



Fear and Loathing in Kenya's Parliament

By Kwamchetsi Makokha



A month before Chief Justice David Maraga advised the president to dissolve parliament, legislators were toying with plans to delete the constitutional requirement that would include women in national political leadership.

“You cannot compel citizens to elect either men or the other gender,” said Justin Muturi. Speaking at a parliamentary retreat, the Speaker of the National Assembly appeared to have lost whatever empathy he previously harboured for affirmative action legislation to promote women’s participation in elected leadership in June 2016.

Following the CJ’s September 21 advice, Muturi mobilised the Parliamentary Service Commission, which he chairs, to mount a court challenge against it. He remarked: “The clamour to pass legislation to ensure [the] two-thirds gender principle potentially violates the sovereign will of the electorate at least to the extent that such legislation will demand top-ups or nominations of women”.

Jeremiah Kioni, who chairs the Constitution Implementation Oversight Committee, told the parliamentary retreat that politicians only agreed to include the clause on the inclusion of women in elective leadership in the 2010 constitution “to stabilise the country and cool tempers”.

Unknown to many at the time of the retreat debate, the Speakers of the National Assembly and the Senate had received an August 3 letter from Chief Justice David Maraga informing them that he was considering six different petitions asking him to advise the president to dissolve parliament as

provided for in the constitution. The letter followed up on a 25 June 2019 one inquiring about the progress made by Parliament in enacting laws to increase women's participation in leadership.

In August, Muturi cautioned members of parliament that there was a real risk of dissolution over failure to enact the law on including women in leadership, but since Maraga delivered his coup de grâce on September 21, the Speaker has gone on the warpath.

Although the constitution - which was passed by 68.6 per cent adult suffrage in August 2010 - gave parliament independence, it contains a suicide clause giving the president the power of dissolution should it fail to enact laws that bring the constitution into application. The clause kicks in if the High Court certifies and declares that parliament has failed to pass a law within the required timelines.

The constitutional provision requiring that no gender should constitute more than two thirds of any elective or appointive body has been successfully implemented in county assemblies, but it has remained a sticking point at the national level. Elections for the National Assembly and the Senate in 2017, and the subsequent allocation of special seats, gave women only [23 per cent](#) of the share of legislative leadership at the national level - a 9 per cent improvement on the 2013 elections.

A 2018 National Democratic Institute survey of gender participation in politics found that "[w]omen who had served in specially nominated positions, for example, were more likely to win an election than those who had never held office at all".

A combination of political chicanery, slothful self-interest and duplicitous male chauvinism has repeatedly thwarted efforts to create an inclusive national legislature. The laws required to cash the promissory note given to women when the country passed the Constitution have never been passed because neither the National Assembly nor the Senate has been able to muster the two-thirds quorum required to debate a constitutional amendment.

The National Gender and Equality Commission documents the [Journey to Gender Parity in Political Representation](#), noting the four floundering attempts to enact laws that would increase the number of women in national legislatures.

In each instance, the bills proposed to become law had already been developed off-site, complete with a [costing](#) of what each option would mean for the taxpayer, and all that was required of MPs was for them to show up and make the quorum for the bills to come under consideration.

The last effort at passing the gender law had been stepped down from the order paper in November 2018 over fears that there would be lack of quorum to consider it since it touched on the constitution. The bill was the product of painstaking negotiation, bargaining, and deal making involving over 50 organisations and that had lined up President Uhuru Kenyatta, political party leaders Raila Odinga and Kalonzo Musyoka.

When the proposed law was put to the National Assembly in February 2019, the headcount came in at 174 MPs - 59 short of the 233 required to consider a law relating to the constitution. Earlier, under the hammer of the High Court in 2016 to pass a similar law, Speaker Muturi innovated a way to get round the requirement for constitutional amendment law proposals to wait 90 days, fast-tracked the bill through the 11th Parliament - only for it to fail because there was no quorum to consider it.

Frustrations over the repeated failure to pass laws that promote women's increased participation in elective politics have triggered a record number of court petitions. The most consequential of these is the petition filed by the Centre for Rights Education and Awareness, from which the High Court issued a declaration that parliament had indeed failed to perform its duty to enact a law to promote

the participation of women in national elective leadership.

The Speaker of the National Assembly lost an appeal against the 2017 High Court decision ordering parliament to enact the law providing for inclusive leadership within 60 days.

Last year, on 5 April, the Court of Appeal observed that the repeated failure to get a quorum to pass the law “does not speak of a good faith effort to implement the gender principle”, noting that Parliament had already exhausted the option of extending for a year the deadline for enacting the gender law.

That decision confirmed parliament’s failure to perform its duty, and within two months inspired five petitions requesting the Chief Justice to advise that it be dissolved. The Law Society of Kenya lodged its petition with the Chief Justice in June this year.

Ken Ogutu, who teaches law at the University of Nairobi, analogises the current dilemma to a construction project where the main contractor has completed the main structure of a new house and a subcontractor is then left to do the finishing to ensure the house is completed to the required standards. “The main contractor gives the subcontractor a schedule of the finishing he must do and by when, and if the subcontractor fails to complete these tasks within the specified timelines, he is fired and a new one hired to do the work”.

Parliament has argued that it has passed all the other laws and should not be punished for not enacting the gender inclusion laws.

The Chief Justice’s advice to dissolve Parliament will likely expose the institution’s hidden weaknesses. Its failure to enact laws to bring women into elected national leadership has only exposed its soft underbelly, revealing a combination of narcissism and incompetence.

Beneath the shining veneer of success, evident in the passage of 47 out of the 48 laws required to implement the constitution as outlined in its Fifth Schedule, there is plenty of evidence that parliament is still stuck in the old constitutional order. Some argue that parliament has been the weak link in turning Kenya into a constitutional democracy.

Since 2011, *Kenya Law Reports* has documented 48 statutes or amendments to the law that the courts have struck down for being [unconstitutional](#). Eight of the controversial laws struck down by the High Court or the Court of Appeal relate to the management of competition in elections.

Judges sitting singly or in panels of three in the High Court, or in the Court of Appeal, have struck down parliament’s attempts at power grabs by avoiding public participation and making laws that violate the constitution. It is even more worrying that the 48 are only those laws that citizens or organisations have challenged, meaning that there could be a great deal of unconstitutionality hidden in other laws.

For example, commenting on the attempt to sinecure seats for political party leaders in the election law, appellate judges Festus Azangalala, Patrick Kiage and Jamilla Mohammed wrote in their judgment: “[F]ar from attaining the true object of protecting the rights of the marginalized as envisioned by the constitution, the inclusion of Presidential and Deputy Presidential candidates in Article 34(9) of the Elections Act does violence to all reason and logic by arbitrary and irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalized to the detriment of the protected classes or interests”.

Other judges have described some of the legislative attempts as “overreach” or “no longer [serving] any purpose in the statute books of this country”. Judge Mumbi Ngugi, commenting on the anti-

corruption law passed by parliament, remarked: “The provisions [...], apart from obfuscating, indeed helping to obliterate the political hygiene, were contrary to the constitutional requirements of integrity in governance, were against the national values and principles of governance and the principles of leadership and integrity in . . . the Constitution . . . [and] entrenched corruption and impunity in the land”.

The low quality of laws emanating from parliament since the promulgation of the constitution in 2010 arises from several factors, among them competence gaps and self-interest, and despite the inclusion of an entire chapter on integrity in the constitution, the country’s politics is weighed down by poor political hygiene. Similarly, the law on qualification for election as a member of parliament sets a very low threshold while the one for recalling elected leaders is impossible to apply.

Data aggregated from the parliamentary website shows that 72 per cent of all members of the National Assembly are university graduates, but many of the qualifications listed appear to be shotgun degrees from notorious religious institutions acquired in the nick of time to clear the hurdle for election. The modest intellectual heft of members in the National Assembly especially makes the institution unsuited for the task of navigating a Western-style democracy in the design of the constitution.

Some 40 MPs have law degrees, but the Kenya Law Reform Commission, the Attorney General’s office, and various interest groups carry out much of the legislative drafting. Parliament is then often left with the duty of playing rubber stamp.

At moments of national crisis, legislative initiative has tended to emanate from outside parliament, whose members are then invited to endorse whatever deal has been agreed. Cases in point from recent history include the resolution of the stalemate over changing the composition of the Independent Electoral and Boundaries Commission in 2017, and the political détente in the aftermath of the putative 2017 presidential election.

In a global first of game-warden-turned-poacher, the Public Accounts Committee, Kenya’s parliamentary watchdog, was [disbanded](#) over allegations of corruption. The Conflict of Interest Bill was only published last year and is yet to reach the floor of parliament. It was not the only instance of members of parliament literally feathering their nests. Legislators have been most voluble in defending the benefits they feel entitled to, and clinging onto the control of the constituency development fund, which they have turned into a pot of patronage.

The constitution refashioned parliament as an independent institution with law-making, oversight and budgeting powers. The institution has not acquitted itself in watching over public institutions and spending, often playing catch-up with reports of the Auditor General. Its lax fiscal management and oversight has resulted in the country’s [debt stock](#) growing from Sh1.78 trillion in 2013 to the current Sh6.7 trillion. Only this year, the Sh500 billion contract for the construction of the standard gauge railway using Chinese loans was found to [have been illegal](#).

Its review of the annual reports from the judiciary and the 14 constitutional commissions has been lacklustre, with the worst case being the parlous state of the Independent Electoral and Boundaries Commission. One of the concerns raised about dissolving parliament is around the readiness of the commission to undertake nationwide parliamentary elections, given that four of the seven commissioners have resigned and have not been replaced, and that the institution does not have a sufficient budget to undertake its work.

Another anxiety around the dissolution of parliament has been that the electorate would not cure the gender imbalance in the national legislature through an election. That anxiety is a misapprehension.

On 20 April 2017, in deciding a case filed by Katiba Institute, Justice Enock Mwita ordered that political parties formulate rules and regulations to bring to life the two-thirds gender principle during nominations for the 290 constituency-based elective positions for members of the National Assembly and the 47 county-based elective positions for members of the Senate within six months. He added that if they failed to do so, the IEBC should devise an administrative mechanism to ensure that the two-thirds gender principle is realised within political parties during nomination exercises for parliamentary elections.

The August 2017 High Court judgment requires the IEBC to ensure that party lists contribute to the realisation of the gender principle. The decision has not been appealed or vacated. Given the parliament's proclivity to pursue the interests of its members in increasing their pay even when not allowed to do so, it is not unlikely that MPs, detained by their own fear of political competition, have refused to see how affirmative action legislation would increase women's participation in politics.

For now, the Chief Justice's advice to the president to dissolve parliament has been challenged in court by two citizens, with Judge Weldon Korir certifying that the case raises constitutional questions that need to be adjudicated by an uneven number of judges. It is not unlikely that the matter could go all the way to the Court of Appeal, meaning that the earliest a final position could be settled is February next year.

The dissolution saga will likely highlight the distance yet to be covered in realising the parliament Kenyans wanted to establish through the constitution. Although parliament has a five-year term, it can be extended in times of war or emergency for a period of one year each time, for a maximum of one year. The corollary is that its term can be shortened if it fails to live up to constitutional expectations.

Bereft of any real power or competence and unable to cut the umbilical cord binding it to the executive, parliament will be President Uhuru Kenyatta's poodle waiting on his charity. And as the president concludes the political calculation of the costs and benefits of dissolving parliament, the country will be assessing its legislature's performance not just on gender but on everything else.

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