

Article 255(1) of the Constitution provides that if the proposed amendment to the Constitution relates to sovereignty of the people and functions of Parliament, then the amendment shall be enacted subject to approval by the people in a referendum.

LIST OF REFERENCES

CASES

1. Supreme Court Advisory Opinion No. 2 of 2012
2. Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR
3. Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR (Petition No. 371 of 2016)
4. Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR
5. Katiba Institute v Independent Electoral and Boundaries Commission, Petition No.19 of 2017
6. Centre for Rights Education & Awareness (CREAW) & 3 Others v Speaker of the National Assembly & 3 Others [2017] eKLR, Petition No. 397 of 2018

PUBLICATIONS

1. Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, 2005.
2. Human rights and democratic governance in Kenya: A post-2007 Appraisal, 2005, Pretoria University Law Press (PULP).
3. International Commission of Jurists, Gender Equality and Political Processes in Kenya, Strathmore University Press, 2016.
4. Mutunga, W., The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions.
5. Technical Working Group, Proposals on the attainment of the Two Thirds Gender Principle, 2015, available online.
6. Wanyande, P., Electoral Politics and Election Outcomes in Kenya, Africa Development, Vol. XXXI, No. 3, 2006, pp. 62–80

ANNEXURE

Cases that relate to the Two Thirds Gender Principle in Appointive Offices

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