

Implementing the Constitutional Two-Thirds Gender Principle The Cost of Representation



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The National Women's Steering Committee
In partnership with
Institute of Economic Affairs

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Foreward

“The most important determinant of a country’s competitiveness is its human talent – the skills and productivity of its workforce.”

World Economic Forum Global Gender Gap Report 2013

This report was commissioned by the National Women’s Steering Committee in an effort to promote informed discussion and debate on one of the most important gender issues of our time and among the most significant of the Uhuru Kenyatta administration, as the first government elected under the Constitution of Kenya 2010.

Kenya has an ambitious vision which is contained in the national development blue print Vision 2030. This guiding document seeks to create a globally competitive and prosperous nation with a high quality of life by 2030. It is impossible to realize this laudable national vision without fully including the majority of the population in representation and public leadership and decision making positions.

Gender equality is not just a Constitutional requirement, it is an economic imperative for any country seeking to compete globally. As part of the broader constitutionally mandated changes to the governance framework, it is also a pre-requisite to the realization of Vision 2030 and the Second Mid Term Plan 2013-2017. It is in this context that we encourage public officials and the general public to read this report rather than as a stand-alone document.

There are changes which are by their nature incremental, progressive if you will, but even incremental change has a tipping point. At a time when it can be said ‘this is who we were’ and ‘this is who we are,’ Kenya is faced with just such a decision. With the August 27, 2015 deadline for all consequential legislation required by Constitution of Kenya 2010 fast approaching, Kenya must make a decision on whether we will try to hold back time or have the courage to leave the past behind and step boldly into the future.

This is an historic time and we are privileged to be a part of it. Kenyans will witness the audacity of visionary leaders who will dare to urge us forward and who understand that the present and future of successful nations demand adherence to certain basic principles, fidelity to the Constitution, integrity, equality and the rule of law. We will also witness a different type of leadership – one that is backward looking, led by people who live in fear of change and who are ruled by the past because they cannot imagine what lies before us is greater than our history.

This report is intended to inform the leadership and the people of Kenya by injecting into the not more than two-thirds same gender principle debate data to inform decision making. We hope to elevate public policy decisions beyond party politics, socialization and bias.

It is our ardent hope that through reading this report and the Constitution, Kenyans and their leaders will choose to align their actions with the Constitution of Kenya 2010 and the times. We must recognize the status quo for what it is: entrenchment of gender inequality and a failure to deal with what Hillary Clinton called “the great unfinished business of the 21st century.”

This isn't an issue for men or women, but an issue for humanity.

We wish to thank our partners Action Aid International Kenya for their unwavering support to the National Women's Steering Committee and their commitment to women's empowerment and advancement and for fully supporting this work. Our thanks also go to The Institute of Economic Affairs (IEA) for their commitment to enriching the dialogue through data and helping us advocate for better public policy decisions – those informed by the law and data.

Daisy Amdany



Executive Director
CRAWN TRUST
Host Organization and Convener of the NWSC 2014-2017

Executive Summary

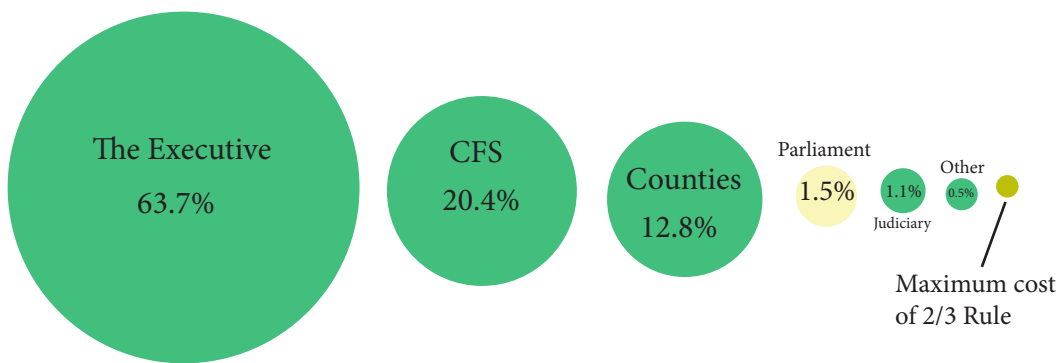
Inclusivity is a key value of democratic politics. It ensures that all identity groups have a voice in the policy making process, whether defined by gender, ethnicity, religion, region, socioeconomic status, age, or education. One dimension of accommodating diversity is actively ensuring the inclusion of women in the electoral system. In recent decades, there have been campaigns for an increase in representation of women across the globe, and many with positive and instructive outcomes. As Kenya seeks to implement a constitutionally required gender balance in the National Assembly and Senate, the national debate ought to be informed by the experiences of other countries, and the economic realities of Kenya itself.

Representation of women in Kenya's parliament has been and remains minimal. Only 9.8% of the tenth parliament was comprised of women, and only 20.7% of the eleventh (sitting) parliament is women — the lowest in East Africa. Underrepresentation of women in positions of power is untenable; a country simply cannot progress economically, politically or socially without half its citizens participating meaningfully in political spheres and critical decision-making processes. Clearly, there is progress to be made toward equitable gender representation in Kenya. Recognizing this, the Constitution of Kenya entrenches the concept in Article 27 (8): "Not more than two thirds of the members of elective or appointive bodies shall be of the same gender." Although the article is technically gender neutral, its intent in the current political context is to provide redress for the underrepresentation of women.

Kenya's constitution came into effect in 2010, but the requirement that not more than two thirds of members of elective or appointive bodies be of the same gender was to come into effect gradually. The current policy debate concerns how to implement the requirement in the face of too few women being elected to comprise at least one third of the National Assembly and Senate. A technical working group under the Attorney General is working with an August 27, 2015 deadline issued by the Supreme Court to pass legislation creating a mechanism for full implementation of the two-thirds requirement.

Unfortunately, many public figures, including women in both elected and nominated positions, have claimed that full implementation of the two-thirds requirement is expensive. Some have claimed that it is prohibitively expensive, and should not be implemented because it is too expensive. However, these individuals have failed to provide the cost of implementation that is, they argue, too high for the Kenyan taxpayer. Figure A lends perspective on the small fraction of the national budget estimated to be consumed by Parliament in 2014/15. The share of the entire national legislature, including both houses' recurrent and development costs, is only 1.5% of the national budget estimates for 2014/14.

Figure A: Estimates of National Budget Allocation for 2014/15



Source: 2014/15 Programme Based Budget

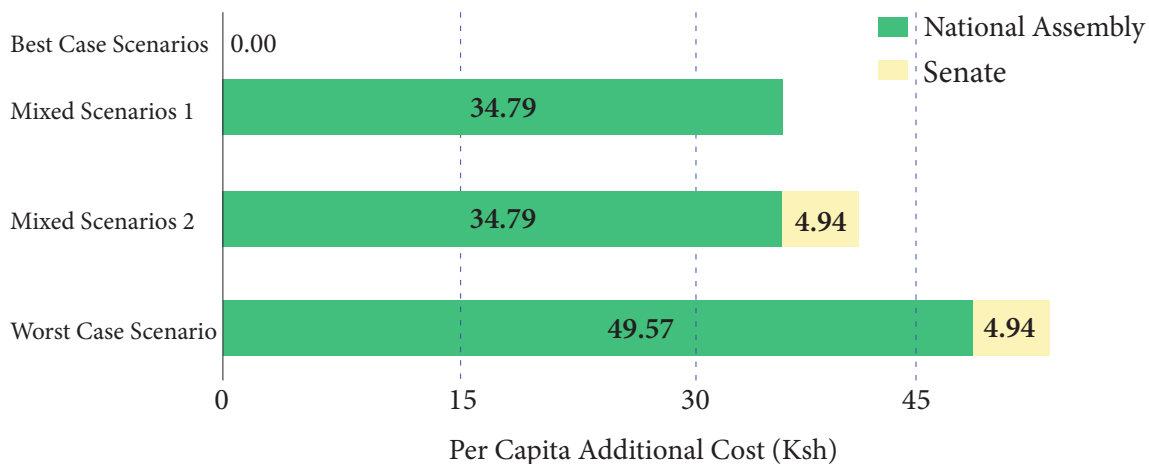
Note: CFS – Consolidated Fund Services

The conventional wisdom that Kenya’s parliament is already expensive is not the focus of this report. However, it is important to put into perspective in advance the portion of the national budget that would be affected by a potential increase in the number of seats in the legislature.

This report seeks to inform two aspects of the debate where improved knowledge can produce improved policy outcomes. Part I is a comparative analysis of legal approaches to women representation, and shows that equity in gender representation has been successfully achieved in other countries through affirmative action programmes. Despite having the greatest capacity to afford an affirmative action programme to increase the participation of women in parliament, Kenya is the only country in East Africa that has yet to achieve a one-third gender equity minimum. The parliaments of Tanzania, Uganda, Rwanda, and Burundi are all comprised of at least one-third women. Their successes in this area are direct results of quota systems to ensure a minimum threshold of gender equity using reserved seats for women, and have been shown to increase the participation of women outside of reserved seats as well.

Section II is a budget analysis and estimation of the cost of adding seats to the National Assembly and Senate should too few women be elected to satisfy the two-thirds requirement. It is particularly critical to informing the current debate: The findings of this report show that despite claims by many public figures, the expansion of houses of parliament to ensure the inclusion of women is not prohibitively expensive to the Kenyan taxpayer. This report provides verifiable evidence that has thus far been absent in the current debate: the cost of additional seats in the National Assembly and the Senate. The critical figures for policy debates are the cost of one additional seat in the National Assembly, and one additional seat in the Senate. This report does not speculate on the mechanism for filling additional seats, or the number of additional seats; these details will be subject to complex decision-making processes and election cycles. Instead, it provides scenarios based on possible (not necessarily likely) mathematical outcomes, guided by the current political realities, including the current gender composition of each house of parliament. Table A below summarizes the additional cost of these scenarios, presented in detail in Part II.

Table A: Cost of Additional Seats to the National Assembly and Senate to Comply with Two-Thirds Requirement



Source: *Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016*

Failure to craft and implement a mechanism to satisfy the two-thirds requirement by August 27, 2015, would be unconstitutional. Criticism of the mechanism for satisfying the constitutional requirement should not be directed at the value of affirmative action (which is in fact high, achievable and constitutionally mandated) or its costs (which are in fact low) as demonstrated by facts and analysis in this report.

SECTION I

A COMPARATIVE ANALYSIS
OF LEGAL APPROACHES
TO WOMEN
REPRESENTATION

1.1 Introduction

Gender equality is one of many protections guaranteed by the Constitution of Kenya. Article 27 recognizes that every person is equal before the law and has the right to equal protection and equal benefit of the law, ensuring freedom from discrimination in very certain terms. ¹Not only does Article 27 provide for protection against discrimination; it puts the full weight of the constitution behind initiatives aimed at the active promotion of the rights of marginalized groups and minorities, requiring the state 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.² This includes those measures to implement the requirement that not more than two thirds of the members of elective and appointive bodies shall be of the same gender.

Chapter Seven of the Constitution (Representation of the People) sets out how the right to vote is realized. It enumerates the general principles that provide the bedrock of the electoral system. Article 81 (b) provides the following: “Not more than two thirds of the members of the elective public bodies shall be of the same gender.” The constitution does not, however, provide specifically for how these requirements are to be met. Article 100 of the constitution goes further to oblige Parliament to enact legislation to promote the representation in Parliament of marginalized groups, including women.

1.2 Women and the Constitutional Composition of the National Assembly & Senate

Guaranteed representation of women is written into the composition of Kenya’s two national legislative houses. The composition of Kenya’s National Assembly is described in Article 97 of the Kenyan Constitution. Of its 349 seats, 290 are for those elected from Kenya’s 290 constituencies, 47 are for women elected to represent each county, and 12 seats for nominated individuals to represent youth, persons with disabilities and workers. This composition, itself a testament to the high priority of affirmative action toward equitable representation of women in Kenya, is displayed in Table 1 below.

Members Elected by Constituencies	290
Women County Representatives	47
Nominated Members	12
Total	349

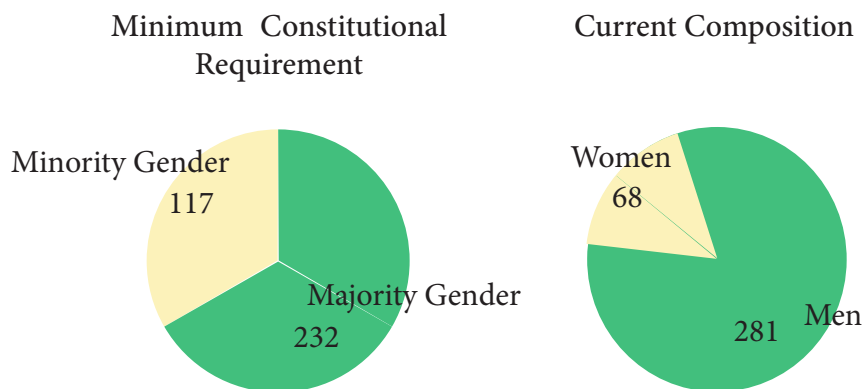
Source: *The Constitution of Kenya*

¹*Constitution of Kenya, Article 27(3).*

²*Constitution of Kenya, Article 27(6).*

If no single gender can constitute more than two-thirds of the National Assembly, then the minority gender must constitute at least one third of its membership. The minority gender in the National Assembly, then, must constitute at least 117 of its 349 seats. Figure 1 below shows the minimum threshold for compliance with the two-thirds gender rule and the current gender composition of the National Assembly.

Figure 1: Minimum Constitutional Requirement and Current (2015) Gender Composition of National Assembly.



Source: *The Constitution of Kenya*; Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

The composition of Kenya’s Senate is described in Article 98 of the constitution, and also provides for women’s representation. Of its 67 seats, 47 are for those elected from the 47 counties, 16 are reserved for women to be nominated by political parties, two seats for those representing youth (one woman, one man), and two seats for representatives of persons with disabilities (one man, one woman). Equitable gender representation is written into the nominated positions in the Senate, a contrast from the National Assembly, whose 12 nominated positions do not have a constitutionally prescribed gender allocation.

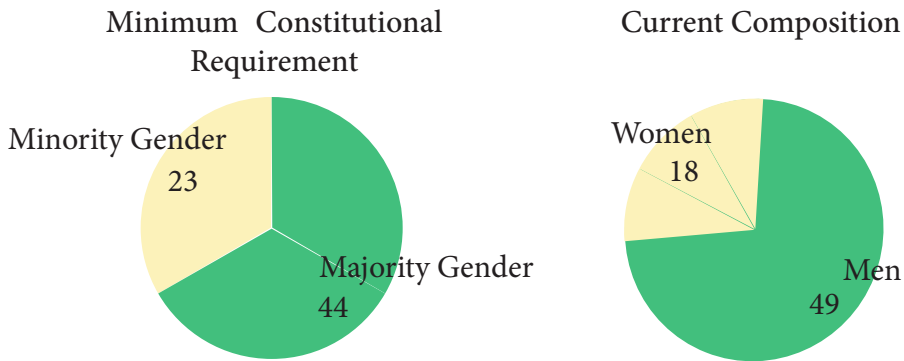
Table 2: Composition of the Senate (Article 98)

Members Elected by Counties	47
Nominated Women Senators	16
Nominated Youth Representatives	2 (one man, one woman)
Nominated Disabled Persons Representatives	2 (one man, one woman)
Total	67

Source: *The Constitution of Kenya*

To satisfy the two-thirds gender requirement in the Senate, at least 23 members must be of the minority gender. Currently, 18 seats are reserved by the Constitution for women: 16 nominated women, one youth representative, and one representative for persons with disabilities. In the 2013 election, the 47 county constituencies elected no women to the Senate, and currently women only hold the 18 seats reserved for women, or 26.87%. All 47 elected positions in the Senate are filled by men. Figure 2 below shows the minimum constitutional requirement to satisfy the two-thirds rule and the current gender composition of the Senate.

Figure 2: Minimum Constitutional Requirement and Current (2015) Gender Composition of the Senate



Source: *The Constitution of Kenya; Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.*

Neither house of parliament is currently in compliance with the two-thirds requirement. If the proportions of the 2013 results are to be a lesson, there is reason for concern that an insufficient number of women will be elected in 2017 to meet the requirement that they comprise at least one third of the National Assembly and Senate. This begs the question: *What if the electorate fails to vote in the requisite number of women at the next general elections?* Failure to bridge the gap could translate to a constitutional crisis. This section describes the legal background for the debate on the two-thirds rule.

1.3 The Supreme Court Advisory Opinion

The Attorney General, foreseeing a possible constitutional crisis in the National Assembly and Senate if the two-thirds gender rule were not achieved by the electoral process alone, sought the Supreme Court’s Advisory Opinion³ on the implementation of the principle. His application sought to bring to finality the matter that had previously been filed at the High Court in by the Federation of Women Lawyers, in which the court held that the principle was subject to progressive, not immediate, realization. In its opinion on the implementation of the two-thirds gender requirement, the Supreme Court held that if the measures required to ensure the crystallization of the two-thirds requirement into an enforceable right were not taken before the March 2013 elections, it would not be applicable at that time.

Consequently, the Supreme Court sought to answer the next emerging question: *If not applicable to the March 2013 general elections, at what time will the principle apply?* The core of their opinion was informed by Article 20(3) of the Constitution, which provides that in applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favors the enforcement of a right or fundamental freedom. The court developed the principle in Article 81(b) into an enforceable right, setting it on a path to maturation through progressive, phased-out realization. Guided by the terms of Article 100 on

³Supreme Court of Kenya Advisory Opinion No. 2 of 2012.

promotion of representation of marginalized groups, and by the Fifth Schedule, which prescribes the timelines for the enactment of required legislation to effect the full implementation of the constitution, the Supreme Court held that legislative measures for giving effect to the two-thirds gender principle under Article 81(b) should be taken by August 27, 2015. This is the date by which the current debate on the nature of and mechanism for implementation of the two-thirds gender requirement must be settled.

Following the advisory opinion issued by the Supreme Court on implementation of Article 81(b) of the Constitution, the Attorney General constituted the Technical Working Group to Implement the Supreme Court Advisory on the Two-thirds Gender Principle. The working group's primary task was to develop a realistic framework towards the realization of the two-thirds gender rule in political representation. The working group had representatives drawn from a number of relevant stakeholders. Among the terms of reference of the technical working group was to develop enabling mechanisms for the attainment of the two-thirds gender requirement, engage the relevant stakeholders, experts and institutions affected by the principle, and review the submitted proposals. Subsequently, the working group has issued a number of proposals to enable the implementation of the principle. Table 3 shows the proposals the working group has considered.

Table 3: Technical Working Group Proposals for Implementation of Two-Thirds Requirement

Proposal	Description
Gender balance through party list	<ul style="list-style-type: none"> Requires an amendment to Articles 97 and 98 of the Constitution Provision similar to Article 177(1)(b) for county governments mandating addition of special seats Political parties to nominate the members in proportion to the seats won in the general election Applies to both the National Assembly and Senate and guarantees the gender requirement is met
Doubling the 47 Women County Seats in the National Assembly	<ul style="list-style-type: none"> Increase County Women Representative seats to 94 Requires an amendment to Article 97 of the Constitution, The Elections Act and Political Parties Act Does not guarantee two-thirds gender requirement is met in the National Assembly (more women must be elected to meet two-thirds) Does not affect the Senate
Proportional Representation	<ul style="list-style-type: none"> Proposes to distribute additional Women County Representatives to all counties Increases the number of women to be proportionate to constituencies in each county and reflect the size of the population Guarantees two-thirds gender requirement at the National Assembly Does not apply to the Senate
Tripling the 47 Women County Seats in the National Assembly	<ul style="list-style-type: none"> Proposes to increase County women seats to 141 Requires an amendment to Article 97 of the Constitution, The Elections Act and Political Parties Act

	<ul style="list-style-type: none"> • Does not guarantee the two-thirds gender requirement is met • Does not apply to the Senate
Voting for a party ticket (“twinning”)	<ul style="list-style-type: none"> • Requires Kenyans to vote for closed party tickets each comprising two candidates of opposite gender • Applies to both the National Assembly and the Senate • If two-thirds gender requirement is not met at the elections, constituencies with the weakest winning ticket will be subject to affirmative action • Guarantees the gender requirement is met
Gender quotas for party strongholds	<ul style="list-style-type: none"> • Proposes to reserve women seats in party strongholds • Definition of ‘stronghold’ remains unclear • Requires a Constitutional amendment and amendment to the Elections Act • Applies to both the National Assembly and Senate • Does not necessarily guarantee the two-thirds gender requirement is met
Rotational seats for affirmative action	<ul style="list-style-type: none"> • Requires the clustering of the 290 constituencies into 73 clusters of 4 constituencies each • Each cluster is required to elect a woman at least once in four election cycles • Used for both the National Assembly and Senate • Requires amendment of Article 88(4) and 89 of the Constitution • Guarantees the two-thirds requirement is met
Reconfiguration of constituencies	<ul style="list-style-type: none"> • Requires a Constitutional amendment to reconfigure the constituencies • Proposes to reduce constituencies from 290 to 150 • Each constituency to elect two candidates, a man and a woman, making a total of 300 MPs • Guarantees the two-thirds gender requirement is met • Does not apply to the Senate
Best runner up	<ul style="list-style-type: none"> • After the elections, the IEBC calculates the number of women short to meet two-thirds gender requirement • In constituencies where a man won on weakest winning ticket, the man to be replaced with the strongest woman candidate in the constituency • Applies to both National Assembly and Senate • Guarantees gender requirement is met

Source: Technical Working Group for Implementation of the Two-Thirds Requirement

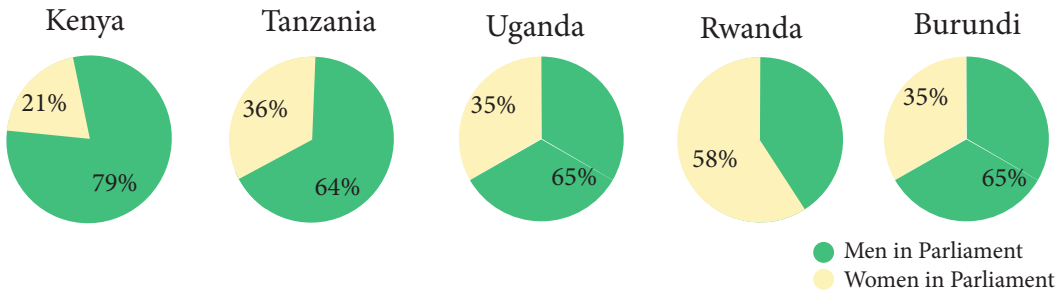
Of these proposals, the technical working group proposes the option on voting for a party ticket — or “twinning” — as their preferred mode of implementation. They argue that this option has no financial implications since it does not increase the size of Parliament and does not require amending the constitution. Its noteworthy that this proposal is not backed by any financial analysis; this is the gap that this study hopes to fill by estimating the additional cost of implementing the two-thirds rule given a number of scenarios.

Secondly, the technical committee did not exhaust all the statutory instruments available for implementing the two-thirds rule.

1.4 Comparative Perspectives

The low proportional representation of women in political and governance structures across the globe has necessitated the introduction of gender quotas in different countries to remedy underrepresentation. In 1995, the Beijing Process advocated for 30% women's parliamentary representation globally. The *Convention to Eliminate All Forms of Discrimination against Women* (CEDAW) also refers to a critical mass of 30-35% women's participation that should be achieved in governance structures for objective representation. Despite its relatively large economy, Kenya is the only country in East Africa that has not achieved gender equity in its legislature, measured by women comprising at least one third of its national legislators. Figure 3 below shows the percentages of men and women in East Africa's parliaments.

Figure 3: Representation of Women in Parliaments in East Africa in 2015



Source: Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

The pursuit to ensure gender equity in representation has raised a number of questions regarding the value addition in insisting that both genders are represented. Questions abound as to whether the gender of a person has any effect on their capacity as a representative and, if so, whether the women elected are expected to represent the party's goals or women's interests only. In Kenya, these questions have been answered solidly: The Kenyan Constitution enshrines the importance of equitable gender representation in Article 81(b): the two-thirds requirement for the National Assembly and Senate.

Kenya is not unique in its pursuit of gender equity in a political system in which women are grossly underrepresented. Out of the 37 countries that had more than 30% women in the lower houses of parliament as of November 2013, 30 (81%) use some type of gender quota. In particular, 14 countries (38%) use legislated candidate quotas, ten (27%) use voluntary party quotas, six (16%) use a reserved seat system, and only seven (19%) do not use any type of quotas. Many governments have used affirmative action to ensure the critical participation of women is strong in number and in contributions, and Kenya will need to do the same. This section presents examples from Kenya's neighbors (Rwanda and Uganda), and from Denmark, shown in table 4 below on comparative perspectives on gender representation. At various stages of the process of promoting gender equality, lessons from the experiences of these countries are valuable for Kenya.

Uganda: Women in Uganda are well represented in parliament as a direct result of an affirmative action policy for women since the sixth parliament (1996–2001). Today, women parliamentarians comprise 35% of Uganda’s legislature. The current composition of Uganda’s Parliament includes 112 reserved seats for women (31%) in addition to 238 constituency representatives and other special reserved seats. In the 2011 general election, 131 seats were won by women, including the 112 district women representatives; 11 women elected through constituency representatives, two youth representatives; two representatives of disabled persons; two workers’ representatives; and two representatives of the Uganda People’s Defense Forces.⁴

Rwanda: The 2003 Rwandan constitution included a mandated quota of 30% reserved seats for women in the legislature. The representation of women increased from 17% in 1995, to 49% in 2003, to 58% in 2013, the highest in the world. Half of the country’s Supreme Court Justices are women, and of the 24 women who gained seats directly after the quota implementation in 2003, many joined political parties and chose to run again and were elected. This is evidence that the quota system works as an “incubator” for driving women’s participation in leadership. Women appointed and elected to a range of public positions have been so successful in making a positive influence and getting elected that Rwanda will soon reach a point where its gender quotas become unnecessary.

Table 4: Comparative Perspectives on Gender Representation

	Uganda	Rwanda	Denmark
Size of Parliament	338	106	179
Number of Women in Office	135	61	68
Percentage Women	35	58	38
Constituency Reserved Seats	Yes	Yes	No

Source: Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.⁵

Denmark: Women’s representation reached a historic worldwide high in the Scandinavian countries — Denmark, Norway and Sweden — due to affirmative action quotas. Denmark, where the representation of women is currently 38%, no longer has legal quotas for gender representation. The quotas outlived their usefulness and were erased. The process of promoting equity in gender representation began with legislation in 1976 and saw continuous efforts to enlarge and improve the work on *de jure* equality between women and men. By 1996, they were no longer necessary as the participation of women in public and private spheres no longer required historical redress through quotas.

Kenya can learn lessons from Denmark, where in spite of the lack of constitutional entrenchment of electoral gender quotas, there exists a comprehensive legislative framework on gender equality with five parliamentary acts specifically on the subject. These include acts on equal opportunity, equal pay, equal treatment, equality in appointing members of public committees, and in appointing board members of the civil service. The constitution

⁴Global Database of Quotas for Women-Uganda, 2015. Available from: <<http://www.quotaproject.org/uid/countryview.cfm?CountryCode=UG>>. [23 April 2015].

⁵Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>

and the equality laws impose a duty on the public sector as well on the private sector to ensure respect for gender equality. This is also true for the political system, which has a duty to implement the equality acts and other *de jure* and *de facto* measures influencing the work for equality.

SECTION II

METHODOLOGY

The primary objective of this study is to estimate what the direct costs of achieving the 2/3rds rule would be in Kenya. In essence this is an attempt to understand the additional costs that would be borne by Kenyan tax payers in order to achieve a parliamentary result where no gender comprises more than 66.66% of the total composition in both the National Assembly and The Senate. What this requires is to calculate the marginal cost for a single member of the National Assembly and the Senate separately. We determined that the data that is required should be as close as possible to that which applies for the financial year 2013/14.

The main source of data for estimation of the marginal cost of a single member comes from the estimates of recurrent expenditure that were presented to the National Assembly in respect of the year 2013/2014. This publication contains the total expenditure by parliament for that financial year together with a breakdown according to the chart of accounts. We reviewed the chart of accounts by line item to determine which costs are fixed and which would vary according to the total number of representatives required for each house to achieve at least one third of the minority gender. For the purposes of calculating the additional cost of representation that ensures full compliance with the rule, it is only the variable costs that matter because the fixed costs of parliamentary representation remain unaffected.

The data sources for the computation of the cost of representation in the National Assembly and the Senate were as follows:

The Constitution of Kenya was used to determine the mandated composition of the Senate and the National assembly in terms of the members elected by constituencies, the women county representatives and the nominated members for the National Assembly on the one side and the Senate on the other. In determining the current gender composition in both houses, we used online resources from the Inter-Parliamentary Union and the website of the Kenyan parliament which contains the names of every member of the Senate and the National Assembly. Based on the current gender composition in the Senate and National Assembly, the Institute of Economic Affairs created four different scenarios detailing what additional seats are required to ensure compliance with the two-thirds gender requirement with the baseline as the current composition by the National Assembly. Regarding the Senate, two scenarios are created with the baseline as the current situation.

The cost of representation for both houses was estimated using the Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission 2013/2014. Although the Salary and Remuneration Commission's recommendations contained in the Kenya Gazette Notice in 2013 differed from the Parliamentary Service Commission's estimates—possibly unconstitutionally so—the estimates from the PSC reflect actual remuneration more accurately, and so these were used to estimate costs for this study. While the reports issued by the office of the Controller of Budget for 2013/14 confirmed the accuracy of the cumulative amounts projected by the estimates of the Parliamentary Service Commission, they are not disaggregated by function or programme leading to the reliance on the estimates.. National population figures were derived from estimates

published by the Kenya National Bureau of Statistics; Economic Survey 2014 showing that Kenya's population was 41.8 million. The added cost of additional seats in either house was based on costs that vary with the size of the elective body. Many fixed costs do not vary with the total membership of parliament. For instance, the Parliamentary Service Commission (PSC) faces a cost in maintain the infrastructure of parliament and this cost does not directly relate to the number of parliamentarians but is a fixed cost.

Joint Service and CPST costs distributions between the National Assembly and Senate are not necessarily equal as we have assumed. The Parliamentary Service Commission budget estimates provides cumulative values for these, not specific estimates for each house. However, the assumption of equal distribution between the houses is reasonable and any error is not consequential in calculating variable costs, nor cumulative (National Assembly and Senate) proportional changes in total costs for Parliament. Additionally, the Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016 incorrectly calculated the total Recurrent Estimates for 2013/2014 at 20,495,580,600 Ksh. The total is in fact 20,498,580,600 Ksh, a difference of 3,000,000 Ksh, and error of Kshs.-3,000,000 Ksh.

Table 5 below summarizes the items that were selected as part of the cost or representation for each elective position (at Senate and National Assembly), and the rationale for why it was selected.

Table 5: The Rationale and Assumptions for Variable Costs Used in the Costing of Representation

Budget Item	Rationale
Basic Salary	Because every Member of Parliament earns a basic salary, and it varies directly with the size of the membership of each house. An additional MP or Senator implies a direct increase in wages for that member
Personal Allowances Paid as Part of the Salary/ Reimbursements:	These allowances are paid to members as sitting allowances for the various house sitting and committee sittings, and payments for pre-existing medical conditions not covered by the insurance plan. While we think that the sizes of committees should not vary with the size of the legislature, we include these costs because of the quest to build in a bias towards the maximum costs considering that legislature may expand committees
Domestic and Foreign Travel and Subsistence:	An amount is set aside for each member to cater for their travel costs, such as per diem for both domestic and international travel while performing their formal duties. We make the same assumption as above that the number of trips or size of delegations need not vary by size of parliament but still accommodate the upper limit by considering this cost as variable
Insurance Costs	Because insurance costs are provided to each member, this factor is definitely a variable cost because it would change in proportion to the number of legislators
Hospitality Supplies and Other	While the hospitality costs are not disaggregated, they could vary with the number of legislators and are considered in the same way
Car Grant*	The Salaries and Remuneration Commission (SRC) acceded to a demand by the Parliamentary Service Commission that members of the

	national Assembly and Senate are entitled to a car grant. The effect of that concession is that each member of either house received a car grant and which is a cost. While this cost has no basis in Kenya's constitution and Public Finance Management law, we include it as part of the cost of representation for uniformity.
Committee Services	These are services provided to legislators who are members of parliamentary committees; this is variable since the size of a committee may change depending on the size of the house
Administration Cost	These are standard operations that must be carried out and as such, we factored in a 2% cost for administrative services that come with addition of representatives. This is an added cost having considered all the variable costs and adding a 2% premium to that total cost to account for any additions that may be necessary.

Having identified the data source and isolated the variable costs, the study computed the costs of full compliance under scenarios applicable to the National Assembly and The Senate. Thus the additional cost for each scenario is compared against the Baseline, which is the state of affairs in 2013 when the Senate and the National Assembly were formally constituted. In sum, the additional cost of representation emerges from variation from the baseline number.

SECTION III

THE COST OF FULL
IMPLEMENTATION OF THE
TWO-THIRDS GENDER
RULE

Introduction

This section describes possible scenarios and associated costs of full implementation of the Kenyan Constitution's two-thirds gender requirement in the National Assembly and Senate. Based on the advisory opinion described in the previous section, the method of achieving full compliance with the two-thirds rule may involve the addition of seats filled by the minority gender to both houses if such a number are not elected in 2017 to satisfy the rule. This section also addresses the gender composition of appointive bodies, which are also subject to the two-thirds gender requirement under Article 27 of the constitution. As gender equity in government cannot be achieved in legislative or elective bodies alone, it is critical to apply scrutiny to these appointive bodies as well.

Though the Attorney General's technical working group is considering mechanisms for implementation of the two-thirds requirement that do not add seats to the National Assembly and Senate, the scenarios in this section are useful for understanding what the cost of adding seats would be, should the chosen mechanism require it. Furthermore, it is important for the debate surrounding the possibility of the addition of seats to be informed by verifiable evidence of what such a choice for implementation would cost. Mechanisms for implementation that expand the membership of the National Assembly and Senate should not be ruled out because they are potentially costly without an understanding of what those costs will be. Estimating the cost of these additional seats requires an understanding of the current composition of the houses of Parliament, drawing scenarios for possible composition of those houses after the 2017 election, and establishing the cost of those scenarios using verifiable data on current costs of both houses of Parliament.

It is important to note that the Kenyan Constitution's two-thirds gender rule is gender neutral: "Not more than two-thirds of the members of elective public bodies shall be of the same gender." This means that neither men nor women may constitute a majority of more than two-thirds. However, the current political reality is that women are underrepresented in the National Assembly and the Senate. The following discussion and analysis of scenarios regarding the addition of seats, therefore, respects the gender neutrality of the Constitution, but recognizes the reality of the current situation. It will address the process of achieving full compliance with the two-thirds gender rule in terms of increasing the representation of women.

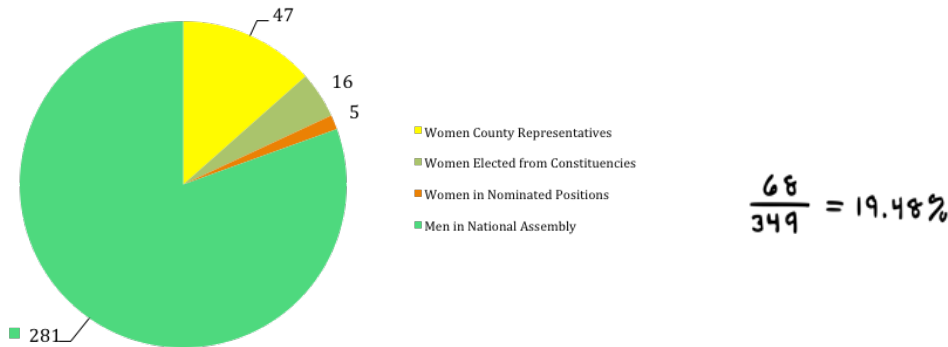
3.0 The National Assembly

Depending on the number of women and men elected in any election, the scenarios for the number of additional seats vary. For those proposals for mechanisms that require addition of seats to either houses of parliament, if fewer women are elected, more seats may be added, increasing the cost of implementing the two-thirds rule. If more women are elected, the cost is minimized to as little as zero. We can use the realities of the current gender composition of the houses of Parliament as a guide to estimate likely costs associated with likely scenarios relating to the addition of seats.

Understanding that women are currently the minority gender, this section will address the scenarios for ensuring that women constitute at least one-third of the membership (117 seats) of the National Assembly. The Constitution ensures that 47 members of the National Assembly are women already. For women to constitute the minimum threshold of 117 seats, an additional 70 women must be elected or nominated from the 290 constituencies and 12 nominated seats. This would ensure full compliance with the two-thirds rule without the addition of seats to the National Assembly.

The current composition of the National Assembly does not satisfy the two-thirds rule. In addition to the 47 County Women Representatives, only 16 women were elected from the 290 constituencies in the 2013 election, and women hold five of the 12 nominated positions. There is a total, then, of 68 women in the National Assembly, falling 49 short of the 117 required for full compliance with the two-thirds gender rule. Figure 4 below shows the gender composition of the National Assembly as of April 2015, the same gender composition of the Assembly since the March 2013 elections.

Figure 4: Current (2015) Gender Composition of the National Assembly



Source: Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

Based on the low numbers of women elected to the National Assembly relative to men, it is reasonable to believe that the results of the 2017 election may produce a gender imbalance such that the membership of the National Assembly will require expansion of seats reserved for women to fully comply with the two-thirds gender rule. The following are scenarios whose costs we estimate as a range of possible outcomes of the 2017 election. These scenarios are summarized in Figure 5 and Table 7 below.

Baseline: (Current Situation) There are 68 women in the National Assembly (47 Women County Representatives, 16 elected from constituencies, 5 nominated), and 281 men (274 elected from constituencies, 7 nominated). The percentage of women is 19.48%, and no seats have been added to the National Assembly. This is not in compliance with the two-thirds requirement.

Scenario 1: (Compliance by Election I) This is one of two possible outcomes of the 2017 election that would not require the addition of seats to the National Assembly. There would be a minimum threshold of 117 women in the National Assembly (47 Women County Representatives, 70 elected, 0 nominated), and 232 men. The percentage of women is 33.52%, and no seats need to be added to the Assembly. This would constitute full

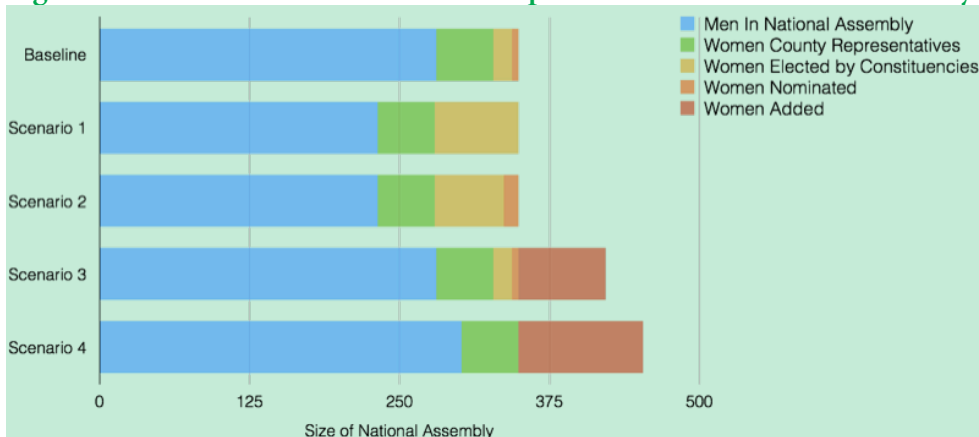
compliance with the two-thirds rule.

Scenario 2: (Compliance by Election II) This is the other of two possible outcomes of the 2017 election that would not require the addition of seats to the National Assembly. There would be a minimum threshold of 117 women in the National Assembly (47 Women County Representatives, 58 elected from constituencies, 12 nominated), and 232 men. The percentage of women is 33.52%, and no seats need to be added to the Assembly. This constitutes full compliance with the two-thirds rule. (The only difference between Scenario 1 and Scenario 2 is the number of women elected from constituencies and nominated. In both, the sum is 70, but Scenario 1 maximizes the number elected from constituencies and Scenario 2 maximizes the number of women nominated. In both, women occupy 117 of 349 seats, and full compliance is achieved without expanding the National Assembly.)

Scenario 3: (Current Composition) This can be viewed as a “likely” scenario if the numbers of women elected and nominated are assumed to remain the same. In 2017, the same number of women would be elected from constituencies (16) and nominated (5) as in the 2013 election. There would be 68 women (47 Women Representatives, 16 elected from constituencies, 5 nominated) and 281 men (274 elected from constituencies, 7 nominated). For full compliance with the two-thirds rule, an additional 73 seats reserved for women would be added. The total size of the National Assembly would grow to 422. Women would constitute 33.41% of the National Assembly. Because this scenario is based on the current gender composition of the National Assembly, consistent since the 2013 election, this would be the cost of representation if the two-thirds requirement had been implemented after the 2013 elections, or the cost of implementation today.

Scenario 4: (Worst-Case Scenario) This can be regarded as a worst-case scenario wherein no women are elected nor nominated to the National Assembly, except for the 47 County Women Representatives. There would be 302 men (290 elected from constituencies, 12 nominated). An additional 104 seats to be filled by women would have to be added to the Assembly to reach full compliance with the two-thirds rule such that the total membership of the Assembly would be 453. This is the most expensive, yet least likely scenario for the Kenyan taxpayer. Women would constitute 33.33% of the National Assembly.

Figure 5: Scenarios for the Gender Composition of the National Assembly in 2017



Source: Author's calculations.

Table 6 below summarizes the gender proportions of the four scenarios. All four scenarios are compliant with the two-thirds rule, shown by the Percentage Women row. The values in this row are shown in green if the scenario is compliant with the two-thirds gender requirement. The red value for the baseline shows that the current composition is out of compliance with the two-thirds requirement.

Table 6: Scenarios for the Gender Composition of the National Assembly in 2017

	Baseline	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Women Reps	47	47	47	47	47
Women Elected	16	70	58	16	0
Women Nominated	5	0	12	5	0
Women Added	0	0	0	73	104
Men In National Assembly	281	232	232	281	302
Percentage Women	19.48	33.52	33.52	33.41	33.33
Size of National Assembly	349	349	349	422	453

Source: Author's calculations.

To understand the cost of expanding membership of the National Assembly to comply with the two-thirds rule, we establish the costs that would vary with the addition of a single member. Table 7 below shows the Parliamentary Service Commission's recurrent cost estimates for the National Assembly for 2013/2014. Only some of these costs would vary with the addition of seats. For example, additional members would earn salaries, so basic salaries are costs that vary with the size of the membership, because they would increase with the number of members of the National Assembly. However, new members would not increase budget items associated only with the Office of the Speaker of the National Assembly, which are the same regardless of the number of members. Costs of such a fixed nature, which would not change with expanded membership, are not included in the additional costs of an expanded National Assembly. Budget items in Table 7 are marked with a "+" symbol if they are variable costs that would increase proportionally with the number of seats added. Budget items not marked with a "+" symbol are costs that would not vary with the addition of seats. It is clear from examining the table that few of the costs of maintaining the National Assembly would vary with the addition of new members to satisfy the two-thirds requirement. Most costs would remain the same. A detailed explanation of the selection of variable versus fixed costs is available in the Methodology section.

** Some values in this row exceed the minimum threshold of one third. If the total size of the National Assembly is not a multiple of three, the constitutional requirement of "no more than two-thirds... shall be of the same gender" requires that not less than one third be of the minority gender. That is, to satisfy the two-thirds rule, the percentage of the minority gender must exceed a perfect third [$1/3 = 33.3\%$] if it cannot be exactly one third, as is only the case when the total size of the assembly is a multiple of three.

Table 7: Recurrent Estimates for the National Assembly 2013/2014

Office of the Clerk	Ksh
Basic Salaries — Permanent Employees	240,785,006
Personal Allowance Paid as Part of Salary	550,375,490
Employer Contribution to Compulsory National Social Security Schemes	2,229,626
Employer Contributions to Social Benefit Schemes	64,200,000
Domestic Travel and Subsistence and Other Transportation Costs	21,558,880
Foreign Travel and Subsistence and Other Transportation Costs	58,431,081
Training Expense (Including Capacity Building)	25,000,000
Hospitality Supplies and Services	24,000,000
Specialized Materials and Supplies	5,000,000
Other Operating Expenses	5,000,000
Legislative Services	
+ Basic Salaries—Members of Parliament	841,200,000
+ Personal Allowances Paid as Part of Salary	3,309,840,000
+ Personal Allowances Paid as Reimbursements	100,000,000
+ Domestic Travel and Subsistence, and Other Transportation Costs	1,302,000,000
+ Foreign Travel and Subsistence and Other Transportation Costs	116,300,000
+ Hospitality Supplies and Services	12,000,000
+ Insurance Costs	440,000,000
+ Other Capital Grants and Transfers	2,450,000,000
Government Pension and Retirement Benefits	30,000,000
Office of the Speaker	
Domestic Travel and Subsistence and Other Transportation Costs	21,300,000
Foreign Travel and Subsistence and Other Transportation Costs	20,000,000
Hospitality Supplies and Services	4,500,000
Fuel Oil and Lubricants	4,000,000
Committee Services	
+ Domestic Travel and Subsistence and Other Transportation Costs	154,600,000
+ Foreign Travel and Subsistence and Other Transportation Costs	355,600,000
+ Hospitality Supplies and Services	135,000,000
Legal Services	
Domestic Travel and Subsistence and Other Transportation Costs	19,500,000
Foreign Travel and Subsistence and Other Transportation Costs	22,000,000
Hospitality Supplies and Services	40,000,000
Constituency Offices	
Basic Wages — Temporary Employees	816,660,000
Other Operating Expenses	700,000,000
Total	11,891,080,083

Source: *Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016. The table total varies from that given by the Parliamentary Service Commission by 42 Ksh, likely due to rounding error. The difference is not significant.*

Table 8 below shows the variable costs identified in Table 7 that are associated with representation in the National Assembly: basic salary, personal allowances, travel and subsistence, insurance cost, hospitality, car grant, committee services and administration costs. Some figures for individual members of the National Assembly are weighted averages, reflecting the different pay scales associated with different members. The cost of the car grant is divided by five to reflect the annual cost to taxpayers over a member's five-year term. The categories of remuneration to the members of the National Assembly included in Table 7 are not inclusive of other fixed costs. They are only those variable costs that would increase with the addition of seats to the National Assembly.

Table 8: Variable Costs of Representation in the National Assembly for 2013/2014

	Total for 2013/17 (Ksh)	Annual Amount per Senator (Ksh)
Basic Salary	841,200,000	2,403,428.57
Personal Allowances	3,409,840,000	9,742,400.00
Foreign & Domestic Travel/Subsistence	1,414,830,000	4,042,371.43
Insurance Cost	440,000,000	1,257,142.86
Hospitality Supplies and Others	12,000,000	34,285.70
Car Grant	488,600,000	1,400,000.00
Committee Services	645,200,000	1,843,428.57
Administration (2%)		414,461.14
Total	7,251,670,000	21,137,518.27

Source: *Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016; author's calculations.*

The sum of the costs that vary with the size of the membership of the National Assembly is approximately 7.25 billion Ksh annually. While there are other fixed costs associated with the National Assembly, those costs that vary with the number of members give us an estimate of the cost of adding one additional member to the National Assembly. The sum of the variable costs associated with a single member is 21,137,518.27 Ksh annually. To estimate the cost of adding many additional seats, as in Scenario 3 and Scenario 4, we multiply the cost of one additional seat per year (21,137,518.27 Ksh) by the number of seats added.

Table 9 summarizes the additional costs of Scenarios 1-4 using this method and gives the added annual cost per capita; that is, the cost per Kenyan per year of each scenario. Additionally, it gives the percentage increase in the total cost of the National Assembly, including fixed costs. The total cost of the National Assembly is higher than the sum of the variable costs of 7.25 billion Ksh from Table 8, because it includes many fixed costs

as well. (For 2013/2014, the Parliamentary Service Commission estimated this cost at 16,071,629,752.2 Ksh. See Table 10).

Table 9: Additional Annual Cost of Scenarios 1-4 for the National Assembly Based on 2013/2014 Estimates

	Women Seats Added	Annual Added Cost (Ksh)	Annual Added Cost Per Capita (Ksh)	Percentage Increase in Total Cost of the Senate
Scenario 1	0	0	0	0.00
Scenario 2	0	0	0	0.00
Scenario 3	73	1,543,038,834	34.79	9.60
Scenario 4	104	2,198,301,900	49.57	13.68

Source: Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016; and author's calculations. Population estimate used for per capita calculations: 44.35 million (2013). Source: The World Bank at <http://data.worldbank.org/country/kenya>.

Scenario 3 would cost each Kenyan an additional 34.79 Ksh per year; Scenario 4, about 50 Ksh per year. For perspective, Kenyans are currently spending 586.21 Ksh per capita on the whole of Parliament annually, including recurrent and development costs for both houses. That is, the legislative branch currently costs each Kenyan 586.21 Ksh per year. Table 10 below shows the Parliamentary Service Commission's estimates for total spending on the National Assembly and Senate for 2013/2014, from which the Table 9 per capita and percentage increase estimates were made. Total spending on the National Assembly is around 16 billion Ksh, and total spending on the Senate is about 8.3 billion Ksh. The total for both houses, then, is 24.5 billion Ksh.

Table 10: Estimate of Recurrent and Development Spending for National Assembly 2013/2014

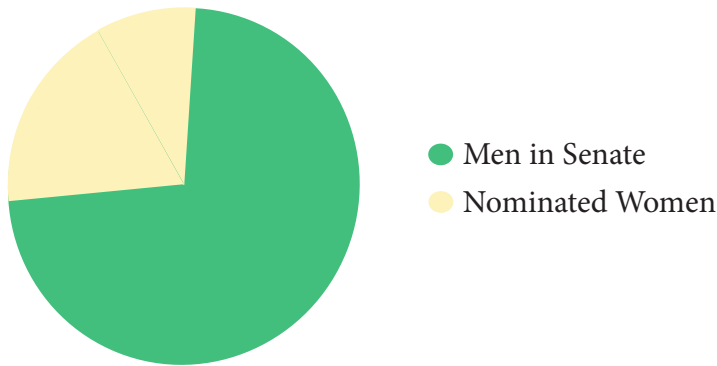
	National Assembly (Ksh)	Senate (Ksh)	Combined (Ksh)
Recurrent			
Main	11,891,080,041	3,391,401,136	15,282,481,177
Joint Service	2,552,149,711.5	2,552,149,711.5	5,104,299,423
CPST	55,900,000	55,900,000	111,800,000
Total	14,499,129,752.5	5,999,450,847.5	20,498,580,600
Development			
Main	0	860,000,000	860,000,000
Joint Service	1,447,500,000	1,447,500,000	2,895,000,000
CPST	125,000,000	125,000,000	250,000,000
Total	1,572,500,000	2,432,500,000	4,005,000,000
Total	16,071,629,752.5	8,341,950,847.5	24,503,580,600

Source: Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016; author's calculations

4.0 The Senate

The smaller size and greater proportion of seats already reserved for women in the Senate makes compliance scenarios less complicated, and potential costs of implementation lower relative to the National Assembly. Already, nearly 27% of the Senate is comprised of women and it would take only an additional five women in elected positions to reach full compliance with the two-thirds rule. Figure 6 below shows the current gender composition of the Senate. All 18 women currently in the Senate were nominated. We present only two scenarios for the Senate, described in Table 11 and displayed in Figure 7.

Figure 6: Current (2015) Gender Composition of the Senate



Source: Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

Baseline: (Current Situation) There are 18 women in the Senate filling the 18 seats reserved for women by the Constitution. Men fill all 47 elected seats, plus an additional two seats reserved for those nominated to represent youth and persons with disabilities. Women constitute 26.87% of the body, which is 6.47% short of the constitutional requirement. This is not in compliance with the two-thirds rule.

Scenario 1: (Compliance by Election) This is a no-additional-cost scenario for compliance with the two-thirds rule without the addition of seats to the Senate. If a minimum of five women are elected among the 47 county constituencies in 2017, in addition to the 18 seats reserved for women, women will hold 23 of 67 seats, or 34.33%. This will constitute full compliance with the two-thirds rule at no additional cost to Kenyan taxpayers.

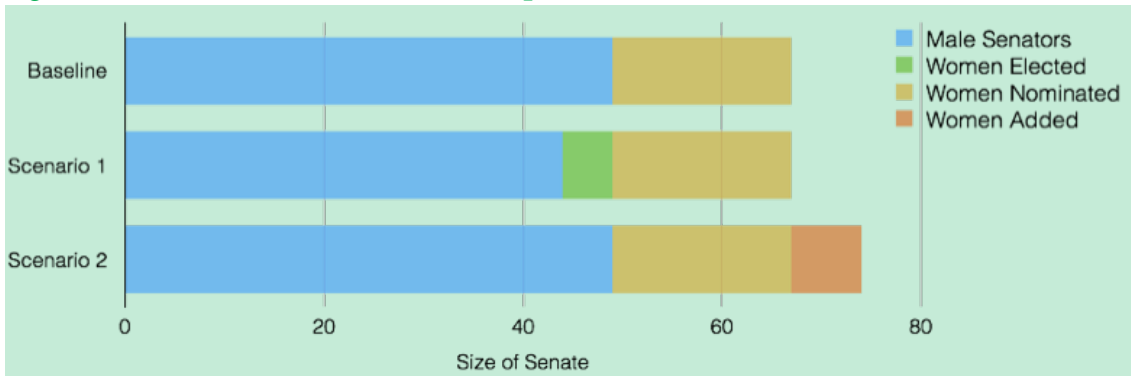
Scenario 2: (Worst-Case Scenario) This can be regarded as a “worst-case” scenario in which no women are elected and hold only the 18 seats reserved in the Constitution. In this case, seven additional seats would have to be added to the existing 67 seats. Women would hold the 18 existing reserved seats, and seven additional seats for a total of 25 out of an expanded membership of 74. Women would constitute 33.78% of the Senate, and this would be in full compliance with the two-thirds rule.

Table 11: Scenarios for the Gender Composition of the Senate in 2017

	Baseline	Scenario 1	Scenario 2
Women Elected	0	5	0
Women	18	18	18
Women Added	0	0	7
Male Senators	49	44	49
Percentage Women	26.87	34.33	33.78
Size of Senate	67	67	74

Source: Author’s calculations.#

Figure 7: Scenarios for the Gender Composition of the Senate in 2017



Source: Author’s calculations.

As with the estimates for expansion of the National Assembly, to estimate the cost of expanding the membership of the Senate, we identify the costs that vary with the size of the Senate. All budget items identified by the Parliamentary Service Commission are shown in Table 12 below. Budget items in Table 12 are marked with a “+” symbol if they are variable costs that would increase proportionally with the number of seats added. Budget items not marked with a “+” symbol are costs that would not vary with the addition of seats. As with the costs for the National Assembly, it is clear from examining the table that few of the costs of maintaining the Senate would vary with the addition of new members to satisfy the two-thirds requirement.

Some values in this row exceed the minimum threshold of one third. If the total size of the National Assembly is not a multiple of three, the constitutional requirement of “no more than two-thirds... shall be of the same gender” requires that not less than one third be of the minority gender. That is, to satisfy the two-thirds rule, the percentage of the minority gender must exceed a perfect third [$1/3 = 33.3\%$] if it cannot be exactly one third, as is only the case when the total size of the assembly is a multiple of three.

Table 12: Recurrent Estimates for the Senate 2013/2014

Office of the Clerk	Ksh
Basic Salaries — Permanent Employees	203,907,883
Personal Allowance Paid as Part of Salary	275,068,453
Employer Contribution to Compulsory National Social Security Schemes	600,000
Employer Contributions to Social Benefit Schemes	40,000,000
Domestic Travel and Subsistence and Other Transportation Costs	6,300,000
Foreign Travel and Subsistence and Other Transportation Costs	38,100,000
Training Expense (Including Capacity Building)	19,600,000
Hospitality Supplies and Services	12,000,000
Specialized Materials and Supplies	4,000,000
Other Operating Expenses	5,000,000
Legislative Services	
+ Basic Salaries—Members of Parliament	449,514,000
+ Personal Allowances Paid as Part of Salary	663,020,800
+ Personal Allowances Paid as Reimbursements	45,000,000
+ Domestic Travel and Subsistence, and Other Transportation Costs	297,000,000
+ Foreign Travel and Subsistence and Other Transportation Costs	64,080,000
+ Hospitality Supplies and Services	6,000,000
+ Insurance Costs	100,000,000
+ Other Capital Grants and Transfers	476,000,000
Office of the Speaker	
Domestic Travel and Subsistence and Other Transportation Costs	14,300,000
Foreign Travel and Subsistence and Other Transportation Costs	15,500,000
Hospitality Supplies and Services	6,500,000
Fuel Oil and Lubricants	3,500,000
Committee Services	
+ Domestic Travel and Subsistence and Other Transportation Costs	132,100,000
+ Foreign Travel and Subsistence and Other Transportation Costs	180,600,000
+ Hospitality Supplies and Services	52,000,000
Legal Services	
Domestic Travel and Subsistence and Other Transportation Costs	20,000,000
Foreign Travel and Subsistence and Other Transportation Costs	15,000,000
Hospitality Supplies and Services	5,000,000
Constituency Offices	
Basic Wages — Temporary Employees	171,360,000
Other Operating Expenses	70,350,000
Total	3,391,401,136

Source: Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016

Table 13 below shows the variable costs of representation in the Senate identified in Table 12: basic salary, personal allowances, travel and subsistence, insurance cost, hospitality, car grant, committee services and administration costs. The figures for individual Senators are weighted averages, reflecting the different pay scales of different members. The cost of the car grant, though it is paid in the first year of members' terms, is divided by five to reflect the annual cost to taxpayers over a five-year term. The categories of remuneration to the members of the Senate included in the table are not exhaustive nor inclusive of other fixed costs. They represent those costs that would increase with the addition of seats, not other fixed costs that would not vary with additional members.

Table 13: Variable Costs of Representation in the Senate Based on 2013/2014 Estimates

	Total for 2013/17 (Ksh)	Annual Amount per Senator (Ksh)
Basic Salary	449,514,000	6,610,500
Personal Allowances	708,020,800	10,412,071
Foreign & Domestic Travel/Subsistence	361,080,000	5,310,000
Insurance Cost	100,000,000	1,470,588
Hospitality Supplies and Others	6,000,000	88,235
Car Grant	476,000,000	1,400,000
Committee Services	364,700,000	5,363,235
Administration (2%)		613,093
Total	2,465,314,800	31,276,722

Source: Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016; and author's calculations

Every additional seat added to the Senate will cost Kenyan taxpayers roughly 31.3 million Ksh annually. Table 14 below summarizes the cost of Scenarios 1-2 for the Senate based on the number of seats to be added. The actual amount would depend on the number of women elected to the Senate in 2017, and could be as little as zero or as much as 218,874,054 Ksh annually if no women are elected and seven seats must be added for full compliance with the two-thirds rule. The actual cost of full implementation will be between zero and about 219 million Ksh, as the values in Scenario 2 are maximums based on the worst-case scenario. Table 14 also gives the maximum per capita cost of adding seats to the Senate and the maximum percentage increase in total costs of the Senate. The added costs, whether viewed as a per capita or percentage increase, have maximums that are affordable to Kenyan taxpayers. Because so few recurrent costs in the Senate would vary with the addition of seats, the percentage increase of the total with the addition of new members is in fact quite small: only 2.62% for the Senate.

Table 14: Additional Cost of Scenarios 1-2 for the Senate Based on 2013/2014 Estimates

	Women Seats Added	Annual Added Cost (Ksh)	Annual Added Cost Per Capita (Ksh)	Percentage Increase in Total Cost of the Senate
Scenario 1	0	0	0	0.00
Scenario 2	7	218,874,054	5.24	2.62

Source: *Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year ending 30th June 2014 and Projections for 2014/2015-2016; and author's calculations. Population estimate used for per capita calculations: 41.8 million (2013). Source: Economic Survey 2014*

5.0 Cost and Budget in a Regional Perspective

Table 15 below shows the total costs for both houses of parliament based on the best (low cost) and worst (high cost) scenarios presented in the previous section. The worst-case scenario is a 9.86% increase in total spending on parliament, costing every Kenyan about 58 Ksh per year. The actual figure would be much less if, as is already the case, some women are elected to the National Assembly and Senate.

Table 15: Total Potential Increase in Cost of Parliament Based on 2013/2014 Estimates

	Senate (Ksh)	National Assembly (Ksh)	Total (Ksh)	Total Per Capita (Ksh)	Percentage Increase in Total Spending on Parliament
Additional Cost	0	0	0	0.00	0.00
Additional Cost	218,874,054	1,543,038,834	1,761,912,888	42.15	7.19
Additional Cost	218,874,054	2,198,301,900	2,417,175,954	57.83	9.86

Source: *Author's calculations.*

The baseless claims that the implementation of the two-thirds requirement is prohibitively expensive should be seen in a regional perspective and in the context of public spending in Kenya. Kenya is the largest economy in East Africa, and enjoys by far the highest GDP per capita. The increase in GDP per capita after the Kenyan economy was rebased in 2014 caused a lot of media excitement about Kenya's new status as a middle-income country. None of its neighbors have reached the same level of income, but all of them have reached gender equity in their parliaments, measured by at least one-third of legislators being women. Table 16 below shows the GDP per capita and percentage of women in parliament for five East African countries.

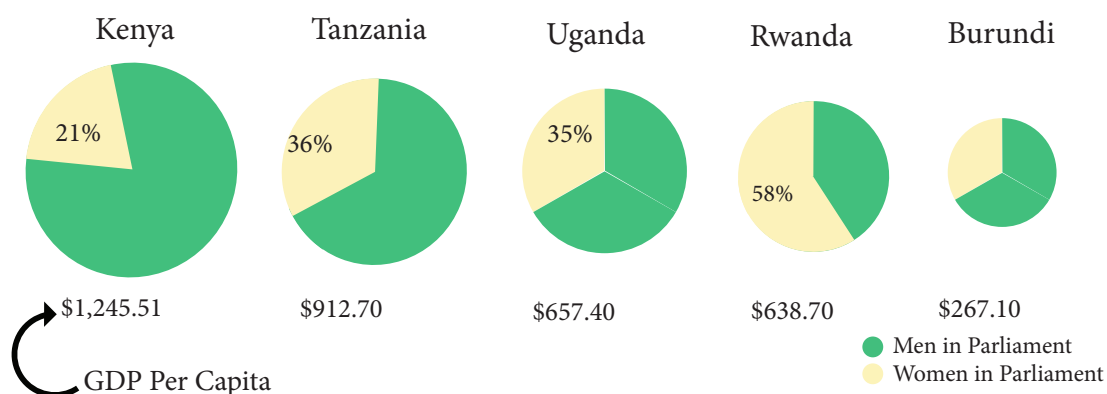
Table 16: GDP Per Capita (2013) and Gender Equity in East African Parliaments

	Kenya	Tanzania	Uganda	Rwanda	Burundi
GDP Per Capita	\$1,245.51	\$912.70	\$657.40	\$638.70	\$257.10
Women in Parliament	20.67%	36%	34.97%	57.55%	34.93%

Source: World Bank national accounts data, OECD National Accounts data files at data.worldbank.org; Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

Kenyans enjoy the highest GDP per capita at \$1,245.51, but have the lowest percentage of women in parliament, and the only one in East Africa below one third. The pie charts in Figure 7 below show the same information in a format that reveals the differences in relative capacity to afford affirmative action programmes. The size of each pie chart is proportional to its GDP per capita. Kenya, the largest circle, corresponds to its GDP per capita of \$1,245.41; Burundi, the smallest circle, corresponds to its GDP per capita of \$267.10. The percentage of women in parliament is displayed for each country.

Figure 8: GDP Per Capita (2013) and Gender Equity in East African Parliaments

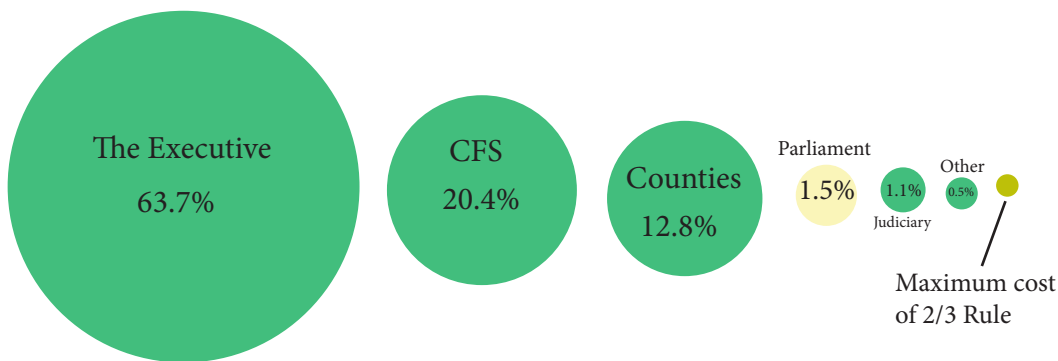


Source: World Bank national accounts data, OECD National Accounts data files at <http://data.worldbank.org/country/kenya>; Inter-Parliamentary Union at <http://www.ipu.org/wmn-e/classif.htm>.

Among its regional peers, Kenya has the greatest capacity to afford an affirmative action programme to increase the representation of women in its parliament, and a constitution and Supreme Court opinion that guarantee equitable gender representation as an enforceable right. Failure to fully implement the two-thirds requirement, then, can be justified neither legally nor economically.

Furthermore, the share of the national budget allocated to the three branches of government lends a relative perspective to the cost of implementing the two-thirds requirement. In the Programme Based Budget Estimates for 2014/15, overall government spending is estimated at 1.77 trillion Ksh. The Executive's share is 1,130.5 billion Ksh (63.7%), the Judiciary's is 18.7 billion Ksh (1.1%), and Parliament's is 26.5 billion Ksh (1.5%). Figure 8 below shows these and the percentage shares for Counties, Consolidated Fund Service, and Other (Equalisation Fund and Contingency Fund). The budget allocation for the Parliamentary Service Commission (PSC) is in yellow. The maximum (worst-case scenario) additional cost of implementing the two-thirds principle is in orange.

Figure 9: Kenya National Budget Allocation

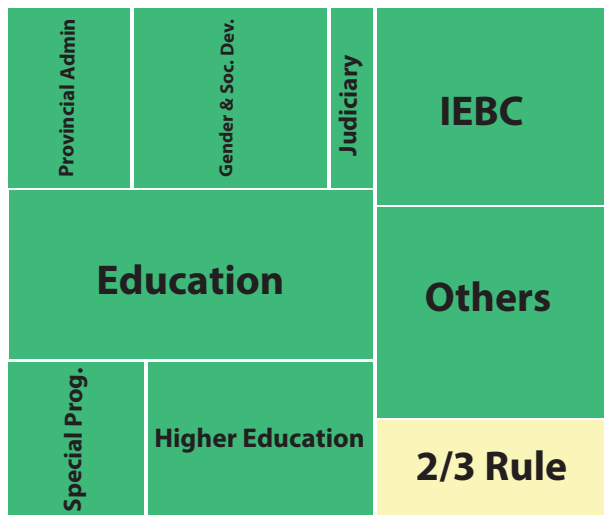


Source: : Programme Based Budget Estimates for 2014/15

It is clear from Figure 8 that the Executive branch accounts for the lion’s share of public spending in Kenya. Budget allocations under the Executive amount to more than 42 times the budget allocations for the Parliamentary Service Commission, and nearly 60 times the budget estimate for the Judiciary. A relatively small increase in spending on the parliament (yellow circle) to fully implement the constitution’s two-thirds requirement would have virtually no effect on the rest of the national budget.

Furthermore, we can compare the maximum cost of full implementation of the two-thirds rule in both houses to the unsupported expenditure by ministries and departments for 2012/13; that is, the cost of implementation of the two-thirds rule compared to how much public money Executive agencies and the Judiciary failed to account for in reports by the Auditor General. The green boxes below are proportional to the amount of public money unaccounted for in 2012/13. For example, the largest box, Education, failed to account for 6.8 billion Ksh. That means that Education failed to account for almost 3 times more public money than the maximum amount it would cost to implement the two-thirds principle.

Figure 10: Cost of Implementation Compared to Unsupported Expenditures 2012/13



Source: Summary of the auditor-general report for the year 2012/2013

6.0 Appointments

Gender inclusion in government cannot be limited to elective legislative bodies if it is to be meaningful and effective in advancing the position of those who have historically faced discrimination and underrepresentation. The composition of appointed bodies also requires scrutiny for equitable gender representation. Table 17 below shows the number of appointments per month since March 2013, when the current government came to power, and the number and percentage of appointments held by women in the 25 months after.

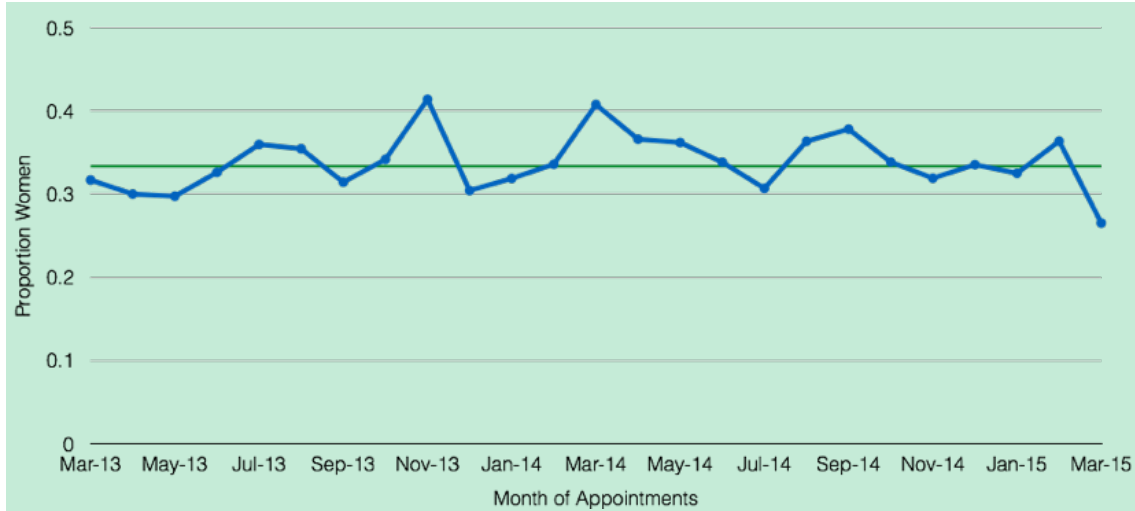
Table 17: Appointed Positions Held by Women, March 2013 – March 2015

Month of	Women Appointed	Total Appointments	Percentage Women
March 2013	45	142	31.69
April 2013	24	80	30.00
May 2013	58	195	29.74
June 2013	90	276	32.61
July 2013	150	417	35.97
August 2013	67	189	35.45
September 2013	33	105	31.43
October 2013	41	120	34.17
November 2013	118	285	41.40
December 2013	42	138	30.43
January 2014	44	138	31.88
February 2014	43	128	33.59
March 2014	1,110	2,723	40.76
April 2014	142	388	36.60
May 2014	139	384	36.20
June 2014	90	266	33.83
July 2014	62	202	30.69
August 2014	245	674	36.35
September 2014	397	1,050	37.81
October 2014	132	390	33.85
November 2014	15	47	31.91
December 2014	776	2,314	33.54
January 2015	26	80	32.50
February 2015	40	110	36.36
March 2015	157	592	26.52
Total	4,068	11,433	35.58

Source: The Kenya Gazette at http://kenyalaw.org/kenya_gazette/. Note: Three months have significantly higher numbers of appointments than others: March 2014, September 2014 and December 2014. These appointments can be attributed to the Uwezo Fund Management Committees and county, district and sub-district Hospital Management Committees, Hospital Management Boards, Dispensaries Management Committees and County Health Center Committees.

Months in red in the Percentage Women column are those during which men constituted more than two thirds of the appointments in that month, and women less than one third. Overall, however, men do not constitute more than two-thirds of appointments as women constitute 36.27% of appointments in the 25-month period. Figure 9 below shows the trend in the proportion of appointments to women candidates during the period. The solid green line shows the minimum threshold of one third; the blue trend line shows the proportion of women appointments from one month to the next. Months with proportions of appointments to women below the threshold of one third, those that appeared red in Table 17, fall below the green line in Figure 9. There were no appointments in January and February 2015, so there is a break in the plot from December 2014 to March 2015.

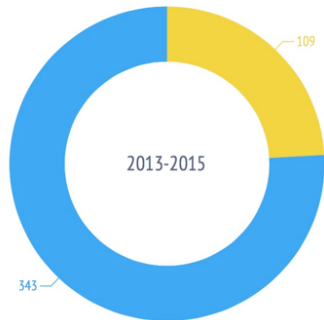
Figure 11: Proportion of Appointments to Women, March 2013 – March 2015



Source: *The Kenya Gazette* at http://kenyalaw.org/kenya_gazette/.

The level of appointments of women should also be of interest. Although 35.58% of appointments have been to women candidates in the given time period overall, are women appointed to leadership positions in similar proportion? The research team identified the following leadership roles to scrutinize for the gender of appointees: chairperson, vice chairperson, secretary, managing director, university chancellor, director general, presidential returning officer, deputy returning officer. By this definition, there were 452 total appointments to leadership positions from March 2013 to March 2015. Only 109 of those appointments — about 24% — were to women candidates.

Figure 12: Leadership Appointments by Gender, March 2013 – March 2015



Source: *The Kenya Gazette* at http://kenyalaw.org/kenya_gazette/.

7.0 Conclusion

Based on the evidence from case studies of affirmative action programmes in representation in Part I, we can reach an important conclusion: Reserved seats are an effective way to increase the meaningful participation of women in national legislatures, politics and decision-making. The experiences of Uganda, Rwanda and Denmark demonstrate a clear process of which the extremes are quite distinct. In Uganda, the reservation of seats for women ensures their participation in high numbers through affirmative action. The same is true in Rwanda, where a longer period and more deliberate action toward inclusion of women in politics has influenced women's participation outside of reserved seats. Women parliamentarians elected to seats that are also open to men now outnumber those in affirmative action seats reserved for women alone. In Denmark, efforts to correct the historical marginalization of women in politics are now decades old and affirmative action in the form of reserved seats is no longer necessary. That is the journey that Kenya must begin.

Kenya seeks to be a regional and global leader in the twenty-first century, and policies regarding gender inclusion must exhibit the same seriousness that the constitution does for the inclusion of women in politics. Failure to begin what has been a long-term process of gender inclusion in other countries will have consequences for decades. Kenya will already be the last country in East Africa to achieve equity in gender representation in its parliament. Surely, that should be sign enough that the Supreme Court's deadline must give Kenyans a different story to tell about Kenyan women in politics.

When public figures make statements that are not true, we must wonder whether they are uninformed or dishonest. Many public figures have claimed that the two-thirds requirement should not be implemented because the costs are too high. They are wrong for two reasons. The first is that the constitutional requirement to ensure that not more than two thirds of elective bodies are comprised of a single gender does not stipulate that it is to be implemented unless its critics are opposed to the financial implications. There is no contingency clause, and proper constitutionalism requires full implementation of this constitutional requirement as it does any other. The second reason these claims are false is simply that the costs, as demonstrated clearly in Part II, are simply not prohibitive to the Kenyan taxpayer. At most, full implementation in the form of additional reserved seats for women would cost individual Kenyans about 58 Ksh annually, less than a ten percent increase in spending on parliament. Even after the maximum hypothetical increase, parliament would still only use a miniscule fraction of total public resources relative to other branches of government.

Sixty-eight percent of Kenyans voted in favor of the constitution in 2010, and pay their taxes for government to implement it. There is no basis in the claim that achieving the two-thirds gender rule would be prohibitively expensive. Tanzanians and Ugandans have already achieved the 33% threshold with smaller economies than Kenya's and similarly large legislatures.

It seems the major impediment to full compliance with the two-thirds gender rule in Kenya is politics and not about affordability or the lack of a mechanism.

In the effort to craft legislation for a mechanism to comply with the two-thirds requirement in Kenya, ideas that use reserved seats for women cannot be ruled out. Quota systems in national legislatures are effective in the long-term in Western countries as well as in Africa, and their costs are inconsequential even in the most expensive hypothetical.



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