The Constitution of Kenya, 2010 mandates the Chief Justice of Kenya to advise the President to dissolve Parliament in case of failure to enact any of the legislations under the Fifth Schedule. Pursuant to Article 261(7) as read with Articles 21(3), 27(3)(8), 81(b) and 100(a), the Chief Justice on an advisory statement dated 21st September 2020 petitioned the President to dissolve the twelfth Parliament for failing to enact the “two-thirds gender rule” designed to redress gender inequality in Kenya. Dissolving Parliament generally implies that parliamentarians’ term of office is brought to an end so as to facilitate election of new office bearers. In Kenya, dissolution of Parliament is however a powerful political tool that eventually determines the process of Government formation and removal. Pertinent questions that crop up inter alia include: how will dissolution be applied in a bicameral setup? After dissolution, whether the country should be subjected to a ‘general’ or ‘by-election’? Should the newly elected Parliament serve its full term of office or for the remainder of term of the dissolved Parliament? Should the Executive be dissolved to pave way for the general elections? and whether it is high time to amend the Constitution to achieve “two-thirds gender requirement”? This paper therefore examines treacherous road to realization of the two-thirds gender parity requirement. Moreover, it evaluates the power, modes, process and effects of dissolution of Parliament under the existing laws in Kenya. Besides, it explores the elusive option of amending the Constitution to achieve the “two-thirds gender requirement.”

1. INTRODUCTION:

Gender discrimination is an age-old phenomenon in the Kenyan society. Cognizant of this fact, the framers of the Constitution of Kenya, 2010 [hereinafter referred to as COK] thought it better to have provisions in the Constitution to promote gender equality.¹ Key among the several provisions is Article 27 which not only prohibits discrimination on any ground i.e., sex,
marital status, age and race but it also categorically states that men and women are equal before the law and are entitled to equal treatment and benefit of the law in all spheres be it social, political, cultural or economic. Besides, to achieve the objectives of the Article as read with Article 81(b), the State is constitutionally mandated to ensure a legislation promoting *affirmative action* programmes is passed in order to actualize the “two-thirds gender rule.”

Parliament being a public body and one of the organs of the State in which its membership is predominantly composed of elected leaders, the Constitution further requires it to enact a legislation within a period of five years after promulgation of the Constitution that promotes suitable representation in the Legislative Assembly of amongst others, women.

Despite the existence of several provisions in the COK, a few Court decisions and an advisory opinion mandating Parliament to pass legislation designed to redress gender inequality in Kenya - “two-thirds gender rule,” the tenth, eleventh and twelfth Parliaments have all failed to perform their constitutional duty. The bone of contention is the formula, matrix and logistics in ensuring that both Houses of Parliament are legally constituted.

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3 This is an acronym prohibiting any form of discrimination in elective and appointive positions in the Republic of Kenya. It is based on the provisions of Article 27(8) that imposes an obligation upon the State to ensure that persons either elected or appointed to hold post in a certain office meet the constitutional threshold i.e., not more than two-thirds should be of the same gender. It was observed in *Center for Rights Education and Awareness (CREAW) v Attorney General & Another* [2015] eKLR: Constitutional Petition No.182 of 2015 at 36 that the two-thirds gender parity rule does not focus on only women, but it is an affirmative action principle meant to benefit either gender.

4 The Kenyan Constitution was promulgated on 27th August 2010.

5 Supra note 1, arts 100(a), 261(1) & the Fifth Schedule. Since the Constitution does not prescribe the process of achieving the two-thirds gender threshold, it obligates Parliament to legislate on the issue.

6 *In the Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011* at 93 & 94, it was observed that though the Apex Court’s opinions are binding, they are incapable of enforcement like ordinary Court decisions (in the form of orders, rulings, judgments, decrees, *etc.*). However, such opinions are to be considered as authoritative statements of the law since they touch on key aspects *i.e.*, policy, legal, economic, social and political situations. Moreover, they ought to be taken seriously particularly by a State organ that request for such opinion as it binds it. This is mainly meant to avoid cases where a body disregards an opinion especially where it only seeks for it simply to have a Court endorse its position. See, *In the Matter of Article 55 of the Constitution Reference re Dual Nationality and Other Questions* Constitutional Reference No.01 of 2004. See also, *In re U.P. Legislative Assembly AIR 1965 SC 745, 762 & 763; Chhabildas Mehta v Legislative Assembly, Gujarat State [1970] 2 Guj LR 729; St. Xaviers College v State of Gujarat & Another AIR 1974 SC 1389; Ram Kishore Sen v Union of India AIR 1965 Cal 282.

7 See, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR: *Center for Rights Education and Awareness (CREAW) v Attorney General and Another* [2015] eKLR:
The COK mandates the Chief Justice of Kenya [hereinafter referred to as CJ] to advise the President to dissolve Parliament in case of failure to enact any of the legislations under the Fifth Schedule. Pursuant to Article 261(7) as read with Articles 21(3), 27(3)(8), 81(b) and 100(a), the Chief Justice on an advisory statement dated 21st September 2020 petitioned the President to dissolve the twelfth Parliament. Dissolving Parliament generally implies that parliamentarians’ term of office is brought to an end so as to facilitate election of new office bearers. In Kenya, dissolution of Parliament is however a powerful political tool that eventually determines the process of Government formation and removal. Accordingly, some pertinent questions crop up: whether the President is duty bound to dissolve Parliament amid the current political tension? Are there circumstances or periods under the COK in which dissolution of Parliament is not permitted? Whether the Senate should be dissolved in the event the National Assembly fails to extend the period requisite for enacting a specific legislation? Should the Executive as well be dissolved to pave way for the general elections? How will dissolution be applied in a bicameral setup? Whether after dissolution, the country should be subjected to a ‘general’ or ‘by-election’? Should the newly elected Parliament serve its full term of office or for the remainder of term of the dissolved Parliament? Can Parliament be dissolved at the discretion of the Executive? and whether it is high time to amend the Constitution to achieve the two-thirds gender parity requirement?

This paper therefore examines treacherous road to realization of the two-thirds gender parity requirement. Moreover, it evaluates the power, modes, process and effects of dissolution of Parliament under the existing laws in Kenya. Besides, it explores the elusive option of amending the Constitution to achieve the “two-thirds gender requirement.”

Constitutional Petition No. 182 of 2015; Center for Rights Education and Awareness (CREAW) & 2 Others v Speaker, The National Assembly & 6 Others [2017] eKLR: Constitutional Petition No. 371 of 2016; Speaker of the National Assembly v Center for Rights Education and Awareness (CREAW) & 7 Others [2019] eKLR.
2. CONCEPT AND MEANING OF THE TERM ‘DISSOLUTION OF PARLIAMENT’:

The dissolution of Parliament is a mandatory exit from office by members of a Legislative Assembly prior to a general election of a new Parliament.¹¹ According to Jain M. P., dissolution of Parliament is “putting an end to the life of the House.”¹² Once Parliament is dissolved, elections are held and the Houses reconvene with possibly a mixture of new and old (re)elected members.¹³ The purpose of incorporating the power to dissolve Parliament in the Constitution ranges from State to State. Generally, such power helps to, inter alia, fortify the Executive, reinforce a Government’s popular mandate, choose the best time to hold general elections, enforce party discipline, win parliamentary majority, break inter-institutional deadlock and test public opinion on major issues.

By and large, dissolution may sometimes be prohibited within a certain period in order to give the new Parliament a reasonable chance to meet and function normally before the power to dissolve may be invoked by the President.¹⁴ Likewise, dissolution may be prohibited at the time the country is at war or during a period of state of emergency.

In a bicameral legislature, dissolution may affect either or both the Lower and Upper House. In the Kenyan scenario, dissolution of Parliament generally refers to the dissolution of both the Senate (Upper House) and the National Assembly (Lower House). Since the Kenyan Parliament is not a continuing chamber, the expiry of its normal life of five years ipso facto dissolves the House.¹⁵


¹⁴ For instance, the Constitutions of Portugal and Lithuania prohibits dissolution of Parliament within the first six months after election.

¹⁵ See, supra note 1, art 101(1).
3. ROAD TO REALIZATION OF THE TWO-THIRDS GENDER PARITY REQUIREMENT:

Systemic gender discrimination has been in existence in the Kenyan society for decades. Women are particularly the group that has for long faced exclusion economically, socially and politically.\(^{16}\) Enactment of effective gender laws and commitment of the State to enforce them is the only means to root out the deep seated patriarchy system in Kenya that has over the years been an instrument of non-balanced power dynamics and cultural inequality among the citizenry. It is in this context that after the promulgation of the current Kenyan Constitution in 2010, there were high expectations that majority of women will get an opportunity to be included in decision making process in all spheres in the governance system. This was to ultimately change the organization of political institutions and define a new social, economic and cultural order in Kenya.\(^{17}\)

There are various international, regional and sub-regional instruments that address the issue of gender equality and to which Kenya is a signatory namely: the Universal Declaration of Human Rights 1948,\(^{18}\) the International Covenant on Economic, Social and Cultural Rights 1966,\(^{19}\) the Convention on the Elimination of All Forms of Discrimination against Women 1979,\(^{20}\) the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) 2003,\(^{21}\) the International Covenant on Civil and Political Rights 1966,\(^{22}\) the Beijing Declaration and Platform for Action 1995,\(^{23}\) the Solemn Declaration on Gender Equality in Africa 2004, etc.\(^{24}\) By virtue of Chapter 1 of the COK, these treaties form

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\(^{16}\) In the Matter of Gender Representation in the National Assembly and the Senate [2012] eKLR, the Supreme Court of Kenya recognized that men and women in Kenyan society have historically had unequal power relations in decision making and governance.


\(^{18}\) Universal Declaration of Human Rights 1948, arts 1, 2, 7, & 21(1).

\(^{19}\) International Covenant on Economic, Social and Cultural Rights 1966, art 2.


\(^{22}\) International Covenant on Civil and Political Rights 1966, art 3.

\(^{23}\) Beijing Declaration and Platform for Action 1995, Strategic Objective ‘G.’

part of the Kenyan law.\textsuperscript{25} It is for this reason that in order to safeguard the fundamental human rights and freedoms and to ensure participation of all citizens in governance, Part 2, Chapter 4 of the COK not only prohibits discrimination on any ground \textit{i.e.}, sex, marital status, age and race but it also categorically states that men and women are equal before the law and are entitled to equal treatment and benefit of the law in all spheres be it social, political, cultural or economic.\textsuperscript{26} Besides, the Constitution bestows every person over the age of eighteen years with several rights \textit{i.e.}, right to make a political choice, right to be registered as a voter, right to vie for any elective post under a public body or office and right to free, fair and regular elections based on the free expression of the will of the voter.\textsuperscript{27} These rights cannot be limited save by law and then only to the extent that the limitation is expressly justifiable and reasonable.\textsuperscript{28}

Further, Part 2, Chapter 8 of the Constitution contains candid provisions regarding the composition of the Senate\textsuperscript{29} and the National Assembly.\textsuperscript{30} A broad look at the provisions under Articles 27, 81(b), 97 and 98 of the COK seem to be incapable of being out-rightly enforced unless certain measures are undertaken. This is based on the fact that for Article 81(b) to be implemented there is need to amend Articles 97 and 98 of the Constitution. In the alternative, Parliament is obligated to enact legislation (as contemplated under Article 27(8) of the Constitution) to conform with the two-thirds gender threshold and at the same time comply with Articles 97 and 98 that details composition of the Senate and National Assembly. It is however

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\textsuperscript{25} Supra note 15, art 2(6).


\textsuperscript{27} Supra note 25, art 38.

\textsuperscript{28} Ibid, art 24(1).

\textsuperscript{29} Article 98 of the Kenyan Constitution provides that Senate members shall consist of 47 members representing each County, 16 women members nominated proportionally by political parties, 2 members, a man and a woman representing the youth, 2 members, a man and a woman representing persons with disabilities and the Speaker.

\textsuperscript{30} For instance Article 97 of the Kenyan Constitution provides that the members of the National Assembly shall consist of 290 members elected in a single member constituency, 47 elected women representatives from each County, 12 special interest group members nominated proportionally by political parties and the Speaker.
significant to note that the Constitution as was held in *USIU v Attorney General & Another*\textsuperscript{31} and *OLUM v Attorney General of Uganda*\textsuperscript{32} has to be read and interpreted as an integral whole and no single provision should be used to destroy another but each sustaining the other. Thus, the Court ought to breathe life into all provisions of the Constitution while interpreting it.

Given that there have been very few elected/nominated women representatives in the Legislative Assembly since independence,\textsuperscript{33} and in order to achieve the objectives of Article 27(8) as read with Article 81(b), the State is constitutionally mandated to ensure a legislation promoting affirmative action programmes is passed in order to actualize the “two-thirds gender rule.”\textsuperscript{34} The significance of such legislation is to ensure that a minority gender in both the Senate and the National Assembly is not less than a third of the total number of seats in each Assembly.\textsuperscript{35} Besides, such legislation will to a great extent guarantee equitable governance by the fact that leaders will be drawn from diverse communities in Kenya.\textsuperscript{36}

Parliament being a public body and one of the organs of the State in which its membership is predominantly composed of elected leaders, the Constitution further requires it to

\textsuperscript{31} [2012] eKLR.
\textsuperscript{32} [2002] 2 EA 508. See, *R v Big Drug Mart* [1985] Canada SC.
\textsuperscript{34} Article 27(8) of the Kenyan Constitution is a mandatory provision which provides that not more than two-thirds of members of elective or appointive bodies should be of the same gender. Article 81(b) is specific to the composition of Parliament. It further reiterates by providing that not more than two-thirds of members of elective public bodies should be of the same gender.
\textsuperscript{35} The number of minority gender (women) should as such be 23 in the Senate and 117 in the National Assembly.
\textsuperscript{36} As of 4\textsuperscript{th} October 2020, there were 76 women out of 349 Members of the National Assembly - (21.78%). In the Senate, there were 21 women out of 67 Members – (30.88%), see, ‘National Assembly/Senate,’ <https://data.ipu.org/node/88/data-on-women?chamber_id=13439> accessed on 4\textsuperscript{th} October 2020; Oluoch Fred, ‘More Women elected in Kenya, But the Number Still Falls Short’ The East African Newspaper (Nairobi, 12\textsuperscript{th} August 2017) <https://www.theafrican.co.ke/tea/news/east-africa/more-women-elected-in-kenya-but-the-numbers-still-fall-short--1371468> accessed on 4\textsuperscript{th} October 2020; ‘Female Representatives’ <https://info.mzalendo.com/female-representatives/> accessed on 4\textsuperscript{th} October 2020; Wainaina Eric, ‘22 Women for Parliament as Regions Elect First Female MPs’ *Daily Nation Newspaper* (Nairobi, 11\textsuperscript{th} August 2017) <https://nation.africa/kenya/news/politics/22-women-for-parliament-as-regions-elect-first-female-mps--436740> accessed on 4\textsuperscript{th} October 2020; Kenya Women Parliamentary Association ‘Laying the Foundation for an Effective Female Legislator’ 12\textsuperscript{th} Parliament Members Induction Training Workshop Report (Naivasha, 11\textsuperscript{th} to 14\textsuperscript{th} January 2018) <https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/175-kenya-women-parliamentary-association-12th-parliament-members-induction-training-report/file.html> accessed on 4\textsuperscript{th} October 2020.

enact a legislation within a period of five years after promulgation of the Constitution that promotes suitable representation in the Legislative Assembly of amongst others, women. The 10th Parliament had about two years left to enact such legislation. The period was not enough for processing the Bill of such magnitude as it required adequate consultation, debate and approval by the Assembly before presentation to the President for assent. This compelled the then Attorney General, Githu Muigai to seek an advisory opinion on the matter at the Supreme Court. By a majority of four Judges, the Court held that the two-thirds gender parity rule is to be progressively realized as envisaged in the COK. Parliament was as such directed to ensure the requisite legislation was enacted by 27th August 2015 to avoid the next Parliament being declared unconstitutional and more importantly to secure women rights as envisioned by the Constitution. However, the then CJ Willy Mutunga dissented on the matter and was of the opinion that the rule ought to be immediately enforced since it is reinforced by values enshrined under Article 10 of the Constitution i.e., equity, inclusiveness, human rights, equality, patriotism, social justice and protection of the marginalized groups. He further held that such values stood subverted if subjected to an interpretation that approved progressive realization of the principle.

A few days prior to 27th August 2015, Parliament was yet to pass the requisite legislation. A petition Center for Rights Education and Awareness (CREAW) v Attorney General & Another was lodged at the High Court at Nairobi. The petitioners contended that the Attorney General and Commission on the Implementation of the Constitution had failed to perform their

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37 Supra note 1, arts 100(a), 261(1) & the Fifth Schedule. The Constitution of Kenya was promulgated on 27th August 2010.


39 See, Federation of Women Lawyers & Others v Attorney General [2011] eKLR. Cf, Milka Adhiambo Otieno & Another v Attorney General & Another Kisumu High Court Constitutional Petition Number 33 of 2011; Centre for Rights Awareness & Others v Attorney General and Another Nairobi High Court Constitutional Petition Number 208 of 2012 as consolidated with Nairobi High Court Constitutional Petition Number 207 of 2012 and Centre for Rights Education and Awareness & Others v Attorney General & Others Nairobi High Court Constitutional Petition Number 16 of 2011.

40 Article 81(b) of the Kenyan Constitution is couched in mandatory terms by use of the word ‘shall.’ Taking into account the holding in R v Minister for Health and Medical Practitioners and Dentists Board, ex-parte Avenue Healthcare Ltd., Nairobi HC JR Misc Application No. 280 of 2007 the Apex Court held that the word ‘shall’ is a compulsory word that mandates an authority to do something.


42 The petitioner could not wait for expiry of the Court appointed date (27th August 2015) for passing the requisite legislation to file the suit because, as it was held in Coalition for Reform and Democracy and Others v Attorney General High Court Petition No. 628 of 2014 and Kenya Association of Stock Brokers and Investment Banks v Attorney General High Court Petition No. 22 of 2015, any person has a right under Article 22(1) and 258(1) to approach the Court for relief where there exists a threat of violation of a fundamental right or freedom or contravention of a provision of the Constitution respectively.
constitutional duty enshrined under Chapter 18 of the COK to facilitate Parliament to enact the two-thirds gender rule. Reckoning that Parliament’s express task as contemplated under Article 261(1) involves some prior action by Attorney General and Commission on the Implementation of the Constitution as spelled out under Article 261(4), High Court Judge Mumbi Ngugi was compelled to issue an order of mandamus requiring the Attorney General and the Commission to fast-track the process of preparation and presentation of a Bill before Parliament geared towards enforcement of Articles 27(8), 81(b) and 100 of the Constitution as read with the Apex Court Advisory Opinion within forty days from 26th June 2015.

Following the Center for Rights Education and Awareness (CREAW) v Attorney General & Another order of the Court, the Attorney General and Commission on the Implementation were able to submit to Parliament Bills geared towards implementation of the two-thirds gender rule. However, Parliament failed to enact the requisite legislation. Its action necessitated filing of another petition - Center for Rights Education and Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others in which the High Court Judge John M. Mativo while acknowledging that failure by Parliament to enact two-thirds gender parity rule was a grave contravention of the COK which parliamentarians swore to defend and that such failure was a subversion of the sovereign will of the citizenry, granted another order of mandamus that required the Attorney General and Parliament to pass the requisite legislation within a period of sixty days from the date of the order and to take steps of regularly reporting the progress to the CJ. Moreover, the Judge pointed out that any person was at liberty to petition the CJ to advise

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43 Under the Transitional and Consequential Provisions - Article 261(4), the Attorney General is mandated to prepare Bills for tabling before Parliament. However, there must be consultation with the Commission for Implementation of the Constitution while.
44 Supra note 38.
45 Supra note 41.
46 It is to be noted that the Kenyan Constitution under Article 21(1) mandates Parliament as a State organ to promote, protect, respect, observe, and fulfill fundamental rights and freedoms of both men and women enshrined under Article 27.
48 See, Supra note 1, arts 1 & 3.
the President to invoke Article 261(7) if it again failed to pass the requisite legislation.\textsuperscript{50} Dissatisfied with the order, Parliament filed an appeal which the Court of Appeal in \textit{Speaker of the National Assembly v Center for Rights Education and Awareness (CREAW) & 7 Others}\textsuperscript{51} dismissed.\textsuperscript{52}

To further ensure proper representation of women in Parliament, Justice Chacha Mwita in \textit{Katiba Institute v Independent Electoral and Boundaries Commission}\textsuperscript{53} held that political parties ought to take pro-active steps in realizing the two-thirds gender principle.\textsuperscript{54} They are therefore mandated to ensure that before submission to the Independent Electoral and Boundaries Commission, the list of nominated candidates for positions in the Senate and the National Assembly must promote gender parity. The commission is thus duty bound to reject nomination lists that do not meet the minimum constitutional requirement on gender representation.

Even though there are several recorded initiatives undertaken by Parliament in trying to unlock and pass the two-thirds gender rule, including publication of the Constitution of Kenya (Amendment) Bills Nos. 3, 4 and 6 of 2015 and subsequent amendments of the Political Parties Act 2011 by the Election Laws (Amendment) Act 2016,\textsuperscript{55} it had however, as of 21\textsuperscript{st} September 2020, not succeeded in enacting the requisite legislation thus prompting the CJ to advise the President to dissolve Parliament.\textsuperscript{56}

\textsuperscript{50} See, \textit{Center for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 Others} [2017] eKLR: Petition No. 397 of 2017 where the conservatory order sought to prevent Members of Parliament from being sworn in after the 2017 General Elections for failure to meet the two-thirds gender principle was dismissed by High Court Judge E. C. Mwita.


\textsuperscript{52} In the appeal, the Speakers of both the Senate and the National Assembly had contested the move of being considered as respondents in the matter. However, taking into account the holding of the Court in \textit{Judicial Service Commission v Speaker of the National Assembly & 8 Others} [2014] eKLR and in \textit{Speaker of the Senate & Another v Attorney General & Others} [2013] eKLR, the appellate Court held that a Speaker of an Assembly can be a proper respondent in a matter pertaining acts or omissions of the Senate or National Assembly as s/he is the spokesperson, representative and figurehead of the Assembly. Besides, s/he represents the Assembly on all ceremonial occasions.


\textsuperscript{54} The Judge made reference to the words “other measures” under Article 27(8) of the Constitution to connote that the gender principle can be achieved through other means \textit{i.e.}, via nomination of candidates.

\textsuperscript{55} The amendment to the Act helps to share out fifteen percent of the political parties fund to registered political parties based on the number of aspirants duly elected during the general elections to represent persons from special interest groups, see, Section 25(1)(aa) of the Political Parties Act 2011 effected by Section 28 of the Election Laws (Amendment) Act 2016.

\textsuperscript{56} The Chief Justice of Kenya had before advising the President to dissolve Parliament received six petitions: a) Petition No.1 of 2019 by Margaret Toili dated 12\textsuperscript{th} April 2019, b) Petition No. 2 of 2019 by Fredrick Gichanga Mbugua’h dated 7\textsuperscript{th} May 2019, c) Petition No. 3 of 2019 by Stephen Owoko and John Wangai dated 20\textsuperscript{th} November 2018, d) Petition No. 4 of 2019 by Aoko Bernard dated 18\textsuperscript{th} June 2019, e) Petition No. 5 of 2019 by Hon. David Sudi dated 10\textsuperscript{th} July 2019, and f) Petition No. 1 of 2020 by the Law Society of Kenya dated 20\textsuperscript{th} July 2020.
After the advisory opinion was sent to the President’s office, petitions were filed in the High Court at Nairobi by Leina Konchella and Mohsen Abdul Munasar and later by the National Assembly and Senate\(^\text{57}\) prompting the Court to suspend the CJ’s advisory pending the hearing and determination of the petition.\(^\text{58}\) The petitioners had claimed that the advisory was ‘unreasonable, irrational and irresponsible’ and as such subject to be quashed as it could not fit to be implemented in a democratic State like Kenya. Justices Weldon Korir and James Makau while issuing conservatory orders not only held that the petition raised substantial constitutional issues that ought to be fully determined before dissolution but that it was significant for the CJ to constitute a panel of Judges to hear and determine the petitions. Following the ruling, the Deputy Chief Justice appointed a five Judge Bench to hear and determine the suit.\(^\text{59}\) The matter is still pending at the High Court. This therefore raises the question as to whether the CJ’s advisory opinion is constitutional and/or amenable to challenge before the High Court? It can be argued that the advisory opinion is not subject to challenge in a Court of law based on the fact that the CJ arrived at the decision after taking into account the previous orders issued by the Courts. Doing so would thus offend the principle of *res judicata*.

4. **RATIONALE BEHIND AMENDING THE CONSTITUTION TO ACHIEVE THE “TWO-THIRDS GENDER RULE”:**

The COK mandates that appointive and elective public bodies must comply in their composition with the gender parity rule.\(^\text{60}\) Such bodies include the Senate and the National Assembly.\(^\text{61}\) The moot question however is the elusive mode of achieving the composition ratio set by the Constitution. There are several ways if adopted, the principle can be achieved but may necessitate the amendment of the Constitution in order to put the issue to rest once and for all. These are: *first*, since it is now proven that achieving the principle in the Senate and the National Assembly in democratic elections is almost impossible considering the social-cultural nature of

\(^{57}\) Petitioners also included Parliamentary Service Commission, Mathare Members of Parliament Anthony Aluoch and Advocate Adrian Kamotho.


\(^{59}\) The Bench consisted of Justices Pauline Nyamweya, James Makau, George Odunga, Antony Ndungu and Lydia Achode. The Chief Justice of Kenya could not constitute the Bench as he was mentioned as a respondent in the matter.

\(^{60}\) Supra note 1, art 27(8).

\(^{61}\) Ibid, arts 27(8) & 81(b).
politics in Kenya, the successful formula adopted in realizing the principle in the County Assemblies should, with necessary modifications, be implemented in both Houses of Parliament.

Part 2, Chapter 11 of the COK sets modalities for constituting a County Assembly that have ultimately helped to achieve the two-thirds gender threshold.\textsuperscript{62} As such, the composition of the Assembly includes elected members from wards, members proportionally nominated by political parties representing special seats meant to ensure not more than two-thirds of the total Assembly members are of same gender, members proportionally nominated by political parties representing marginalized groups\textsuperscript{63} and the Speaker of the Assembly who is an \textit{ex officio} member.\textsuperscript{64} Through the foregoing mode, it is guaranteed that in the event, after the general election, men or women members elected to a County Assembly are less than one-third, political parties may proportionally nominate, based on votes attained, a number of men or women required to achieve the constitutional threshold. Article 177 of the Constitution does not prescribe the maximum number of County Assembly members thus making the formula easily implementable. This however is not the case under Articles 97 and 98 that curbs maximum membership of the National Assembly and the Senate to be 349 and 67 respectively.

Second, Part 2, Chapter 4 of the COK guarantees every citizen the right to vote for a candidate of one’s choice and/or the right to vie for any elective position to a public office or body.\textsuperscript{65} Through this, the electorate is expected to elect representatives with gender mix that will ultimately achieve the constitutionally prescribed two-thirds gender threshold. However, this formula has since independence been unsuccessful majorly because of the existing cultural order. Given that the right to vote for a candidate of one’s choice is not an absolute right,\textsuperscript{66} this then calls for the amendment of the Constitution to ensure that both men and women are well represented in Parliament. In so doing, a Clause can be inserted in the Constitution that provides for reservation of seats for the minority gender. Such reservations can be rotationally carried out in each constituency. However, there must be an express provision highlighting the limit a constituency seat can remain reserved. For majority gender incumbent who may wish to continue serving the citizenry as a Member of Parliament but whose constituency has been reserved for a

\textsuperscript{62} Ibid, art 177.
\textsuperscript{63} See, Ibid, art 100.
\textsuperscript{64} Ibid, art 177(1) & (2).
\textsuperscript{65} Ibid, 2010, art 38.
\textsuperscript{66} Under the Bill of Rights, the only fundamental rights and freedoms which cannot be limited are freedom from slavery, torture, inhumane treatment as well as right to fair trial and to an order of habeas corpus, \textit{see}, ibid, art 25.
minority gender candidate, s/he still has a right to vie from any unreserved constituency in Kenya.

Third, the current Constitution mandates Parliament to pass a legislation which ensures that the requisite constitutional ratio in Parliament is achieved. Since Parliament has failed to perform its constitutional obligation almost ten years after the promulgation of the Constitution, there is therefore need to amend, inter alia, Articles 27(8), 38, 81(b), 97, 98 and 100 of the Constitution. This will go a long way in avoiding instances where Parliament is dissolved for failure to attain the two-thirds gender principle. It is thus proposed that the existing 290 constituencies be abolished and instead one man and one woman be elected from each of the existing 47 Counties considered as single constituency units to serve in the Senate and National Assembly. Ultimately, such a measure will not only significantly reduce the cost of running both Houses of Parliament but it will also guarantee equal representation of both men and women therein.

Fourth, Articles 97 and 98 of the Constitution can be amended to enable nomination or ‘top up’ of a number of members from a minority gender after the general elections particularly in instances where the constitutional gender threshold is not met. However, the cost implications of running Parliament under this formula will be huge. Moreover, questions regarding altering the sovereign will of the citizenry as demonstrated in voting the candidates of their choice as their preferred representatives in a well defined constitutional democracy may crop up. Besides, such a proposal to amend Articles 97 and 98 to actualize the two-thirds gender principle will probably necessitate amendments to i.e., the Political Parties Act 2011, the Elections Act 2011, the National Gender and Equality Commission Act 2011, the Independent Electoral and Boundaries Commission Act 2011 and the Election Campaign Financing Act 2013. Accordingly, since the sovereign will rests on the electorates, they can choose to either scrap or amend Articles 27(8) and 81(b) of the Constitution.

Fifth, there is need to encourage the minority gender to participate in the general elections. Besides, minimal financial resources should be allocated to them to facilitate meeting of mandatory election related expenses.

67 Supra note 60.
5. **POWER AND MODES OF DISSOLUTION OF PARLIAMENT:**

The power to dissolve Parliament is a significant power that sways the political arena in any State. As such, it depends on which authority is entitled to exercise it, whether it is the Executive, Judiciary or the Legislature itself matters a lot since the design of such power eventually determines the kind of relationship Parliament will have with its coordinates. Under the present law in Kenya, the power to dissolve Parliament rests on the President.\(^{68}\) Such power cannot be exercised arbitrarily by the President. The COK specifies circumstances or periods upon which Parliament can be dissolved.\(^{69}\) Thus, the President cannot dissolve the House other than as it is provided for by the Constitution.

There are various ways under which dissolution can be triggered. *First*, it can be *automatic/obligatory dissolution* upon the end of a maximum or fixed term period. It is automatic in the sense that the Assembly is legally dissolved devoid of any action by either the Prime Minister or Head of State. Dissolution may be obligatory where the State Constitution mandates either the Prime Minister or Head of State to dissolve the Assembly by a specific date. Either way, there is no discretion on the part of the Prime Minister or Head of State to dissolve the Assembly.

*Second*, there can be *early dissolution* particularly in a parliamentary system or in a semi-presidential system of governance. This may be as a result of a conflict between an Assembly and the Executive, or where the Legislature has no confidence in the existing Government, or where the Executive seeks to enhance its legislative support through a snap election, *etc.*\(^{70}\)

*Third*, the *dissolution by the Head of State at will* is another design option in dissolving Parliament. However, a State’s Constitution must expressly bestow such power on the Head of State with a disclaimer that s/he may discretionary use the power devoid of external interference. Even though some State Constitutions may require the Head of State to consult other institutions prior to dissolution, the power to dissolve still remains with the Head of State.\(^{71}\) Under this mode of dissolution, there can also be circumstances where exercise of the power to dissolve Parliament by the Head of State may be limited to specific instances (*i.e.*, where a newly

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\(^{68}\) *See* for *e.g.*, ibid, art 261(7).

\(^{69}\) *See* for *e.g.*, ibid, arts 102(1) & 261(7).


\(^{71}\) The French Constitution bestows such kind of power to the Head of State.
established Government fall short of achieving a vote of confidence or where Parliament fails to enact a certain legislation within a specified time) or upon advice of another authority i.e., the Chief Justice or a Prime Minister.

*Fourth,* there can be popular dissolution in which a referendum is carried out. Though not a very popular initiative, majority of the votes leads to dissolution of Parliament. This mode of dissolution is perceived to be democratic in the sense that Parliament is merely considered to be the people’s agent and as such, the citizenry themselves with sovereign authority should be afforded an opportunity to make the final decision. This is prompted particularly in circumstances where there is recorded dismal performance of Parliament as per the public opinion.

*Fifth,* there can be dissolution by decision of Parliament. Some State Constitutions contain provisions that confer Parliament discretionary power to dissolve itself prior to the end of parliamentary term of office. This is particularly possible where for instance there exists a political crisis as a result of inconclusive general election result that ends with no clear majority. The exercise of parliamentary power to dissolve itself signifies parliamentary sovereignty which ultimately implies that there cannot be undue influence and/or interference from the Executive in the functioning of Parliament. Besides, where a Constitution requires absolute majority of Assembly membership to vote for dissolution, junior coalition partners equally have veto powers vis-à-vis senior coalition partners which they can use to bargain for or against certain aspects.

6. **PROCESS OF DISSOLVING PARLIAMENT IN KENYA:**

According to Part 2, Chapter 8 of the COK, the election exercise for Members of Parliament is conducted on the second Tuesday in August in every fifth year. As such, Parliament stands dissolved on the date of the next general election. This therefore implies that

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73 Supra note 68. See, for e.g., Constitution of Czech Republic, 1993, art 35 where the presidential power to dissolve Parliament is also limited.
74 See, for e.g., Supra note 68; Constitution of Bangladesh, 1972, art 72 and Constitution of Trinidad and Tobago, 1976, art 68. The requirement to act upon the advice is in most cases taken as binding.
76 See for e.g., Constitution of Solomon Islands, 1978, s 73.
77 See for e.g., Constitution of Kosovo and Lithuania.
79 Ibid, art 102(1).
Parliament cannot be dissolved in any other time except in circumstances contemplated under Chapter 18 of the Constitution.\textsuperscript{80}

It is Parliament’s duty, after the commencement of the effective date, to pass legislations specified in the Fifth Schedule to the Constitution within a period stated in Chapter 18.\textsuperscript{81} However, the National Assembly is empowered to extend the period specified therein if only it fulfills the following four key requirements: \textit{first}, a resolution supporting the extension must be made by at least two-thirds of all Assembly members; \textit{second}, the period of extension cannot exceed one year; \textit{third}, approval for extension can be undertaken only once; \textit{fourth}, the National Assembly Speaker must certify the extension only in exceptional circumstances.\textsuperscript{82}

The COK permits any person to petition the High Court incase Parliament fails to pass any legislation within the specific period in the Fifth Schedule to the Constitution.\textsuperscript{83} This therefore implies that the High Court is the only Court of first instance with jurisdiction to entertain such kinds of petitions. Once petitioned, the Court is vested with power to make a suitable declaratory order obligating the Attorney General and Parliament to fast-track the process of legislation and to report the progress to the CJ.\textsuperscript{84} Such reporting to the CJ is mandatory. Besides, it is implied that there should not be any distinction as to which Parliament (9\textsuperscript{th}, 10\textsuperscript{th}, 11\textsuperscript{th} or 12\textsuperscript{th}) the High Court order is directed to. The Constitution contemplates that an order is directed to Parliament as an institution due to the principle of perpetual succession. Moreover, an aggrieved party in the decision rendered by the High Court has a right to appeal to the Court of Appeal and finally to the Apex Court.\textsuperscript{85}

In the event the legislature still fails to perform its task even after the High Court order, Chapter 18 contains remarkable enforcement mechanisms \textit{i.e.,} the CJ is mandated to advise the President to dissolve Parliament.\textsuperscript{86} In such circumstances, the President has no option but to

\textsuperscript{80} For instance, Article 261(7) calls for dissolution of Parliament by the President upon advice from the Chief Justice of Kenya for failure to enact legislation spelled out in the Fifth Schedule to the Constitution. This Article is an enforcement mechanism designed to eliminate the possible cultural resistance by the political elite on gender equity.

\textsuperscript{81} Ibid, art 261(1).

\textsuperscript{82} Ibid, art 261(2) & (3).

\textsuperscript{83} Ibid, art 261(5).

\textsuperscript{84} Ibid, art 261(6).

\textsuperscript{85} See, ibid, arts 163(3)(b), (4) (5) & 164(3)(a).

\textsuperscript{86} Supra note 68. There is no discretion on the part of the Chief Justice. Before such advise, it is significant for the Chief Justice of Kenya to carry out due diligence to ensure that Parliament has indeed failed to perform its constitutional mandate. Even though there were two Bills pending in Parliament – the Constitution of Kenya (Amendment) Bill 2019 and the Representation of Special Interest Groups Laws (Amendment) Bill 2019, both
execute the constitutional mandate. The bear reading of the Chapter leaves no doubt that the CJ’s exclusive role is two-fold: first, the CJ must ascertain that there exists a Court order, and second, whether the order has been complied with.\textsuperscript{87} It may however be noted that the COK does not specify the timelines for the President to dissolve Parliament.\textsuperscript{88} Accordingly, this is a grave loophole upon which the Executive may use to prolong the process of dissolution of Parliament. Nonetheless, if the President dissolves Parliament, the newly elected Members of Parliament have an obligation to ensure that the requisite legislation is passed within the period specified in the Fifth Schedule.\textsuperscript{89} In determining the exact period upon which the specified time in the Schedule is to lapse, the date of commencement of the new Parliament’s term is to be taken into account.\textsuperscript{90}

7. COMPOUNDING EFFECTS OF DISSOLVING KENYAN PARLIAMENT:

Dissolution of Parliament for failure to enact legislation under the Fifth Schedule to the COK has several adverse and positive effects. Even though it may cause inconvenience in governance and economic hardship, it is one of the best actions to advance equity, inclusiveness, social justice, equality and rule of law which ultimately curtails impunity, corruption and holds individuals accountable for their actions and omissions. As such, pertinent questions arise \textit{i.e.}, what is the ultimate effect of dissolution in a bicameral setup? Should the Executive as well be dissolved to pave way for the general elections? Whether after dissolution, the country should be subjected to a ‘general’ or ‘by-election’? and should the newly elected Parliament serve its full term of office or for the remainder of term of the dissolved Parliament?

Generally, after dissolution, the immediate net effect is that all 67 seats in the Senate and 349 seats in the National Assembly are declared vacant.\textsuperscript{91} This implies that there are no longer Members of Parliament with the power to transact parliamentary business as enshrined under Chapter 8 of the COK.\textsuperscript{92} Thus, any provision that has the force of law in Kenya cannot be passed by a dissolved Parliament.\textsuperscript{93}

\hspace{1cm} Assemblies had taken unreasonable period to pass them necessitating the 21\textsuperscript{st} September 2020 Chief Justice’s advisory opinion to the President.
\textsuperscript{87} See, ibid, art 261(6).
\textsuperscript{88} Even though there is no specific timelines, the circumstances justify the application of the concept of reasonable timeframe in dissolution of Parliament.
\textsuperscript{89} Supra note 1, art 261(8).
\textsuperscript{90} Ibid, art 261(8).
\textsuperscript{91} Ibid, art 103(1)(f).
\textsuperscript{92} See, ibid, arts 94, 95 & 96.
\textsuperscript{93} See, ibid, art 94, 95(3) & 96(2).
The individuals who were members of the legislature in the last Parliament are discharged from meeting and attending parliamentary sessions and they automatically cease to be representatives of their constituents and lose access to parliamentary resources, privileges and facilities. Besides, such persons no longer refer themselves as Members of Parliament but former or ex-Members of Parliament save where they resolve to stand again as candidates for election and are subsequently re-elected. This apart, the Speakers and Deputy Speakers’ seats are as well declared vacant immediately the newly elected members first meets after the election. This triggers the process of election of new Members of Parliament. The Independent Electoral and Boundaries Commission is then mandated by the COK, the Elections Act 2011 and the Independent Electoral and Boundaries Commission Act 2011 to observe, monitor and evaluate elections and to publish a notice of parliamentary election in the official Gazette and in the electronic and print media of national circulation upon receipt of Parliamentary Speakers’ notice.

It is as well significant to note that once Parliament is dissolved, any incomplete parliamentary work including Bills tabled before the Assembly but have not been debated and approved by Members of the Assembly and have subsequently not received presidential assent, and all activities of Parliamentary Select Committees are halted. This is simply because Bills cannot be carried over from one legislature to another due to the doctrine of ‘parliamentary sovereignty’ whereby no Parliament can bind its successor. As such, all matters that were pending before the last Parliament was dissolved must be presented and addressed afresh before the new Parliament. It is under this backdrop that Chapter 18 provides that in circumstances where Parliament is dissolved, the newly elected Parliament is mandated to pass the two-thirds gender parity rule within five years as specified in the Fifth Schedule. The five years period is calculated from the date of commencement of the term of the new Parliament.

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94 Ibid, art 106(2)(a). The law permits them to stand again for re-election as Speakers or Deputy Speakers.
95 Ibid, art 88(4)(h).
96 Elections Act 2011, s 16(1).
97 Independent Electoral and Boundaries Commission Act 2011, s 4(h).
98 The notice generally contains details in regard to submission of party lists by political parties, nomination and polling dates.
99 Bills debated and approved by Parliament pending assent by the President would however not lapse with dissolution of Parliament.
100 Supra note 1, art 261(8).
101 Ibid.
In view of the above, it is thus important to know the ultimate effect of dissolution in a bicameral setup. The question as to which of the two Houses of Parliament is affected by the CJ’s advisory statement is fundamental. As noted above, the term ‘Parliament’ refers to both the Senate (Upper House) and the National Assembly (Lower House).\(^\text{102}\) Both Houses have specific roles as highlighted under Part 1, Chapter 8 of the COK.\(^\text{103}\) The Senate is charged with considering, debating and approving Bills concerning Counties. Enactment of the two-thirds gender principle should basically be the sole role of the National Assembly. However, the Fifth Schedule directs that the legislations highlighted therein should be enacted by ‘Parliament.’ This therefore indicates that dissolution in Kenya’s bicameral setup affects both Houses of Parliament.

In regard to whether the Executive should as well be dissolved to pave way for the general elections, Article 261(7) of the COK is designed in a manner that only calls for dissolution of Parliament upon the advise of the CJ. This implies that it is only Parliament which is targeted by the provision. Thus, the Executive in such a circumstance cannot as well be dissolved. The Executive and the Legislature are two separate institutions. The Members of the Cabinet including the President, Deputy President, Cabinet Secretaries, Attorney General and the Secretary to the Cabinet remain and continue to serve in their respective positions when Parliament is dissolved.\(^\text{104}\) Their roles are independent of the roles of a Members of Parliament. Besides, they keep their official titles after dissolution of Parliament and they are only replaced after formation of a new Government immediately after the general elections.\(^\text{105}\) The fact that Members of Parliament are required to be elected on the same day with the President and his/her Deputy does not necessarily call for dissolution of the Executive.\(^\text{106}\)

On the point as to whether after dissolution, the country should be subjected to a ‘general’ or ‘by-election,’ the COK, under Chapter 8 provides for instances when a seat of a Member of Parliament may be declared vacant.\(^\text{107}\) This includes, *inter alia*, when a parliamentarian dies, or resigns, or unlawfully absents him/herself from eight sittings of


\(^{103}\) Constitution of Kenya, 2010, arts 95 & 96.

\(^{104}\) See, supra note 12 at 64.

\(^{105}\) After general election, the President is entitled under Article 132(2) of the Kenyan Constitution to nominate and appoint, Cabinet Secretaries, Attorney General and the Secretary to the cabinet.

\(^{106}\) Ibid, art 101(1).

\(^{107}\) Ibid, art 103.
Parliament, or resigns from a political party that sponsored him/her to Parliament, or his/her term of office ends, and/or is removed from office under the provisions of the law.\textsuperscript{108} The COK further provides that once such vacancy has been declared, elections/nominations must be conducted to fill the vacancy.\textsuperscript{109} Consequently, in the case where the vacancy has been declared as a result of end of term of Parliament (five years), a ‘general election’ is conducted to fill the vacancy.\textsuperscript{110} However, in other circumstances, the law provides that there must be a ‘by-election’\textsuperscript{111} held within ninety days of the occurrence of the vacancy.\textsuperscript{112} But, a ‘by-election’ cannot be held within three months prior to a ‘general election.’\textsuperscript{113} The 21\textsuperscript{st} September 2020 Chief Justice’s advisory opinion to the President to dissolve Parliament was made almost two years to the next ‘general elections’ scheduled in August 2022. This therefore implies that there can only be a ‘by-election’ for each 290 constituencies after dissolution of Parliament.

The foregoing discussion therefore leads to the next question: should the newly elected Parliament serve its full term of office or for the remainder of term of the dissolved Parliament? Chapter 8 of the COK provides that the term of office of the bi-cameral legislature ends every fifth year on the date of the next general elections unless extended\textsuperscript{114} upon a resolution supported by two-thirds of parliamentarians.\textsuperscript{115} As such, Members of Parliament are expected to serve office for a period of five years. Once Parliament is dissolved, a ‘by-election’ for each constituency is conducted. Candidates elected after such by-elections are expected to serve for the remainder of term of the dissolved Parliament and not Parliament’s full term.

8. **CONCLUSIONS:**

From the above discussion, it is evident that enactment of effective gender laws and commitment of the State to enforce them is the only means to root out the deep seated patriarchy system in Kenya. The Republic of Kenya has the largest economy and perhaps the highest gross

\textsuperscript{108} Ibid.

\textsuperscript{109} Ibid, arts 101(1) & 101(4)(b). The filling of the vacancy depends on whether the post is for an elected or nominated Member of Parliament. For a nominated Member of Parliament, the Speaker of either the Senate or the National Assembly is mandated to notify the affected political party and the Independent Electoral and Boundaries Commission within 21 days of the occurrence of the vacancy. The vacancy is then filled within 21 days after notification, see, ibid, arts 101(2) & (3).

\textsuperscript{110} Ibid, art 101(1) and supra note 96, s 16.

\textsuperscript{111} Such type of election takes place within the term of Parliament, see, Githinji George, ‘The Six Types of Elections in Kenya’ Afrocave 17\textsuperscript{th} September 2020 <https://www.afrocave.com/types-of-elections-in-kenya/> accessed on 18\textsuperscript{th} October 2020.

\textsuperscript{112} Supra note 110, art 101(4)(b). See, supra note 96, s 16(3) & (3A).

\textsuperscript{113} Supra note 1, arts 101(5).

\textsuperscript{114} The extension is first for six months and for a further six months for the second and last time.

\textsuperscript{115} Supra note 113, art 102.
domestic product among the six East African Community States but it is one of the countries in the region yet to undertake concrete measures of establishing an affirmative action programme for gender representation in the two Legislative Assemblies. As such, the high expectation of the minority gender to be included in decision making process in all spheres in the governance system has been muted.

Kenya being a signatory to various regional and international instruments that promote gender equality and the fact that the current COK prohibits discrimination on any ground, it is high time therefore that Parliament performs its constitutional duty by ensuring that the two-thirds gender parity rule is passed. Any of the various modes highlighted above can be adopted by the legislature to unlock gender discrimination in the Kenyan society. This apart, the issue of inter-sex persons needs to be clearly addressed as the State embarks on the enactment and implementation of the two-thirds gender rule.

The CJ’s advisory opinion should not be taken for granted as such action may not only lead to a constitutional crisis but it may specifically be perceived by the citizenry as utter disregard or breach of the transformative COK by the President if at all he fails to dissolve Parliament as advised by the CJ. Besides, failure to dissolve Parliament will negatively impact on the validity of the constitutionally prescribed advisory opinions, raise the legality of transactions conducted by both Houses of Parliament after 21st September 2020 and may ultimately lead to economic, social and political anarchy in an otherwise peaceful Kenya.