**Gender Quota Legal Brief**

This brief reviews the current legal posture of the two-thirds gender rule in the 2010 Kenyan Constitution, which mandates that no more than two-thirds of the members of any elected or appointed public body be of the same gender. It traces the developments of the two-thirds gender rule legislation from its beginning in the 2010 Kenyan Constitution until the most recent implementation attempt in early 2019.

**Executive Summary**

The 2010 Kenyan Constitution contains several provisions on the inclusion and participation of marginalized groups in political life, including Article 27(8), which requires the State to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. The constitution contains provisions to implement this rule in the county assemblies by topping up the number of members of the less represented gender after an election until the necessary one-third quota is achieved. There is no corresponding provision on achieving the gender quota in the National Assembly.

In an advisory opinion requested by the attorney general and issued in 2012, the Supreme Court ruled that the National Assembly should enact legislation to implement the gender rule within five years of the constitution's adoption. Despite much public and legislative debate on the issue, the assembly has failed repeatedly to pass legislation to implement the principle. A bill was reintroduced in February 2019, but the National Assembly was not able to achieve quorum to hold a vote on it. The legislation's future remains uncertain. The High Court's recent rulings indicate a real possibility that the Parliament could be dissolved if it fails to pass implementing legislation.[1] If Parliament passes the pending legislation, the earliest the gender rule could be enforced is the next general election, scheduled for 2022.

**Implementation of the two-thirds gender rule in the Kenyan Constitution**

The 2010 Kenyan Constitution contains several provisions on the inclusion and participation of marginalized groups in political life. These include: Article 27(6), which mandates that the State take legislative and other measures, including affirmative action programs and policies, designed to redress any disadvantage suffered by individuals or groups because of past discrimination; Article 27(8), which states that in addition to the measures in Clause 6 above, 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; Article 81(b), which mandates that the electoral system shall comply with the principle outlined above, that not more than two-thirds of the members of any elective public body shall be of the same gender; and Article 56(a), which calls on the State to put in place affirmative action programs designed to ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life.

In 2012, the attorney general filed a petition with the Supreme Court asking for an advisory opinion on whether the two-thirds gender rule was immediately enforceable or if it should be progressively implemented/enforced.[2] The court reasoned that the gender rule, as outlined in Article 81(b), was a general principle when applied to the Parliament and should be enforced progressively. This

[1] Article 261(6)(7)(8) and (9) of the constitution.

[2] file:///C:/Users/donal/Downloads/ADVISORY_OPINIONS_APPLICATION_2_of_2012%20(1).pdf

view was enforced by the fact that Articles 97 and 98 of the constitution set the maximum number of seats in the National Assembly and the Senate.

The court contrasted this situation with that of the county assemblies, where no maximum number of members is set in the constitution and Article 177 calls for topping up the number of members in order to meet the gender rule. Therefore, the court found that the gender rule was immediately enforceable to the county assemblies through Article 177.

The court then reasoned, under the Fifth Schedule of the constitution, that since Parliament had been given five years to implement legislation promoting the representation of marginalized groups under Article 100, the same should apply to the gender rule. As such, the implementation deadline was set at Aug. 27, 2015. The court subsequently stated that the failure of Parliament to meet the deadline would be the basis for action, in accordance with the terms of Article 261(6)(7)(8) and (9) of the constitution, which calls for the High Court to order the Parliament to enact legislation within a specified timeframe and report progress to the chief justice of the Supreme Court. If Parliament fails to comply with the High Court order, "the Chief Justice shall advise the president to dissolve Parliament and the president **shall** dissolve Parliament."

As the five-year deadline approached and no parliamentary action was taken, the Center for Rights Education and Awareness (CREAW) filed a petition in the High Court seeking a declaration that Parliament had failed to enact legislation within the specified timeframe and an order directing Parliament to enact such legislation within the given deadline.[3] The petition was allowed and on June 26, 2015, the court ordered that legislation be tabled before Parliament within 40 days in order to meet the Aug. 27 deadline.

Before the expiration of the deadline, Parliament exercised its prerogative under Article 261(2) of the constitution to extend any deadline in the Fifth Schedule by one year, thus extending the deadline to Aug. 27, 2016. Parliament again failed to act before the deadline.

On Sept. 26, 2016, CREAW, joined by the Community Advocacy and Awareness Trust and then the Kenya National Commission on Human Rights, filed a petition with the High Court seeking an order under Article 261(5)(6)(7) of the constitution setting a new deadline and the dissolution of Parliament if the deadline was not met.[4]

On March 29, 2017, the court found that Parliament had "failed, refused and or neglected to perform their constitutional mandate" and issued the following orders:

> (a) A declaration be and is hereby issued that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender.
> (b) A declaration be and is hereby issued that the failure by Parliament to enact the legislation contemplated under article 27 (6) & (8) and 81 (b) of the constitution amounts

[3] http://kenyalaw.org/caselaw/cases/view/111102/
[4] http://kenyalaw.org/caselaw/cases/view/133439/

to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.
(c) An order of Mandamus be and is hereby issued directing Parliament and the Honorable Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of this order and to report the progress to the Chief Justice.
(d) That it is further ordered that if Parliament fails to enact the said legislation within the said period of SIXTY (60) DAYS from the date of this order, the Petitioners or any other person shall be at liberty to petition the Honorable Chief Justice to advise the President to dissolve Parliament.

Parliament once again failed to act before the deadline set by the court and recessed on May 28, 2017, until after the scheduled Aug. 8, 2017, general election. At that point the petitioners made a strategic decision not to return to court until after the results of the general election were known, in the hope that the case would be moot if the newly elected Parliament met the gender rule.

Unfortunately, the 2017 general election did not result in the election of sufficient women to satisfy the gender rule. In the National Assembly, a mere 23 women were elected in the first-past-the post contests. Together with 47 women's county representatives and six nominated women, the number of female parliamentarians totaled 76, creating a shortfall of 41 women to satisfy the gender rule.[5] In the Senate, three women were elected, 16 were nominated by the political parties, one was nominated to represent youth and another to represent persons with disabilities, bringing the total to 21. This fell short of meeting the one-third gender quota by two female members.

Subsequently, in September 2017, CREAW went back to court seeking a declaration that the National Assembly and the Senate had failed to meet the gender rule. They also sought an order directing that the first and only order of business for the new Parliament was to pass the necessary implementing legislation to enforce the gender rule. This request was denied on procedural grounds.

However, the prior High Court case was still pending, and since Parliament had missed the deadline, the petitioners can return to court and ask that an order be issued under Article 261(5)(6)(7) of the constitution, which could eventually lead to the dissolution of Parliament. The parties subsequently agreed to voluntarily extend the deadline for the newly elected Parliament to act by July 31, 2018.

Since this time, legislation has been introduced in Parliament concerning the gender rule. One bill proposed adopting the solution used in the county assemblies by topping up the number of women to meet the rule. A second proposal called for the creation of multi-member districts in which a certain number of seats would be guaranteed for women.[6] If adopted, these proposals would have amended the constitution.

[5] The number of members to the National Assembly is set at 290 plus 47 women's county representatives and 12 nominated members to be made up of marginalized groups for a total of 349.
[6] This second proposal was never formally introduced as a bill for parliamentary debate.

However, Parliament failed to pass either proposal. The petitioning parties again agreed to an extension until Sept. 30, 2018. As this deadline was not met, the petitioners can return to court and seek an order from the High Court that would eventually result in the dissolution of Parliament and subsequent elections. However, under Article 261(8) of the constitution, any Parliament elected after dissolution under Article 261(7) has another five years to address the gender rule as the deadline in the Fifth Schedule starts anew.

Despite much public and legislative debate on the gender quota in fall 2018, a vote on implementing legislation was deferred to 2019 after the National Assembly was unable to achieve quorum to hold a vote on the legislation. The bill was reintroduced in February 2019, but the assembly again failed to meet quorum. The legislation's future remains uncertain.

**Conclusion**

It is clear from the recent rulings of the High Court that there is a real possibility that Parliament could be dissolved if it fails to pass implementing legislation to uphold the two-thirds gender quota. Even if Parliament passes pending legislation and constitutional amendments are enacted, the earliest the gender rule can be enforced is the next general election, scheduled for 2022. As noted above, if Parliament is dissolved for failure to act, the new Parliament would be allowed another five years to implement the gender rule.

Most countries that have successfully implemented gender quotas have a proportional electoral system, in which the number and position of women on party lists can be legislated, resulting in a higher number of women getting elected. It is difficult to implement a gender quota in a first-past-the-post-system except through the topping-up method. Women's rights advocates, however, caution that efforts to amend the constitution risk weakening the current provisions to protect and strengthen women's political participation, as a constitutional referendum could result in the reversal of the gains made to date and removal of the two-thirds gender quota.

In any likely scenario – a continuation of the status quo or the Parliament is dissolved and a new election is held with an additional five-year cycle to achieve the gender rule – effective regulations and processes should be enacted to enforce compliance with the constitutional principles. The Carter Center strongly encourages the Office of Registrar of Political Parties to enforce political party compliance, as outlined in the Political Parties Act, through strict monitoring. Furthermore, the government and political stakeholders should cultivate a politically enabling environment that supports the Independent Electoral and Boundaries Commission, the National Gender and Equality Commission, and other relevant state bodies' ability to monitor and enforce such regulations and processes, as relevant within their mandates.