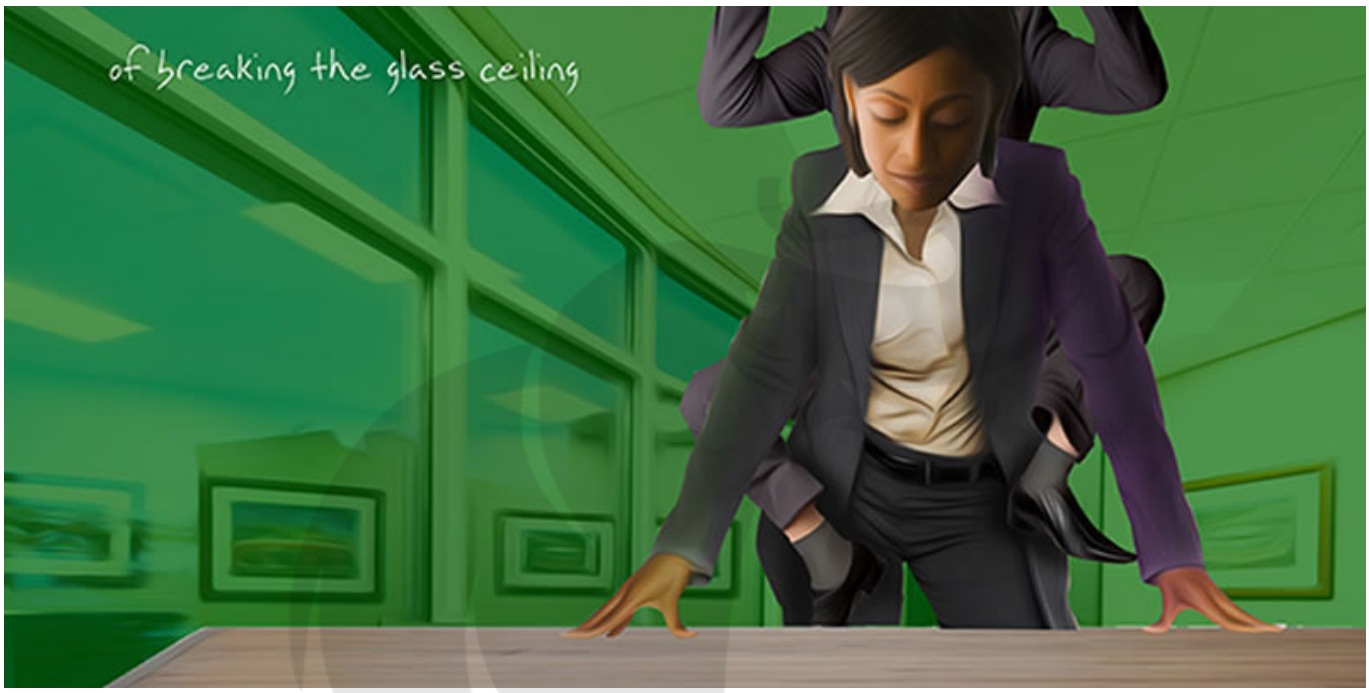
Sex, Laws and Legal Tape

By Jill Cottrell Ghai



Background

The women's conference in Beijing in 1995 emphasised that what was needed in law making bodies was enough women to have an impact (not just two or three or six), to show that women could really make an effective contribution to public affairs. It popularised the idea that one-third women (33%) should be enough.

Kenyan women picked up the Beijing ball, and ran with it. In 1997 there was an effort to get the law changed to require parties to have at least one-third women candidates. No law was passed, but the failure spurred the establishment of the Women's Political Caucus who "rejected the role of merely saying prayers, making tea and dancing for politicians during meetings", as two authors put it.

In the past, there have not been many women in Kenya's Parliament. Before 2010, there were 222 MPs: 210 for constituencies and 12 "nominated". The latter were chosen by parties after the election results were in, and were supposed to be the voice of groups with inadequate representation, including women. For example, in 2007 sixteen women were elected for constituencies, and six nominated – just 10%. One woman elected in a by-election in 2008 brought the total up to 11%.

Now we have 349 MPs and 67 senators. Not more than two-thirds men would mean 117 women in the National Assembly and 23 in the Senate.

At the end of the 1990s, FIDA Kenya (International Federation of Women Lawyers) argued that under a new Constitution 30% of the seats in Parliament should be reserved for women. In fact, they said, law should reserve one-third of the seats in all public bodies for women. (Of course, 30% is not one third. In our current National Assembly of 349 members, the difference between the two is eleven).

Making a constitution

In 2001 the first official body to work on a new constitution started work: the Constitution of Kenya Review Commission (usually called the CKRC). The Act of Parliament setting it up said its task included gender equity. Seven CKRC members were women— 26% of the regular members, not the 50% that FIDA had demanded, or even one third. But they included formidable women such as Phoebe Asiyo who had entered Parliament in 1979 (one of only three women), Nancy Baraza, former chair of FIDA, Professor Wanjiku Kabira, founding secretary of the Women's Political Caucus, and Salome Muigai, gender and disability activist.

> "One-third women" became "not more than two-thirds of either gender" at the Bomas conference. Of course it is logical, but the language reflects the male fight-back against women's demands.

Between 2002 and 2010, there were about eight versions of a new Constitution. All talked about the need to have one third women or "not more than two thirds of either gender". The CKRC proposed an electoral system that would have guaranteed that at least 45 members out of a house of 300 (15%) were women. National Constitutional Conference at Bomas in 2003-4 replaced this with something quite like the current system: this could have produced 25% women in the National Assembly (the percentage was not clear because, while it named each district/county and gave each a woman member, it left it to Parliament to fix the number of ordinary constituencies).

The idea of "topping-up" with extra women to ensure one third women in county assemblies was in draft constitutions ever since Bomas. But the second draft by the Committee of Experts (CoE) included the same system for the National Assembly and the Senate as well as the county assemblies. The Parliamentary Select Committee that reviewed the draft in early 2010 removed this except for county assemblies. This is important because this is the system that Parliament was most recently discussing.

Incidentally, "one third women" became "not more than two thirds of either gender" at Bomas (let's call this principle "not>⅔" for short). Of course it is logical, but the language reflects the male fight-back against women's demands. However, women have sometimes found it useful in argument: not more than two-thirds, they say, means precisely that. There should be no "rounding" of numbers.

The 2010 Constitution

The Constitution seems to make making a clear commitment to not>⅔, particularly in elected bodies, with some provisions about "appointive bodies" (like the cabinet, commissions, the public service, judiciary and various boards and authorities). But it is not always really clear what has to be done, and how and when.

Only in county assemblies is not>⅔ totally guaranteed. After the ward election results are announced, and four seats assigned to parties to represent marginalised groups, including persons with disabilities and the youth, the question is: will more than two-thirds of the seats be occupied by men? If "Yes", the Constitution provides that enough women must be selected to ensure not>⅔ are

men. These extra women are taken from lists of candidates put forward by each party before the election. And the number of these extra members that each party gets depends on how many ward seats the parties have won.

On the Senate, the Constitution has rules making it much easier to achieve not>⅔, but not guaranteeing it. Senate must have 16 extra women and two women to represent persons with disability and marginalised groups. So there is a guarantee that just under 27% of the Senate will be women. If only five women are elected as county Senators, not>⅔ would be achieved. But in 2013 no woman was elected county Senator!

The Constitution takes us less far towards not>⅔ in the National Assembly. It does guarantee 47 seats for women—county women representatives. Though there are 12 seats for marginalised groups (often called "nominated"), there is no guarantee of how many will be women, though probably not less than four. Progress towards not>⅔ could be slow. To get there under the existing rules, 65 women would have to be elected for regular constituencies. In 2013 only 16 of those constituencies (just under 6%) elected women: a smaller percentage than in the 2007 elections. Providing specific seats for county women representatives tended to discourage parties from putting forward women for regular seats: they argued that "women have their special seats".

> "Promote" is not the same as "guarantee" or "ensure". Incentives, education and persuasion may be forms of promotion, but they do not guarantee representation.

The Constitution also clearly says "Not more than two-thirds of the members of any county executive committee shall be of the same gender" (Article 197). The Governor has a free hand in appointing executive members, so it should be easy to ensure that there are enough women. The same should be true of the President appointing the Cabinet.

Another possible approach is not to require certain behaviour, but provide an incentive – like money. Two early draft constitutions said that Parliament must pass law about how much political parties would get from the Political Parties Fund, and that one factor should be how many women candidates each party had got elected. But the Parliamentary Select Committee removed this, wanting Parliament to have a free hand in deciding how the Fund was used.

Article 81 does not say how the result is to be achieved: the electoral system must comply with several principles— including not>⅔ in elective public bodies. But what is a principle? Does it mean "This must happen and must happen now", or "Later will do" or just "Make an effort"?

Article 27(8) is also important, and equally puzzling: the State must do what is necessary "to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender".

Finally, Article 100 says that law "promoting" representation of women and disadvantaged groups must be passed within five years. "Promote" is not the same as "guarantee" or "ensure". Incentives, education and persuasion may be forms of promotion. In fact, the most sensible meaning of Article 100 is that it is about something different from special rules, like at least one-third women. It is about ensuring that, over time, parties and people are encouraged and educated to accept women and disadvantaged groups as legislators.

After the Constitution

In 2013, the IEBC (Independent Electoral and Boundaries Commission) and the parties had no

choice: there had to be 47 women county members of the National Assembly, and 12 extra members of the same body – taken from lists that had to alternate men and women (often called zebra lists); there had to be 18 extra women members of the Senate and top-up members of the county assemblies. Every county's assembly has been "topped up" this way. So every county has one third women (no less —but also no more). Senate got just the guaranteed 27% women. The National Assembly had 19% women: 16 elected for constituencies, the 47 county women and 5 of the 12 extra members.

And most commissions and other public bodies have one-third women. The same is not always true of government executives: nationally or in the counties. Early on, a FIDA report found that only 16 of the county executives had as many as one third women.

> Despite fine words about the Constitution and women's rights, the Court of Appeal did almost nothing to move the Supreme Court towards not>⅔.

In short, appointers to bodies have usually done what they had to and no more—and sometimes not even that.

Most interest (in the media and in the courts) has been in not>⅔ in Parliament. So we shall look at that saga in detail. But first, the court cases about appointive bodies.

The Courts on "appointive bodies"

There have been two particularly important cases.

One, in 2011, was brought by FIDA about the composition of the Supreme Court, with two women and seven men (over 70% men). Despite fine words about the Constitution and women's rights, the Court of Appeal did almost nothing to move the Supreme Court towards not>⅔. The Court of Appeal read 27(8) as though it demanded "progressive realisation" or gradual movement towards not>⅔, and did not create any immediate duty. But "progressive" is not there. To be fair to the Court of Appeal, teasing out the meaning of 27(8) is not easy.

And it said that the Judicial Service Commission—which selects the judges—did nothing wrong. It suggested that the JSC could do nothing until the government passed law or took some other measures to ensure not>⅔. But this ignores that Article 27(8) puts the duty on "the State" not just the government, and the JSC is part of the State. Indeed, because the JSC is an independent commission, there is very little the government or Parliament can do to tell it how to work.

In 2017, the issue came up again—brought by the National Gender and Equality Commission. Justice Chacha Mwita was happy to decide that two thirds of seven is five, leaving little room for requiring efforts to make the Supreme Court truly gender equal. He did not explain what the Constitution means when it says the JSC must promote gender equality.

In the second case, in 2017, the make-up of the cabinet was challenged. Justice Onguto held that Article 27(8) did apply to the cabinet, and had been violated because cabinet had more than two thirds men. However, because of the imminent election he said the cabinet did not have to be changed immediately, but a wrongly made-up cabinet after the election would be invalid. He did not accept the idea that this was a matter for progressive realisation.

Trying to get not>⅔ in Parliament

The IEBC

The IEBC and its predecessor the Interim Independent Election Commission did try to ensure not>⅔ in Parliament. An expert proposed a novel system: every candidate in a regular constituency would have to run on a "ticket" of a woman and a man. Voters would vote for the ticket not the individual. If a "ticket" won, usually the first name on the ticket—man or woman—would become the MP. But, after all results were in, if not enough women had seats, the women rather than the men from winning tickets would have been taken, until enough women were taken. The taking-the-women process would have begun with the tickets that had won, but the least resoundingly (by the smallest proportion of the votes cast). It wasn't a perfect system—independent candidates particularly presented a problem. But it would have meant no-one had to give up the chance to stand because of their gender, and women would have had a chance to stand in every constituency, learn about campaigning etc. And it would not have needed a change in the Constitution.

But the IIEC preferred another system: grouping constituencies into fours, and designating one of each four as a "women only" constituency for one election. This could have been done without amending the Constitution. But the idea did not get past Cabinet. Men could not bear the idea of not being able to stand for "their" constituencies.

So in 2013 there was no mechanism to ensure not>⅔.

Enter the courts

The question of not>⅔ in Parliament went to court just before the 2013 elections; the case was brought by CREAW (Centre for Rights Education and Awareness). A majority of the Supreme Court decided that "principles" were not firm rules. And affirmative action, like special measures to get women into Parliament, was something to be achieved gradually. So Parliament with under 33% women would not be immediately unconstitutional. A bit like the FIDA case on the Supreme Court.

> Because the JSC is an independent commission, there is very little the government or Parliament can do to tell it how to work.

Chief Justice Willy Mutunga disagreed. He would have insisted on the necessary law being passed then.

The Supreme Court majority seized on Article 100: about law "promoting" representation of women and disadvantaged groups. By 2015, the Court said, the law guaranteeing the gender quota must be in place. This is ingenious, if not perhaps what the drafters intended. But what the Supreme Court says is the law.

The Attorney-General

The Attorney General set up a Task Force. It considered various solutions including the two systems just mentioned, and others, most of which would have needed a change to the Constitution—except financial incentives to parties to strive for women to win their seats.

The MPs

Bills were introduced into Parliament to amend the Constitution to ensure not>⅔. The MPs just did

not turn up in sufficient numbers to pass the Bills.

Parliament did amend the Political Parties Act to include a provision that says that 15% of the Political Parties Fund must be distributed to parties based on how many "special interest group" members were elected for the parties at the preceding general election. Women are among the "special interest groups". This may not help much. Last time, only three parties got anything from the Fund. Even with recently changed rules for allocating the Fund, no more than four parties will get money from it after the 2017 elections if the pattern of seats won is like last time. Finally, though the Fund is not small, is it enough to persuade parties to change deep-seated prejudices?

The courts again

In 2015, Justice Mumbi Ngugi held, in another case brought by CREAW, that Parliament must pass the necessary law by the Supreme Court's deadline. So Parliament extended the deadline. Soon after the National Assembly missed this new extended deadline, CREAW went back to court. Justice Mativo decided this case on March 29th 2017. He ruled that Parliament had failed to do what the Supreme Court had directed. He told them they had to do it by May 29th, otherwise anyone could apply to the Chief Justice asking for an order that Parliament should be dissolved (which means an election). This is because the Constitution says that if Parliament does not comply with a court order to make a law implementing the Constitution, anyone may apply to the Chief Justice. And the Chief Justice must ask the President to dissolve Parliament, and the President must do so.

> Bills were introduced into Parliament to amend the Constitution to ensure not>⅔. The MPs just did not turn up in sufficient numbers to pass the Bills.

But changing the voting system is not the only way to get more women. One other court case suggested that one way is for parties to put forward enough women candidates, and for the IEBC should pressurise parties to do so. The court agreed. But the judge said that because time was short, he would not order this for 2017. But for next time the IEBC must take this approach. In fact, the IEBC has said that it has tried to do it this time, but it cannot force the parties.

This approach does have shortcomings: a party might nominate women as candidates for half its constituencies, but if these were constituencies the party was least likely to win, it might end up with well under one-third women members actually elected. However, last time, 15% of women ward MCA candidates got elected—the same as men. But a large number of (mostly male) independent candidates might also produce more male members.

Conclusion

We waited for Parliament. Could it push through a constitutional amendment in time? Might it try the women-only constituency system rule, or the two-name ticket approach—so avoiding constitutional amendment? But was there time before the election to do the necessary new nominations? Or would it fail to meet the court's deadline?

Now we know: Parliament discussed amending the Constitution to introduce top-up seats for women. This has been their favourite approach because existing MPs wanted to hang on to their chances. It would have been the least complex system to administer so close to the elections. If it had been passed, and if the results were the same in terms of numbers of seats held by women as in 2013, to achieve not>⅔ the National Assembly would have had to have 73 top-up women—and a total of 422 members.

Anyway, Parliament failed. How hard did it try? On June 6th the National Assembly debated the Bill, but after that the members perhaps realised the effort was pointless—despite being on the House's agenda repeatedly, nothing was done before they closed finally on June 15th. And it had not gone to Senate!

No-one seems to have gone to the Chief Justice. Probably everyone realised this would not have helped. There is already to be an election —less than two months after Justice Mativo's deadline. And the IEBC is struggling to be ready by then.

> But changing the voting system is not the only way to get more women. One other court case suggested that one way is for parties to put forward enough women candidates, and for the IEBC should pressurise parties to do so.

We have some time to rethink strategies, including whether we want an even more "bloated" National Assembly. And, let's think about the position of women representatives. In the National Assembly only 16 were elected on the same basis as most men: competing in a constituency. The forty-seven county members have roles less well understood by the public, and with larger constituencies to manage; and five are list members with roles also less well understood. In the Senate: all have unclear roles, not representing counties, unlike most of the men. In the counties, most of the women are list members, without ward responsibilities or support, so again having a role that is not clear to everyone. Is this satisfactory? Do we want even more of these sorts of seats for women? However, many of these women have been active members. One indication may be how well women who have served as "nominated members" in the current Parliament or county assemblies are able to use that experience as a springboard to election for regular constituencies, wards, counties or even governorships.

A report says that this time, 11 women are standing for Governor (there were only six last time), and 42 for Senator (17 last time), but the picture is sketchy so far. However, a final thought: suppose—by a miracle—in August five women are elected Senator and 65 women are elected as constituency MPs, so neither house has more than two-thirds men. Would that not be a better solution? Would it be the end of the story?

The sting in the tail

Now for the bad (or worse) news: some have said that the new Parliament would also risk being dissolved if it fails to pass this law. But, the Constitution (it's Article 261(8)) says that the period Parliament gets to pass a law begins again when the new Parliament begins its term. For Article100—the peg on which the Supreme Court hung its ruling in the CREAW case— the implementation period allowed is five years. No Parliament will last more than five years. So the CREAW case technique will never work again.

But the constitutional principles still apply. Article 100 is not an essential aspect of the achievement of the "not more than two thirds" rule. In his minority decision in the original CREAW case, Chief Justice Mutunga was clear that "any of the elected houses that violate this principle will be unconstitutional and the election of that house shall be null and void." Will the courts agree?

Published by the good folks at The Elephant.

The Elephant is a platform for engaging citizens to reflect, re-member and re-envision their society by interrogating the past, the present, to fashion a future.

Follow us on Twitter.