

The two-thirds gender rule ‘mirage’: Unlocking the stalemate

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Keywords

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1 Introduction

Today we talk about the principle of gender inclusivity in Kenya’s governance framework.¹ I thank the administration of the Mombasa Law Campus of the University of Nairobi for giving me an opportunity to address its academic community on the subject. I thank the Mombasa Law Society, the oldest law society in this country, for partnering with the University of Nairobi, Mombasa Campus, on this worthy course. Partnerships between industry and the academy are always a worthy venture.

The choice of topic today is both germane and misleading. It is germane because it comes hot on the heels of the advisory by the Chief Justice David Maraga to President Uhuru Kenyatta, calling on the latter to dissolve the National Assembly and the Senate pursuant to the dictates of Article 261(7) of the Constitution of Kenya (2010 Constitution). The material failure by the National Assembly and the Senate, as Parliament, is that they have not enacted a relevant legislative framework to give effect to the principle that not more than two-thirds of the members of the National Assembly and the Senate should be of the same gender. It is germane because such advice lacks precedent in Kenya’s history and has far-reaching effects. It is germane because as members

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of the intellectual community, it is our obligation to reflect on such extant issues affecting our society and provide a way out. The topic is, however, misleading because it presupposes that as the speaker at today's webinar, I come with the silver bullet to unlock the stalemate.

The journey towards a more inclusive society in Kenya has been a rather long one. On 9 March 2018, the key protagonists in Kenya's political space, President Kenyatta and former Prime Minister Raila Odinga recognised inclusivity as one of the nine-point agenda towards *building bridges* in Kenya.

The aspect of inclusivity called gender inclusivity has also had a longwinded history. There is no possibility of me capturing the story of this journey fully and justly in today's presentation alone. I will, therefore, focus on a very small aspect of this journey, that is, the cases that I have had the privilege of history to walk through as an advocate.

2 The duality of the gender inclusivity challenge in Kenya

The gender inclusivity principle in our Constitution is only in part a legal phenomenon. I submit that this is the smaller part of the problem. It is also the easier part of the problem to resolve. It is however, the part that we have not resolved in multiple respects since the promulgation of the 2010 Constitution. The rather articulate aspect of this challenge manifests itself in the composition of the National Assembly and the Senate. There are other significant manifestations of this aspect that have not articulated themselves as loudly but which still reveal the challenge. A good example is the gender disparity in the composition of Supreme Court of Kenya. I will later on in this presentation allude to the composition of the Supreme Court.

Apart from the legal phenomenon, there is gender inclusivity as a sociological/cultural phenomenon. I may also refer to this latter phenomenon as a *spiritual* phenomenon. This is the harder conundrum to resolve because, dealing with any social problem at a normative level can be an *event*. Dealing with the same problem at a sociological level is a *process*, a *long process*.

3 My footsteps in the 'not more than two-thirds' gender principle journey

On 27 August 2010, the people of Kenya adopted, enacted and gave the 2010 Constitution to themselves and their future generations. I have engaged

with the gender inclusivity principle in our Constitution purely as a *constitutionalist* by which I mean *an adherent or advocate of constitutionalism or of an existing constitution*.²

On 15 March 2017, I made the opening remarks before Justice Muting'a Mativo in *High Court Constitutional Petition Number 371 of 2016* where I implored the Court in the following terms:

Ours is a constitutional democracy. It declares itself as such. Article 4(2) of the Constitution provides that the Republic of Kenya shall be a multi-party democracy. A constitution is not a self-executing instrument. It requires certain pillars to be realised. There are four central pillars:

1. The architecture and design of the Constitution;
2. An independent judiciary to give meaning and to help grow the Constitution;
3. A vigilant people to look out for rodents that may eat the roots of the Constitution; and
4. Political will.

The 2010 Constitution came fully fitted with different promises to different segments of the Kenyan population. One of the unfulfilled promises is the question of gender representation in the National Assembly and the Senate. There are, however, many other areas where we are lagging behind in realising gender equity and gender inclusivity.

In 2015, Justice Mumbi Ngugi captured my reflections on this state of affairs in *High Court Constitutional Petition Number 182 of 2015*, as follows:

106. At the hearing of this petition, Counsel for the petitioner, Mr Ongoya, made an impassioned plea to this Court to help realise the promise to women with respect to their representation in the National Assembly and Senate. He impressed on the Court the need to translate the promise made to the women of Kenya in the Constitution into reality, and to ensure that the legitimate expectation that the promise made by the people of Kenya, in exercise of their sovereign power, will become a reality.

107. Mr Ongoya further asked how long the promise to the women of Kenya can be postponed, and whether there is a role for this Court to finally state that there is no more room for postponement of that promise.

4 The terms of the gender inclusivity promise of the 2010 Constitution

Article 27 of the 2010 Constitution materially provides that:

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

² <<https://www.dictionary.com/browse/constitutionalist?s=t>> on 5 January 2021.

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall 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.

(8) In addition to the measures contemplated in clause (6), 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) of the 2010 Constitution stipulates that:

The electoral system shall comply with the following principles—not more than two-thirds of the members of elective public bodies shall be of the same gender.

On 28 January 2011, five months after the promulgation of the 2010 Constitution, the Office of the President announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget. All the persons so nominated were men. This nomination culminated into the institution of *High Court Constitutional Petition Number 16 of 2011*. Determining an application for conservatory orders as to whether Article 27(3) was violated by virtue of the four nominations, Justice Daniel Musinga observed that indeed there was discrimination against women. Counsel (for the Attorney General) conceded, not without some hesitation. The Court went ahead and made an interlocutory declaration that:

In light of that, this court must uphold the twin principles of constitutionalism and the rule of law in its decisions. Consequently, and in view of the court's findings regarding constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011. That will have to await the hearing of the petition or further orders of this court.

The above petition was never heard on the merits since the president recalled the nominations and the substratum of the court action disappeared.

5 The emergence of the 'progressive realisation argument' of the gender inclusivity principle

On 15 June 2011, the Judicial Service Commission (JSC) recommended to the president for appointment five persons as Judges of the Supreme Court; of the five, one was a woman and four were men. It is also clear that the JSC

had earlier recommended to the president, for parliamentary approval, persons to the Offices of Chief Justice and Deputy Chief Justice out of whom one was a man and the other a woman. The petitioners alleged that in making its recommendations to the president, the JSC violated the 2010 Constitution and fundamental rights and freedoms of women in not taking into consideration the correct arithmetic/mathematics of the constitutional requirements on gender equity. As a result, the recommendations fell below the constitutional mandatory minimum and maximum on gender equality. In short, did the JSC violate the provisions of Article 27 of the 2010 Constitution in recommending to the president the five judges for appointment as judges of Supreme Court? This was the simple factual matrix that informed *High Court Constitutional Petition Number 102 of 2011 – Federation of Kenyan Women Lawyers and 5 others v Attorney General and another*. In this petition, Justice John Mwera, Justice Philomena Mwilu and Justice Mohammed Warsame held that the realisation of the not more than two-thirds gender rule was progressive (futuristic). In a rather condescending judgment, the Court of Appeal concluded thus:

We think that the rights under Article 27(8) have not crystallised and can only crystallise when the State takes legislatives or other measures or when it fails to put in place legislative or other measures, programmes and policies designed to redress any disadvantaged within the time set by the Fifth Schedule to the Constitution 2010. ... To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two-thirds principal is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle which can only be achieved through an enabling legislation by Parliament. We cannot in our estimation give what is not contained or found or intended by the drafters. To do so would be tantamount to fragrant abuse of our Constitutional responsibility to interpret the constitution objectively, plainly, responsibly, purposively, broadly, contextually and liberally. We are obliged to apply the law as it is at the moment and as we deem just and permissible without rocking the foundation and the intention of the drafters, and not as any party thinks the law should be.

Listen to this:

In conclusion: dear petitioners, we regret to inform you that your petition has been rejected. It is hereby ordered dismissed...To the Petitioners and supporters we advise that you keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame...If we were to decide this case on moral grounds or we were conducting a lottery or giving honorary degrees we would have granted your prayers.

In 2012, faced with the challenge of the implication of the foregoing judgement on the general election that was due in March 2013, the Attorney

General framed the following question for determination by the Supreme Court by way of an advisory opinion (*Advisory Opinion Number 2 of 2012*):

Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98 of the Constitution require progressive realisation of enforcement of the one-third gender rule or require the same to be implemented during the general election scheduled for 4 March 2013?³

On 11 December 2012, the Supreme Court by a majority decision advised that the not more than two-thirds gender rule was progressively realisable. The Supreme Court went ahead to express itself thus:

[75] That leaves open the question: if Article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then at what stage in the succeeding period should it apply?

The Supreme Court's response to this question was as follows:

[77] We see as the requisite manner to develop the principle in Article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realisation. We are, in this regard, in agreement with the concept urged by learned amicus Mr Kanjama, that hard gender quotas such as may be prescribed, are immediately realisable, whereas soft gender quotas, as represented in Article 81(b) with regard to the National Assembly and Senate, are for progressive realisation....

[78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr Nderitu and Ms Thongori: When will the future be, as baseline of implementation of the gender-equity rule?

[79] Bearing in mind the terms of Article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August 2015.

[80] *The foregoing opinion is a basis for action in accordance with the terms of Article 261(6), (7), (8) and (9) under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions.* (Emphasis added).

In reaching the foregoing advisory opinion, the Supreme Court materially observed thus:

[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents

³ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned Counsel Ms Thongori aptly referred to this phenomenon as “the socialisation of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].

6 A target on the National Assembly and the Senate

In 2015, due to the apparent lethargy of the Attorney General and the Commission for the Implementation of the Constitution (CIC) to publish the necessary bills to give effect to the not more than two-thirds gender principle in the National Assembly and the Senate, the Centre for Rights, Education and Awareness instituted *High Court Constitutional Petition Number 182 of 2015* against the Attorney General and CIC seeking the following reliefs, among others:

- i. A declaration that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012, they have violated their obligation under Article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified.”
- ii. A declaration that the foregoing failure, refusal and or neglect by the 1st and 2nd Respondent is a threat to a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.
- iii. An order of mandamus directed at the 1st and 2nd Respondents directing them to within such time as this court shall direct, prepare the relevant Bill for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.

In addressing itself to the above issues, the High Court materially observed thus:

56. The people of Kenya recognised the inequities and inequalities in our electoral system, the unequal power relations between men and women, and “the socialisation of patriarchy” as a result of, inter alia, discriminatory practices, gender insensitive laws and policies. They sought to remedy these historical wrongs by the express provisions in the Constitution which are intended to ensure the equitable participation and representation of hitherto excluded groups, such as women. It is undisputed that in its Advisory Opinion in December 2012, *the Supreme Court gave the 27th of August (2015) as, so to speak, the “future”, the dawn, by which date the requisite measures should have been taken to realise the constitutional threshold set for the representation of women in elective positions in the National Assembly and Senate.* (Emphasis added)

In the final analysis, the High Court in the above petition granted the first and second reliefs. On the third relief, the High Court issued an order of mandamus with these specifications:

c. An order of mandamus be and is hereby issued directed at the 1st and 2nd Respondents directing them to, within the next forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.⁴

In giving the foregoing order, Justice Mumbi Ngugi expressed her cognisance of:

...the fact that there have been various processes undertaken in the last year or so which ought to culminate in legislation for presentation to Parliament for consideration. Bearing in mind also the fact that the 27th of August 2015 is barely 60 days away, the timeline should allow the National Assembly, should it not be possible to consider and enact the requisite legislation, to consider the question of extension of time with respect to the two-third gender principle in accordance with the provisions of Article 261(2).⁵

As if taking seriously the advice of the High Court above, the National Assembly extended the period required to pass enabling legislation under the 2010 Constitution by one year, which lapsed on 27 August 2016.

Article 261(2) as read with (3) of the 2010 Constitution states:

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

(3) The power of the National Assembly contemplated under clause (2), may be exercised—

- (a) only once in respect of any particular matter; and
- (b) only in exceptional circumstances to be certified by the Speaker of the National Assembly.

⁴ *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, para.113.

⁵ *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, para.114.

Following the lapse of the extension without the enactment of the requisite legislation as required by the Constitution and the Supreme Court Advisory Opinion Number 2 of 2012, Centre for Rights Education and Awareness and the Community Advocacy and Awareness Trust instituted *High Court Constitutional Petition Number 371 of 2016* pursuant to Article 261(5) and (6) of the 2010 Constitution seeking the necessary reliefs.

The National Assembly and the Senate fully participated in the proceedings, which culminated into the judgment and decree delivered by Justice Mativo on 29 March 2017, in the terms that:

- (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 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 Honourable 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 Honourable the Chief Justice to advise the President to dissolve Parliament.⁶

By way of *Civil Appeal Number 148 of 2017*, the National Assembly and the Senate contested the decision of Justice Mativo. This appeal was argued and determined during the tenure of the 12th Parliament in 2019.

The Court of Appeal elaborately rationalised the justification for the inclusion of the not more than two-thirds gender principle in the 2010 Constitution. The Court of Appeal considered three approaches to the realisation of the principle in the National Assembly and the Senate as quoted below:

A reading of Article 27 and 81 leaves no doubt in our minds that the Constitution contemplates that elective public bodies, including the National Assembly and the Senate, would in their composition, comply with the gender principle. But how are the ratios set by the Constitution to be achieved? In our view, there are three possible methods.

⁶ *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR, at 16.

The first method is through elections, where voters in the exercise of their democratic will return into elective offices members with the gender mix required by the Constitution. This, however, is the method that has failed to work since independence and necessitated the writing of the gender principle into the Constitution. The other two methods become necessary where this first method fails and the exercise of the voters' democratic right does not result in the gender ratios demanded by the Constitution.

The second method is set by the Constitution itself, but unfortunately only for the county assemblies, rather than for the National Assembly or the Senate. The Constitution contemplates that in democratic elections it is possible that the required minimum numbers based on gender will not be achieved. Hence for the county assemblies, Article 177(1) (b) provides a formula for achieving or satisfying the gender principle. For that purpose, the Constitution provides that a county assembly is made up, firstly, of members elected by the registered voters of the wards, secondly the number of members of marginalised groups, including persons with disabilities and the youth as prescribed by an Act of Parliament; thirdly, the speaker who is an ex officio member, and lastly:

“the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender”.

Those special seat members are to be nominated by political parties in proportion to the seats they won in the election in the county. Through this formula, the Constitution ensures that in the event a county assembly has, for example less than one-third women, political parties, based on the votes attained in the election, will nominate the number of women required to attain the constitutional ratio. Equally, in the event that the county assembly returned after the election has less than one-third men, the political parties are to nominate the number of men required to achieve the prescribed gender ratio. This method works where the maximum number of members of the institution is not prescribed. It may not work where the Constitution has prescribed the maximum number of members of a House, as Articles 97 has done for the National Assembly and Article 98 for the Senate. By Article 97, the National Assembly is made up of 290 members elected by single member constituencies; 47 women elected by counties as single member constituencies; 12 members nominated by parliamentary political parties proportionate to their members in the National Assembly, to represent special interest such as the youth, persons with disabilities and workers; and the Speaker, who is an ex officio member. As for the Senate, by dint of Article 98 it is made up of 47 members elected by the counties as single member constituencies; 16 women nominated by political parties proportional to their members in the Senate; 2 members, a man and a woman to represent the youth; 2 members, a man and a woman, to represent persons with disabilities; and the Speaker, who is an ex officio member.

The last method is that contemplated by Article 27(8), namely, resort to legislative and other measures to ensure that the constitutional ratio in elective bodies is attained. As we understand it, the 1st and 2nd Respondents' main contention is that Parliament has failed to take the contemplated legislative and other measures to realise the gender principle in the National Assembly and the Senate.

The Fifth Schedule to the Constitution prescribes the period within which legislation required to implement the Constitution is to be enacted. It is a contested issue in this appeal whether Article 81 of the Constitution imposes on the State the obligation to take legislative

and other measures to ensure realisation of the gender principle and why the Fifth Schedule is silent on the period within which those measures should be taken.⁷

In the following extensively quoted dicta, the Court of Appeal went ahead to elaborately address itself on the purported crises that could arise from implementing Justice Mativo’s decision:

On the last ground, the appellant has focused on what he claims to be an inevitable constitutional crisis should the judgment of the trial court be implemented. Article 261 of the Constitution sets out an elaborate default mechanism leading to the dissolution of Parliament, as many times as it takes, so long as it does not enact legislation required to implementation of the Constitution...As we have already noted, Parliament has already extended the period for enactment of legislation to implement the gender principle. By dint of Article 261(3), that period can be extended by Parliament only once. The High Court has already issued a declaration under Article 261 (6) of the Constitution that Parliament has failed to enact the relevant legislation and gave it sixty days within which to enact the legislation. As of now, Parliament has not enacted any legislation and any interested party may petition the Chief Justice to advise the President to dissolve Parliament. We ask ourselves, why did the Constitution deem it necessary to provide the default mechanism in Article 261? In our view, it was simply to guard against legislative inertia or inaction which would thwart or frustrate the fully implementation of the Constitution. This is borne out by the Final Report of the Committee of Experts (CoE), which drafted the Constitution, where it was stated thus:

The new Constitution also set out a procedure to be followed if a law were not enacted within the scheduled time. The challenge was to ensure that the new laws envisaged by the new constitution are promptly enacted. Under Article 308 of the Bomas Draft, if Parliament failed to adopt a particular law within the time stipulated in the table, anyone could petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this was not done, Parliament would be dissolved...The new Constitution follows the Bomas approach in allowing the National Assembly to extend the time within which a Bill is to be passed, provided that the extension is justified by exceptional circumstances and has the support of at least two-thirds of its members. It also permits any person to petition the High Court to deal with a failure by the National Assembly to pass a law in time. If the National Assembly fails to abide by the court order, it will be dissolved and a new election held. (Emphasis added by court).⁸

In summary, the appellant’s submissions on this ground of appeal amounted to the contention that the provisions of Article 261 of the 2010 Constitution are inconsistent with other provisions of the 2010 Constitution and therefore, we must not implement Article 261.

⁷ *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 3-4.

⁸ *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 15-16.

The Court of Appeal finally assessed the seriousness of any efforts previously undertaken by Parliament to deal with the two-thirds gender rule legislation in the following terms:

It is on record that Parliament has undertaken several initiatives, including publishing constitutional Amendment Bills to implement the gender principle. It is equally a matter of public notoriety, which we are entitled to take judicial notice of, that none of those constitutional Amendment Bills has ever been debated or considered by Parliament seriously; they have all been lost due to lack of quorum in the National Assembly. That, to us does not speak of a good faith effort to implement the gender principle and is precisely the kind of conduct that the people of Kenya wanted to avoid by writing into the Constitution Article 261.⁹

This foregoing decision of the Court of Appeal has neither been set aside nor challenged. In addition, the decision gels with a similar observation by Justice Mumbi Ngugi in *Petition 182 of 2015* that:

104. I accept that the respondents have, in the last one year, set in motion some processes which appear to have been moving, except for the last 3 months, at a somewhat leisurely, one might even say, reluctant pace, towards realisation of the two-thirds gender rule. Nothing concrete, however, appears to have been done between the date of the Advisory Opinion on 11 December 2012, or the date of the formation of the Technical Working Group on 3 February 2014, towards having the requisite legislation in place.

The foregoing history has culminated into the 2020 advisory by the Chief Justice Maraga to President Kenyatta. This advisory has attracted six petitions against it and two petitions in its support. The jury is still out there on what the outcome of these court actions will be. Nevertheless, the history shows us the ‘mirage’ of the constitutional stipulation on gender inclusivity, that is, visibly near but simply not reached despite the efforts so far put in.

7 Conclusion: What is the way out?

I examine two possibilities, none of which can be yielded by waving a magic wand.

The sharp shock therapy: Implementing the Chief Justice’s advice

In view of the above chronology of events, I hold an unqualified view that the Chief Justice had no option but to ‘advise the President to dissolve

⁹ *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 16.

Parliament,' and the president has no option but to 'dissolve Parliament' as dictated by Article 261(7) of the 2010 Constitution.

The Building Bridges Initiative proposals

I have argued elsewhere that the Building Bridges Initiative (BBI), in and of itself is incapable of solving the multiple governance problems Kenya faces; the gender issue included. There is greater desire for an extra dosage of political will and people's vigilance – a constitutional culture question.

What does the current BBI document in the public domain propose about gender inclusivity? The BBI proposes an amendment to Article 97 of the Constitution to increase the number of members of the National Assembly from 290 to 360. There is no explicit prescription on how this will culminate into the fulfilment of the constitutional dictate on gender inclusivity. It will require further efforts, demanding political will and popular vigilance to secure gender inclusivity in the National Assembly even in the face of the BBI proposal. In respect of the Senate, the BBI document proposes twining of elected members of the Senate to two representatives, one man and one woman, for each of the 47 counties. This will result in a state of gender balance in the Senate if the proposal sees the light of day.

All said, nothing will substitute an honest discourse informed by political will and the vigilance of the citizenry to implant a sustainable solution to the gender inclusivity question.

Thank you.