



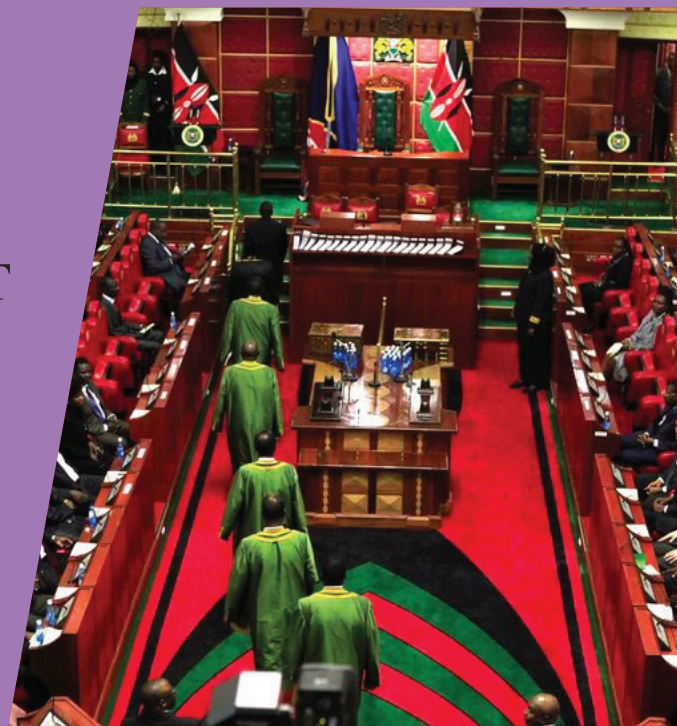
REPUBLIC OF KENYA

MINISTRY OF GENDER, CULTURE, THE ARTS
AND HERITAGE

STATE DEPARTMENT FOR GENDER AND
AFFIRMATIVE ACTION



A REPORT OF THE MULTI SECTORAL WORKING GROUP(MSWG) ON THE REALISATION OF THE NOT MORE THAN TWO-THIRDS GENDER PRINCIPLE (2024)





Multi-Sectoral Working Group
on the realisation of the not more than
two thirds gender principle

**REPORT OF THE MULTI-SECTORAL WORKING GROUP
ON THE
REALIZATION OF THE NOT MORE THAN TWO- THIRDS GENDER
PRINCIPLE**

Presented to

Hon. Aisha Jumwa K. Katana
Cabinet Secretary
Gender, Culture, the Arts & Heritage

February, 2024

NAIROBI



Multi-Sectoral Working Group
on the realisation of the not more than
two thirds gender principle

February 22, 2024

Hon. Aisha Jumwa K. Katana

Cabinet Secretary

Ministry of Gender, Culture, the Arts and Heritage

Maktaba Kuu Building, Upper Hill

Nairobi

Dear Madam

RE: LETTER OF TRANSMITTAL

The Multi-Sectoral Working Group (MSWG) on the realisation of the **not more than two-thirds gender principle** was established by your office vide Gazette Notices No. 10848 and No. 11090 published on August 15 and August 25, 2023 respectively.

The MSWG was tasked to develop and recommend a framework for the implementation of **the not more than two-thirds gender principle** as captured in Articles 27(6) and (7) as well as 81(b) of the Constitution of Kenya 2010.

The Terms of Reference for the MSWG were as follows;

- i. To review and analyse previous proposals for the implementation of the two-thirds gender principle;
- ii. To conduct comparative studies on best practices in other jurisdictions towards the achievement of gender equality;
- iii. To engage such experts or institutions as may be necessary to achieve the objectives of the Working Group;
- iv. To develop and recommend a framework for the implementation of the **not more than two-thirds gender principle**;
- v. To conduct stakeholder engagement and undertake public participation on the proposed framework for the implementation of the **not more than two-thirds gender principle**;
- vi. To mobilise resources towards the achievement of the objectives of the Working Group; and
- vii. To perform such other function(s) as may be approved by the Cabinet Secretary for the achievement of the objectives of the Working Group.

The Working Group was mandated to complete its work and submit its final report to the Cabinet Secretary within six months from the date of its appointment. The Working Group's term was extended vide Gazette Notice No. 1770 dated February 8, 2024.

In the course of executing its mandate, the MSWG engaged the National Dialogue Committee (NADCO) and submitted preliminary proposals for their consideration since the **not more than two-thirds gender principle** was one of the issues to be addressed. In its final report, NADCO recognised the mandate of the MSWG and recommended the matter for to be addressed comprehensively by the MSWG and submit its report to Parliament for consideration and further action.

As cited in the NADCO report in paragraph 464, which states that 'There was general consensus by the Committee on the need to implement the **not more than two-thirds gender principle** and that the issue should be addressed in collaboration with the Multi-Sectoral Working Group on the Realisation of the Two-Thirds Gender Principle.'

Paragraph 518 also states that 'The Committee recommends that (a) The Multi-Sectoral Working Group on the Realisation of the Two-Thirds Gender Principle under the Ministry of Public Service, Gender and Affirmative Action to finalise its work, and recommend a framework of implementation of two-thirds gender principle and submit its report to Parliament for consideration.'

The MSWG has since fulfilled its mandate and developed a framework for the implementation of the not more than two thirds gender principle. Further, the MSWG has prepared a report detailing the considerations made in arriving at the proposed framework.

The Working Group is honoured to present this report with the proposed legislative instruments to the Cabinet Secretary, Ministry of Gender, Culture, the Arts and Heritage.

We are thankful for entrusting us with this noble assignment.



.....
Anne N. Wang'ombe - Chairperson



.....
Daisy Amdany – Co-Chairperson

.....

Harriet Chiggai, Advisor, Women Rights

.....

Faith Nziku Kasiva – Member



.....

Anne Nderitu - Member



.....

Tecia Tum - Member



.....

Angela Wambugu - Member



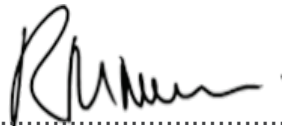
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Mercy Jelimo – Member



.....

Beatrice Kamau - Member



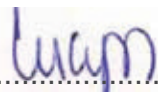
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Rahab Muiu – Member



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Mitchelle Oyuga - Member



Lucy Mitei - Member



Sarah Muhoya - Member



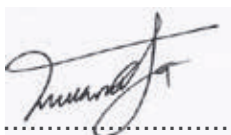
Ruth Makuthu – Member



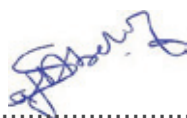
Beth Michoma - Member



Stellah Chepkemboi Ruttoh - Member



Frankline Mukwanja - Member



Sophia Abdi Noor - Member



Sheikh Ibrahim Lethome Asmani - Member



Al-Haji Hassan Kirua ole Naado - Member



Kennedy Odhiambo Otina - Member



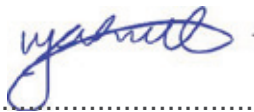
George Kombe Kagohu - Member



Salim Vayani - Member



Adams Barasa - Member



Ibrahim A. Yakub - Member



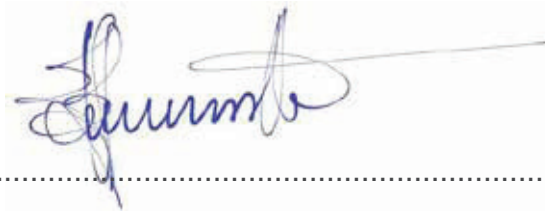
Jackline N. Makokha - Joint Secretary



Richard Miano - Joint Secretary



Eva Mageto - Joint Secretary



Sylvester Mbithi - Joint Secretary



Christabel Wekesa - Joint Secretary



Rhoda Misiko - Joint Secretary

WORKING GROUP MEMBERS

The table below shows the names of the members and the institutions represented.

Name	Designation	Institution
Anne N. Wang'ombe	Chairperson of the MSWG	Principal Secretary, State Department for Gender, and Affirmative Action
Daisy Amdany	Co-Chairperson	Community Advocacy and Awareness (CRAWN) Trust
Faith Nziku Kasiva	Member	Ministry of Gender, Culture, the Arts and Heritage
Anne Nderitu, CBS	Member	Office of the Registrar of Political Parties
Harriet Chiggai	Member	Advisor, Women Rights
Hon. Dr. Tecla Tum	Member	Executive Office of the President
Angela Wambugu	Member	United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)
Mercy Jelimo	Member	Center for Rights Education and Awareness (CREAW) Kenya
Beatrice Kamau	Member	Women in Leadership and Decision Group Committee of the Gender Sector Working Group
Rahab Muiu	Member	Maendeleo ya Wanawake Organisation
Mitchelle Oyuga	Member	FIDA Kenya
Lucy Mitei	Member	Kenya Private Sector Alliance (KEPSA)
Sarah Muhoya	Member	Echo Network Africa (ENA)
Ruth Makuthu	Member	Independent Electoral and Boundaries Commission (IEBC)
Beth Michoma	Member	Law Society of Kenya
Dr. Stellah Chepkemboi Ruttoh	Member	Former Country Woman Member to the National Assembly candidate
Frankline Mukwanja	Member	Center for Multiparty Democracy - Kenya
Hon. Sophia Abdi Noor	Member	Former Member of Parliament/National Council for Children Services (NCCS)

Sheikh Ibrahim Lethome Asmani	Member	Jamia Mosque
Al-Hajj Hassan Ole Naado	Member	Supreme Council of Kenya Muslims (SUPKEM)
Kennedy Odhiambo Otina	Member	Masculinity Institute
George Kombe Kagohu	Member	Kenya National Association of Social Workers
Salim Vayani	Member	National Muslim Leaders Forum (NAMLEF)
Adams Barasa	Member	Central Organisation of Trade Unions (COTU) – Kenya
Ibrahim A. Yakub	Member	Pastoralist Professionals Association
Jackline N. Makokha	Joint Secretary	State Department for Gender and Affirmative Action
Richard Miano	Joint Secretary	Office of the Prime Cabinet Secretary/State Department for Parliamentary Affairs
Eva Mageto	Joint Secretary	Office of the Attorney General
Sylvester Mbithi	Joint Secretary	National Gender and Equality Commission (NGEC)
Christabel Wekesa	Joint Secretary	Kenya Law Reform Commission
Rhoda Misiko	Joint Secretary	State Department for Gender and Affirmative Action



Multi-Sectoral Working Group
on the realisation of the not more than
two thirds gender principle

February 22, 2024

J M Nyegenye, CBS

Clerk of the Senate
Clerks Chambers
The Senate
Parliament Buildings
P O Box 41842 - 00100
Nairobi.

The Clerk of National Assembly
Clerk's Chambers
National Assembly
Parliament Building
P.O Box 41842 -00100
Nairobi

Dear

RE: IMPLEMENTATION OF THE CONSTITUTIONAL TWO-THIRDS GENDER PRINCIPLE AND IMPLEMENTATION OF THE MSWG REPORT

Your above subject refers.

The Multi-Sectoral Working Group (MSWG) was appointed by this office on the vide Gazette Notices No. 10848 and No. 11090 published on 15th August and 25th August, 2023 respectively. The MSWG was tasked to develop and recommend a framework for the implementation of the not more than two-thirds gender principle as captured in Articles 27(6) & (7) and 81(b) of the Constitution of Kenya 2010.

The Terms of Reference for the MSWG were as follows;

- viii. To review and analyze previous proposals for the implementation of the two-thirds gender principle;
- ix. To conduct comparative studies on best practices in other jurisdictions towards the achievement of gender equality;
- x. To engage such experts or institutions as may be necessary to achieve the objectives of the Working Group;
- xi. To develop and recommend a framework for the implementation of the not more than two-thirds gender principle;

- xii. To conduct stakeholder engagement and undertake public participation on the proposed framework for the implementation of the not more than two-thirds gender principle;
- xiii. To mobilize resources towards the achievement of the objectives of the Working Group; and
- xiv. To perform such other function(s) as may be approved by the Cabinet Secretary for the achievement of the objectives of the Working Group.

The Working Group has now submitted its report and three legislative proposals namely:

1. The Constitution of Kenya (Amendment) Bill, 2024;
2. The Elections (Amendment) Bill, 2024; and
3. The Political Parties (Amendment) Bill, 2024.

As you are aware the National Dialogue Committee-NADCO report in paragraph 464 which states 'There was general consensus by the Committee on the need to implement the not more than two-thirds gender principle and that the issue should be addressed in collaboration with the Multi-Sectoral Working Group on the Realisation of the Two-Thirds Gender Principle.' As well as in paragraph 518 which states 'The Committee recommends that- (a) The Multi-Sectoral Working Group on the Realisation of the Two-Thirds Gender Principle under the Ministry of Public Service, Gender and Affirmative Action to finalize its work, and recommend a framework of implementation of two-thirds gender principle and submit its report to Parliament for consideration.'

This is therefore to submit the to you the MSWG Report together with the proposed legislative proposals for your further action.

We thank you for your continued cooperation.

Yours sincerely,

Hon. Aisha Jumwa K. Katana

Cabinet Secretary

Ministry of Gender, Culture, the Arts and Heritage

Encl

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FOREWORD

The Multi-Sectoral Working Group (MSWG) on the realisation of the **not more than two-thirds gender principle** was established through Gazette Notices No. 10848 and No. 11090 published on August 15 and August 25, 2023 respectively by the Cabinet Secretary for Gender, Culture the Arts and Heritage, Hon Aisha Jumwa.

The MSWG was mandated to develop a framework to implement the outstanding constitutional requirements on the **not more than two-thirds gender principle** in elective and appointive public institutions. The Working Group comprised of members from State and non-State agencies representing diverse sectors.

The Constitution of Kenya 2010 commits the State to take legislative and other measures, including affirmative action programmes and policies, designed to redress any disadvantage suffered by individuals or groups arising from past discrimination. To effectively implement this constitutional requirement, it is necessary to formulate a comprehensive framework for the implementation of the **not more than two-thirds gender principle**.

The development of the proposed implementation framework was undertaken through a consultative approach that involved participation of a wide range of stakeholders. Further, a rigorous literature review was undertaken and a comparative analysis of gender quotas in other jurisdictions within the African continent conducted. The MSWG proposes the implementation framework to facilitate the achievement of gender representation in elective and appointive positions. These are categorised into: Legislative proposals, policy interventions and administrative actions to actualise and accelerate the realisation of the **not more than two-thirds gender principle**.

ACKNOWLEDGEMENTS

The Multi-Sectoral Working Group (MSWG) on the realisation of the not more than two-thirds gender principle extends its deepest gratitude to all those who contributed to the successful execution of its mandate.

The MSWG particularly appreciates the Cabinet Secretary for Gender, Culture, the Arts and Heritage, Hon. Aisha Jumwa Katana, whose foresight and commitment to the promotion of gender equality and inclusion paved the way for the establishment of the Working Group. Her trust and support were instrumental in guiding the Group's endeavours.

Our special thanks go to the UN Women Kenya Country Office and Development Partners for their extensive support to the MSWG process. Notable appreciation goes to other partners that supported the process financially, including the Centre for Rights Education and Awareness (CREAW), ECHO Network Africa, Community Advocacy and Awareness Trust (CRAWN), Electoral Law and Governance Institute for Africa (ELGIA), Africa Woman and Child Feature Service (AWCFS) the Federation of Women Lawyers in Kenya (FIDA Kenya), Maendeleo ya Wanawake Organisation (MYWO), the Electoral Law and Governance Institute for Africa (ELGIA) and the Centre for Multiparty Democracy (CMD).

The MSWG further appreciates the valuable technical support from Ms. Winfred Lichuma, the Lead Technical Consultant, Mr. Bjarte Tora of Oslo Centre, Mr. Peter Musyimi, HSC (KLRC), Mr. Mbugua Ng'ang'a and Ms. Saskia Brechnemacher of Carnegie Endowment for International Peace for their contribution.

We also extend our sincere thanks to the institutions and citizens who actively participated in stakeholder engagements and public forums. Their diverse perspectives, constructive feedback and impassioned advocacy were pivotal in shaping the outcomes of this report.

Finally, we acknowledge with deep appreciation the dedication and commitment of the Members and the Secretariat of the Multi-Sectoral Working Group under the able leadership of the Chairperson and Co-Chairperson whose tireless efforts brought this report to fruition.

Special recognition to everyone who continues to play a pivotal role in advancing gender equity, equality, constitutionalism and the rule of rule.

Chairperson

Co-Chairperson

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
BETA	Bottom-Up Economic Transformation Agenda
CAJ	Commission of Administrative Justice
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CGSWG	County Gender Sector Working Group
COK	Constitution of Kenya
CSOs	Civil Society Organisations
FBO	Faith Based Organisations
FPTP	First-Past the-Post
GBV	Gender-Based Violence
GEWE	Gender Equality and Women Empowerment
GOK	Government of Kenya
GRB	Gender Responsive Budgeting
IEBC	Independent Electoral and Boundaries Commission
KNBS	Kenya National Bureau of Statistics
MCA	Member of County Assembly
MP	Member of Parliament
MSWG	Multi Sectoral Working Group
MTP IV	Medium Term Plan IV
NADCO	National Dialogue Committee
NGEC	National Government Equality Commission
NGO	Non-Governmental Organisation
PR	Proportional Representation
PWD	Person with Disability
SDG5	Sustainable Development Goal 5
SGBV	Sexual and Gender-Based Violence
UN	United Nations
SDGAA	State Department for Gender and Affirmative Action
TORs	Terms of Reference
TWG	Technical Working Group

1.0 CHAPTER ONE:

INTRODUCTION

The promulgation of the Constitution of Kenya (2010) ushered in a new dispensation for implementation of the **not more than two-thirds Gender Principle** in elective and appointive positions.

Article 10 of the Constitution promotes national values and principles of governance that include equality and non-discrimination, inclusiveness, respect for human rights, equity and protection of the marginalised and minorities. Gender equality is promoted in various Articles of the Constitution and it is well stipulated in Chapter Four on the Bill of Rights, which anchors human rights as an integral part of Kenya's democratic State. It is the framework for social, economic and cultural policies.

Article 27 promotes equal rights for men and women in public and private spheres. Further, the Constitution promotes fundamental freedoms for men and women, preserves their dignity and promotes the right to equal opportunities in political, economic, cultural and social spheres.

The "**not more than two-thirds Gender Principle**" — hereinafter referred to as "**the Gender Principle**" — in the Constitution of Kenya is designed to ensure that neither gender occupies more than two-thirds of seats in elective or appointive positions in public institutions. The rationale behind this principle is to advance gender equality and address historical imbalances in representation. It is also the promotion of the rights of the most vulnerable and marginalised and recognition of women's rights as human rights.

By limiting the dominance of any single gender in decision-making bodies, the principle aims to create a more inclusive and diverse governance structure that reflects the composition of the population. This helps to ensure that the perspectives, experiences and interests of both men and women are considered in the formulation and implementation of laws and policies.

Additionally, promoting gender balance in leadership positions is crucial for achieving sustainable development and social progress. It enables both women and men to contribute their talents, skills and insights to address pressing issues, such as poverty alleviation, political participation, healthcare, education and environmental sustainability.

Overall, the not more than two-thirds Gender Principle is an important step towards advancing gender equality and building a more inclusive society where all individuals have an equal opportunity to participate and thrive.

The National Parliament has made several unsuccessful attempts at enacting legislation on the Gender Principle since the promulgation of the Constitution of Kenya in 2010.

They include the;

- i. Constitution of Kenya (Amendment) Bill, 2011 (Mutula Kilonzo Bill)
- ii. Constitution of Kenya (Amendment) Bill, 2014 (Joe Mutambu Bill)
- iii. Constitution of Kenya (Amendment) Bill, 2015 (Samuel Chepkong'a Bill)
- iv. Constitution of Kenya (Amendment) (No. 4) Bill, 2015 (Aden Duale I Bill)
- v. Constitution of Kenya (Amendment) Bill, 2015 (Judith Sijeny Bill)
- vi. Constitution of Kenya (Amendment) (No. 6) Bill, 2015 (Aden Duale II Bill), the Constitution of Kenya (Amendment) Bill, 2018 (Aden Duale III Bill)
- vii. Constitution of Kenya (Amendment) Bill, 2019 (Gladys Boss Shollei Bill)
- viii. Constitution of Kenya (Amendment) Bill, 2019 (Farhiya Ali Haji & Mutula Kilonzo Junior Bill) and
- ix. Kenya (Amendment) Bill, 2023 (Beth Syengo Bill), which is yet to be tabled for debate.

Following six petitions to the Chief Justice by Messrs Margaret Toili, Fredrick Gichanga Mbugua'h, Hon. Stephen Owoko and John Wangai, Ms Aoko Benard, Hon David Sudi and the Law Society of Kenya and filed pursuant to Article 261(7) as read together with Articles 27(3) and (8) and 81(b) of the Constitution, the then Chief Justice, the Hon. David Kenani Maraga on September 21, 2020 advised the then President Uhuru Muigai Kenyatta to dissolve Parliament.

Before the President could comply with the advisory, 10 cases were filed, being **Petition No E291 of 2020**; Leina Konchellah & Another Versus Chief Justice and President of the Supreme Court of Kenya, The Attorney General, The Speaker of the National Assembly and The Speaker of the Senate (**Consolidated with Petition Nos. E300 of 2020, E302 of 2020, E305 of 2020, E314 of 2020, E317 of 2020, E337 of 2020, 228 of 2020, 229 of 2020 and Judicial Review E1108 of 2020**), some in support and others in opposition to the said advisory.

On September 24, 2020, Hon Justice Weldon Korir issued conservatory orders suspending implementation of the advisory. The learned judge further directed that the file be forwarded to the Chief Justice for purposes of constituting a panel of judges to hear the petition. He suo moto joined Messrs Margaret Toili, Fredrick Gichanga Mbugua'h, Stephen Awoko, John Wangai, Aoko Bernard, Hon. David Sudi and the Law Society of Kenya as interested Parties in the Petition.

Separately, Justices J.A. Makau and A.C. Murima on September 29, 2020 and October 5, 2020 in Petitions E300 of 2020 and E314 of 2020 respectively issued similar conservatory orders against the CJ's advisory and directed that the files be transmitted to the Chief Justice for purposes of constituting a bench to hear the matters. On October 14, 2020, the Hon. Deputy Chief Justice Philomena Mwilu appointed a five-judge-bench comprising of the Hon. Lady Justices Lydia Achode (Presiding), Pauline Nyamweya, and the Hon. Justices George Odunga, James Makau and Anthony Ndung'u to hear the cases.

The two Houses of Parliament raised an objection as to whether the Deputy Chief Justice had powers under the Constitution to empanel the bench, but this was dismissed by the said bench. On appeal, the Court of Appeal stayed the proceedings before the High Court until the appeal before it was heard and determined. The matter is still pending before the Court of Appeal.

On December 9, 2022, the President, H.E. Dr William Ruto, submitted a memorandum to Parliament requesting it to consider a constitutional amendment to enact the Gender Principle. It is against this background and in the spirit of fully implementing the Constitution of Kenya (2010) on the two thirds gender principle that the Multi-Sectoral Working Group (MSWG), comprising of State and non-State actors, was established.

1.1 ESTABLISHMENT OF MSWG

The Multi-Sectoral Working Group (MSWG) on the not more than two-thirds gender principle was established by the Cabinet Secretary for Gender, Culture, the Arts, and Heritage, the Hon Aisha Jumwa, vide Gazette Notices No. 10848 dated August 15, 2023 and No. 11090 dated August 25, 2023 to develop and recommend a framework for the implementation of the not more than two-thirds gender principle as captured in Articles 27(6) and (7) and 81(b) of the Constitution of Kenya 2010. In addition, the MSWG was tasked with conducting stakeholder engagements, reviewing and analysing earlier proposals for the implementation of the Gender Principle and soliciting public input on the suggested framework.

1.3 TERMS OF REFERENCE OF THE MSWG

MSWG had a total of 25 experts with varied expertise in matters gender, law, women's rights, diversity and inclusion. They were drawn from State and non-State actors. Six of the members comprised the secretariat that was drawn from relevant key institutions namely, the State Department for Gender and Affirmative Action (SDGAA), the State Department for Parliamentary Affairs, National Gender and Equality Commission, the Attorney General's Office and the Kenya Law Reform Commission.

The Terms of Reference for the MSWG were to:

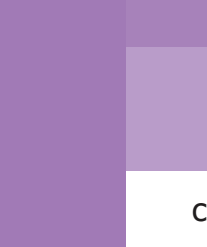
- i. Review and analyse previous proposals for the implementation of the two-thirds gender principle
- ii. Conduct comparative studies on best practices in other jurisdictions towards the achievement of gender equality
- iii. Engage such experts or institutions as may be necessary to achieve the objectives of the Working Group
- iv. Develop and recommend a framework for the implementation of the two-thirds gender principle
- v. Conduct stakeholder engagement and undertake public participation on the proposed framework for the implementation of the two-thirds gender principle
- vi. Mobilise resources towards the achievement of the objectives of the Working Group and
- vii. Perform such other function(s) as may be approved by the Cabinet Secretary for the achievement of the objectives of the Working Group.

1.4 INTERPRETATION OF THE TERMS OF REFERENCE

In interpreting its Terms of Reference, the Multi-Sectoral Working Group (MSWG) on realisation of the Gender Principle, understood its key mandate as to develop and recommend a framework for the implementation of the not more than two-thirds principle within a period of six months.

In its workings, the MSWG had an opportunity to regulate its own procedures, including developing a clear roadmap with timelines, a budget and drawing its rules of engagement. In addition, the group formed sub-committees for efficient discharge of its functions and mandate. Further, it was agreed that the State Department for Gender and Affirmative Action be the point of contact and custodian of all the documents of the working group.

To enhance its work and comply with constitutional requirements on public participation, the working group put out a call for memoranda through two dailies of national circulation and set up a dedicated email account to receive the same. Stakeholders drawn from political, religious, academic and social institutions, including workers' organisations, appeared before the MSWG and made submissions as appropriate. The group held public participation forums across the country, clustering the 47 counties into 11 regions. During the sessions, members of the public made submissions on the Gender Principle. Select experts, both local and international, were also engaged from time to time to support the work of the group, including a national



consultant who was hired to support the team throughout the exercise. The group also held stakeholder's meetings that allowed various stakeholders to make presentations and propose various frameworks towards implementing the gender principle.

In the course of executing its mandate, the MSWG received varied submissions, including but not limited to constitutional amendments, administrative actions and strategies to address socio-cultural constraints that impede the implementation of this constitutional requirement.

1.5 METHODOLOGY

The MSWG used several approaches and strategies to execute its mandate. This included: Desk literature review, call for and receipt of memoranda, stakeholder engagement, public participation, engagements with technical experts, creation of sub-communities, analysis of submissions, report writing and development of periodic briefs to the Cabinet Secretary.

i. Literature Review

The MSWG sourced and reviewed relevant literature with reference to its Terms of Reference. Some of the reviewed documents included: Constitution of Kenya 2010, Acts of Parliament, previous constitutional and legislative Bills on the framework of the Gender Principle, public policies, reports, international conventions and treaties on gender equality and other relevant studies. The literature review enabled the MSWG to develop data collection tools to be utilised during stakeholder engagements. In addition, the literature review was used to identify key stakeholders, individuals and groups for interviews and engagements.

Comparative analysis

The MSWG conducted a Comparative Analysis in other jurisdictions with similar election systems to explore the utilisation of gender quotas for achieving gender equality. This analysis involved examining select Sub-Saharan African countries, including Rwanda, Uganda, Tanzania and South Africa, which have implemented legal, policy and/or administrative measures to promote gender equality and diversity. The purpose was to assess the effectiveness of gender quotas and to derive insights, best practices and lessons learned from such measures for potential application or adaptation in the Kenyan context.

Key factors considered in the comparative analysis included legal framework supporting gender quotas, their implementation mechanisms, the role of political parties and the impact on gender representation in elected bodies. By studying these aspects, the MSWG identified best practices, lessons and potential challenges, ultimately informing proposals tailored to the Kenyan context.

ii. Stakeholder Engagement

The MSWG mapped out key stakeholders to be engaged at the national level. Stakeholders were invited to give their views to MSWG at the Kenya National Library Services Building in Nairobi, while others were consulted at their offices including within the regions during public participation. -

iii. Public Participation

In line with the TORs and constitutional requirements on public participation, MSWG held open public engagements across eleven regional clusters to achieve a representative sample of the country. These fora took one day in each region and served as crucial platforms for citizens to articulate their perspectives on gender representation, particularly in the National Assembly and Senate. The MSWG heard oral submissions and collected hard copy memoranda. These engagements were conducted between November 17 and 30, 2023.

iv. Call for Memoranda

The MSWG sought views from the public through print and electronic media. These memoranda were received by the secretariat hosted at the State Department for Gender and Affirmative Action (SDGAA), at Telposta Towers in Nairobi.

v. Engagement with technical experts

The MSWG engaged diverse technical experts, including lawyers, consultants, statisticians, planners and politicians. The engagements also included key government agencies such as: IEBC, political parties, the Attorney General's Office and the Kenya Law Reform Commission.

One external election expert, Dr Bjarte Tora, who had previously worked with IEBC and other government agencies to craft a framework on implementing the gender principle, provided the team with views on the proposed framework and critically analysed the various proposed formula.

vi. Operationalisation of the MSWG

To effectively discharge its function and mandate, the MSWG established sub-committees. Each sub-committee had a chairperson and was allocated specific TORs as described below.

- (a) **Strategy and Planning:** This sub-committee developed an overall strategic direction for the MSWG; conducted regular assessments and reviews of the MSWG's progress, challenges and opportunities; coordinated the planning and scheduling of MSWG activities, meetings and events; and provided strategic guidance and recommendations to the MSWG leadership and members for informed decision-making and effective execution of the Group's mandate.
- (b) **Legal:** The legal sub-committee roles included advising the MSWG on legal and constitutional issues related to the Gender Principle; conducting legal research on matters directly associated with the mandate of the MSWG; and drafting legislative proposals and amendments necessary for the implementation of the gender principle.
- (c) **Resource Mobilisation:** This sub-committee was responsible for ensuring there was sufficient budget for the timely delivery of the mandate of the MSWG; identifying and pursuing potential funding sources, grants and donors to secure financial resources for the timely delivery of the MSWG's mandate; developing fundraising strategies and initiatives to ensure sufficient budget allocation for MSWG activities; maintaining a database of potential donors and partners and initiating outreach efforts to secure financial support.
- (d) **Advocacy, Lobbying and Civic Education:** This sub-committee was responsible for developing advocacy and lobbying strategies to garner support and cooperation from political leaders, civil society organisations and the public for the Gender Principle; organising awareness campaigns, workshops and civic education programmes; building relationships with key stakeholders, including Members of Parliament, Government officials and civil society leaders, to advocate for policy changes and reforms; in addition to monitoring and evaluating the impact of advocacy and civic education initiatives to ensure their effectiveness and relevance.
- (e) **Communication:** The sub-committee was responsible for developing an effective and comprehensive communication strategy to convey the goals and progress of the MSWG to the public; managing public relations and media engagement, including press releases, interviews and social media to raise awareness and support for the Gender Principle; creating and maintaining the MSWG's social media platforms to disseminate information and engage with stakeholders; while organising and coordinating communication workshops or training sessions for MSWG members to enhance their communication skills.

vii. **Data Analysis and Report Writing**

The MSWG received several submissions through emails, memoranda and reports. It also received views through engagement of stakeholders and members of the public through public fora. The information received contained both quantitative and qualitative data that was analysed to inform this report. The drafting and compilation of the report was coordinated and supported by the MSWG secretariat. The MSWG membership also reviewed, gave expert inputs and adopted this final report.

1.6 LIMITATIONS

During the period of public participation, some parts of the country were experiencing heavy rains, leading to flooding. The team took a proactive approach in compliance with the disaster risk management policy 2017, to ensure safety of the team members and participants in the affected regions. The Mandera forum was moved to Isiolo while the Kilifi one was moved from Kilifi town and to Malindi.

Despite the challenges and last-minute postponements and changes of venue for some public fora, public participation proceeded well without any exposure to danger or risk due to adverse climate conditions.

The MSWG's activities were limited in financial resources. However, the team receive immense support from UN Women and leveraged this with other support from partnerships, networks and from MSWG members, who organised events and fora, while others hosted committee meeting at their institutions' expense. These fostered broader engagement and collaboration in achieving the mandate of the MSWG.

CHAPTER TWO:

THE JOURNEY TOWARDS FINDING A FORMULA OF IMPLEMENTING THE NOT MORE THAN TWO-THIRDS GENDER PRINCIPLE

2.1 INTRODUCTION

The Not More than Two-Thirds Gender Principle has historically remained an elusive agenda in Kenya, having failed on many occasions in Parliament, and this has frustrated efforts to find a legal framework either through constitutional amendments or legislative proposals. The failure is attributable to various factors, including social, economic and political dynamics that have over time since the promulgation of the Constitution of Kenya 2010, impeded the realisation of a formula to give effect to the constitutional provision under Articles 27(6) and (8) as well as 81 (b).

This chapter outlines the historical context, including the many attempts made by various stakeholders to realise the constitutional imperative on the not more than two-thirds gender principle. It concludes with a fresh commitment by the current Government, through the memo by H.E. President Dr. William Ruto to Parliament dated December 9, 2022, to consider new proposals towards realisation of the Gender Principle in Parliament.

2.1.1 A historical perspective

The journey towards women's political inclusion is as old as Kenya's struggle for independence. In 1960, Ms Phoebe Asiyo, the first African President of Maendeleo Ya Wanawake Organisation (MYWO), together with Ms Priscilla Ingasiani Abwao (1924-2009) mobilised women from the then eight provinces of Kenya to travel to Lodwar, (then in the Rift Valley Province and now in Turkana County) to visit Mzee Jomo Kenyatta and other political prisoners who had been arrested for leading the independence movement. The purpose of their visit was to persuade Jomo Kenyatta, who would later become Kenya's first President, to constitutionally allocate 50 per cent of positions in Parliament to women. However, their proposal was not considered at the point of establishment of Kenya's first independence Parliament.

As constitutional reforms unfolded, the Legislative Council (then known as LegCo, modelled on Westminster system of 1907-1963) was formed, and Kenyans agitated for independence. Ms Abwao became the first African woman to serve in the LegCo. She was nominated as the sole female African representative among the ten delegates who attended the Lancaster House Conference on May 10, 1961. Her mission was to represent the needs of African women as Kenya moved toward independence. However, she was a lone voice. Due to her vocal stance on women's rights, a British journalist described her as Kenya's Suffragette of the 1960s (Oduol, 1993). Women's journey into leadership and decision-making was not a priority issue and, therefore, was not considered for discussion at all.

In the late 1960s through to the 1980s, women's political participation remained limited. The traditionally male dominated nature of Kenyan politics posed significant challenges. However, a few notable women began to break barriers and enter political spaces. In 1969, Hon. Grace Onyango made history by becoming the first woman to be elected Mayor and First Woman to be elected to Parliament. In 1974, Hon. Chelagat Mutai contested for the Eldoret North Constituency seat at the age of 24, becoming the first Nandi and Kalenjin woman MP. Later, Hon. Dr. Julia Ojiambo became the second black woman after Hon. Onyango to defeat a male contender when she was elected MP for Funyula Constituency in 1974. And in 1980, Ms Phoebe Asiyo was elected to Parliament in 1980. In the succeeding years, more women were elected to Parliament, but the process was painfully slow.

In 1997, Hon. Phoebe Asiyo moved a Motion on Affirmative Action in Parliament, asking the government to pass legislation compelling political parties to nominate at least 30 per cent of their candidates from among women. Her Bill also sought to introduce an amendment to the Constitution to create two constituencies solely for women in each of the eight provinces and introduce legislation for funding of political parties, which would be linked to the percentage of women in the party (Kabira & Kimani, 2012). Though the motion was defeated, it set the stage for further debate on women's political participation.

In 2000, Hon. Beth Mugo sought to introduce another Affirmative Action Motion seeking to improve and increase representation for marginalised groups, particularly women, in policy-making institutions. The Bill that was the result of intense technical work by women in civil society organisations that had undertaken research and a comparative analysis of various jurisdictions that had implemented affirmative action. When MPs debated the Motion, they noted that it should be included as an issue in the constitutional review process which was due. As a result, it was not passed. This discussion made women rally together to ensure that they participated in the constitutional review process from a place of knowledge and influence (Kabira & Kimani, 2012).

The next key moment for women engagement was during the National Constitutional Conference, which commenced in April 2003. This was held at the Bomas of Kenya, and thus came to be known as the Bomas process. For the first time, Kenya was going through a people-driven constitutional review and women were at the centre of it all unlike the Lancaster process in which very few people participated.

A draft constitution was finalised and delivered to the Attorney General in 2004. The document secured women's political, social and economic rights and women were determined to safeguard those gains. However, political disputes threatened to scuttle the process. For women, it was important that the process did not collapse as it was their only hope at securing gender related reforms. They, therefore, used their networks within the political class to convince leaders to negotiate and return to the process. The Bomas draft, together with the compromises made in Naivasha, were put together in a new product dubbed the 'Kilifi Draft'. The Attorney General

proceeded to draft the Proposed New Constitution based on the draft MPs had approved and this was subjected to a referendum in 2005. However, it was rejected largely due to political differences.

In 2006, Hon. Martha Karua, the then Minister of Constitutional Affairs, restarted the process of constitutional review. A multi-sectoral forum was established. Women, through the Kenya Women's Political Caucus and the Women's Political Alliance, undertook a process of identifying the women to be nominated to the forum. Five women were identified (Kabira, 2012). In 2007, Hon. Karua tabled the Constitutional (Amendment) Bill, 2007 on Affirmative Action that aimed at creating 50 automatic seats for women in the 10th Parliament and creating additional 40 constituencies in Kenya. She defended the creation of 50 special seats as an affirmative action issue, which sought to put women's representation in Parliament at par with their population size. The Bill was not debated, however. The next constitutional moment came as a result of the post-election violence of 2007-08 and the subsequent constitutional and political crisis that eventually set in motion the process which birthed the 2010 Constitution.

The promulgation of the Constitution of Kenya 2010, marked a turning point in the journey towards women's political inclusion and participation. It explicitly recognised women's rights and emphasised gender equality. The principles of inclusion and non-discrimination were entrenched in the entire framework of the Constitution. Article 10, for instance, underscores the national values and principles of governance which include human dignity, equity, equality, non-discrimination, social justice, inclusiveness and protection of the marginalised among others. Chapter 4 in the Bill of Rights guarantees rights and fundamental freedoms and Article 27 enshrines freedom from discrimination as a fundamental right.

Article 27 (8) states; "the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender."

Article 81(b) further provides that: "the electoral system shall comply with the principle that not more than two-thirds of members of elective public bodies shall be of the same gender."

This principle applies in all elective and appointive positions in the Republic of Kenya.

As noted, County Assemblies have been able to realise the principle due to the self-executing mechanism set out in Article 177(1) (b) of the Constitution.

Despite the gains and promise deriving from the Constitution, Parliament is yet to provide a legal framework to realise the **not more than two-thirds gender principle**. There have been various efforts aimed at providing an enabling framework to realise the principle, however the number of women elected to competitive constituency-based seats to Parliament have consistently increased with each election

cycle since independence. The table below shows the increasingly slow pace of Kenyan women in Parliament.

Table 2.1: Women's Representation in National Assembly, 1963-2024

Parliament	Date	Constituencies (Total)	Women (Elected)	Nominated Members	Nominated Members
1 st Parliament	1963 -1969	158	0	12	0
2 nd Parliament	1969 - 1974	158	1	12	1
3 rd Parliament	1974 -1979	158	4	12	2
4 th Parliament	1979 - 1983	158	5	12	1
5 th Parliament	1983 - 1988	158	2	12	4
6 th Parliament	1988 - 1992	188	2	12	0
7 th Parliament	1992 - 1997	188	6	12	1
8 th Parliament	1997 - 2002	210	4	12	5
9 th Parliament	2002 - 2007	210	10	12	8
10 th Parliament	2008 -2013	210	16	12	6
11 th Parliament	2013-2017	290	16	12	5
12 th Parliament	2017-2022	290	23	12	6
13 th Parliament	2022-2027	290	28	12	6

Women Representation in the Senate

National Assembly	Date	Counties	Elected Women	Total Nominated Women
11th Parliament	2013-2017	47	0	18
12th Parliament	2017-2022	47	3	18

13th Parliament	2022-2027	47	3	18
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Nonetheless, the not more than two-thirds gender principle has not been achieved.

On February 3, 2014, the then Hon. Attorney General, Prof Githu Muigai, set up a Technical Working Group (TWG) whose terms of reference were to coordinate the process of developing enabling mechanisms for the attainment of the two-thirds gender rule within 90 days effective from February 11, 2014. The team was to identify and facilitate key stakeholder engagements towards the process of developing the enabling mechanism; organise and coordinate public participation; engage such experts or institutions as may be necessary to facilitate the process; review proposals towards implementation of the Supreme Court's Advisory Opinion No. 2 of 2012; mobilise resources towards the agenda of the TWG and undertake such other functions that may be necessary for the attainment of its objectives.

The TWG drew its membership from key relevant institutions, including the National Gender and Equality Commission (NGEC) (Convener and Secretariat), the Attorney General's Office, Ministry of Devolution and Planning (as it then was) Directorate of Gender, Commission on the Implementation of the Constitution (CIC as it then was), the Commission on the Administration of Justice (CAJ), the Independent Electoral and Boundaries Commission (IEBC), Office of the Registrar of Political Parties (ORPP), the Justice and Legal Affairs Committee (JLAC) of the National Assembly, Committee on Legal Affairs and Human rights in the Senate, Kenya Women's Parliamentary Association (KEWOPA) and the Federation of Women Lawyers (FIDA Kenya) representing the Civil Society Organisations.

The TWG presented its report in May 2015, making a raft of recommendations after considering various options available. It proposed the most viable formula, which was importing Article 177(1) (b) and (c) of the Constitution and writing it in Articles 97 and 98. The proposed amendment to the Constitution would see the inclusion of the provisions:

"the number of special seat members necessary to ensure that not more than two-thirds of the membership of the assembly are of the same gender" and

"the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament".

The implication was:

- i. It would ensure that at any one time, the August House was constitutionally constituted

- ii. It contained a **gender-neutral** provision and would apply even should the tide change to disfavour men
- iii. It was a simple and direct formula that adheres to the principles on legislation on elections as outlined in Article 82 of the Constitution
- iv. It provided room to encourage election of women so as to limit the extent of its application through proposed additional amendments to existing legislation
- v. It protected and guaranteed gains already made in the Constitution: Reserving elective positions of 47 county women MPs and six women nomination seats.

Further the TWG made proposals that were immediate, mid-term and long term. In the immediate, in order to realise the institutionalisation of the framework as is by law required, it was expected that various amendments of the Constitution and enabling legislations would be effected, namely to amend:

- a) The Constitution (by way of parliamentary initiative)
- b) The Elections Act
- c) The Political Parties Act
- d) The IEBC Act

In the mid-term, they proposed that, there should be an aggressive information and education campaign aimed at:

- i. Informing the populace on the value of sustained realisation of the constitutional principle of inclusion in the national unity agenda.
- ii. Providing guidelines on how inclusion and non-discrimination could be realised within the nation's existing realities.
- iii. Soliciting engagement of key actors; viz political parties, women and marginalised groups as identified in Article 100 of the Constitution of Kenya 2010, in ensuring the inclusion agenda.

The long-term measures included a holistic approach that cut across State and community structures so as to counter practices and perceptions that foster discrimination and adopting structures and strategies that present a more realistic approach to promoting equality. They also proposed enactment of an equality law.

The team generated the Constitution Amendment Bill and various proposals to amend supporting legislative frameworks as stipulated above. To this end, various Bills seeking to amend the Constitution and give life to the not more than two-thirds gender principle in terms of the composition of Parliament were introduced in Parliament at different times. However, these attempts have failed.

The following section of this report looks at what each Bill provided for and the specific reasons why it failed.

2.1.1.1.1The Bills

Since 2011, there have been twelve attempts at legislating on the not more than two-thirds gender principle, with most Bills seeking to entrench the principle in the Constitution. The Samuel Chepkong'a Bill sought to make the principle progressive while the Joe Mutambu Bill sought to scrap the principle altogether. The other Bills were;

i) Constitution of Kenya (Amendment) Bill, 2011

The Constitution of Kenya (Amendment) Bill 2011 was introduced to the National Assembly by the Hon. Mutula Kilonzo (now deceased). This Bill was introduced before the first elections under the newly promulgated Constitution.

It proposed to amend Articles 97 and 98 of the Constitution by lifting the provisions of Article 177(1)(b) to give full effect to Articles 27(8) and 81(b), which would have offered a lasting solution on the issue of gender parity in elective positions, more specifically in the National Assembly and Senate.

The Bill also sought to address other issues including clarifying the date on which the names and details of the delimited boundaries would come to effect, the date of the first General Election under the 2010 Constitution. It also sought to move the date of General Elections from 'the second Tuesday in August' to 'the third Monday in December' every fifth year.

ii) The Constitution of Kenya (Amendment) Bill, 2014 (Joe Mutambu Bill)

This Bill sought to delete Article 81(b), which provides that the electoral system shall comply with the requirement that not more than two-thirds of the members of elective public bodies shall be of the same gender.

It also sought to reduce the number of constituencies from 290 to 140, do away with the 47 elected county woman representatives in the National Assembly, reduce the number of counties from 47 to 10, do away with the 16 nominative seats reserved for women in the Senate and instead, elect 20 senators, a man and a woman, from each of the proposed 10 counties, thus achieving gender parity in the Senate. It further proposed to remove reserved seats for youth and persons with disabilities in the Senate and introduce two new seats for minority communities. Finally, it sought to reduce the number of members of constitutional commissions from a maximum of nine to three.

The Bill was motivated by the public service wage bill debate. It was withdrawn before it could be debated by the National Assembly.

iii) Constitution of Kenya (Amendment) Bill, 2015 and the Two-Third Gender Rule Laws (Amendment) Bill, 2015

These Bills were introduced simultaneously in the National Assembly on April 30, 2015 by Hon. Samuel Chepkong'a. The Constitution of Kenya (Amendment) Bill, 2015 simply provided for amendment to Article 81(b) by inserting the words "progressive implementation of legislation to ensure that."

The amended Article 81(b) would thus have read as follows: "The electoral system shall comply with the principle of progressive implementation of legislation to ensure that not more than two-thirds of members of elective public bodies shall be of the same gender."

The Two-Third Gender Rule Laws (Amendment) Bill, 2015 was intended to amend the National Gender and Equality Commission Act, 2011; the Political Parties Act, 2011; the Elections Act, 2011; the Independent Boundaries and Electoral Commission Act, 2011 and the County Governments Act, 2012 by introducing various provisions seeking to promote representation, in Parliament, of special interest groups including women, persons with disabilities, youth, ethnic and other minorities and marginalised communities as envisaged in Article 100 of the Constitution.

The two Bills were not debated in the National Assembly and eventually lapsed upon the expiry of the 11th Parliament.

iv) Constitution of Kenya (Amendment) (No.4) Bill, 2015

Popularly known as **Duale I**, this Bill was published on July 24, 2015 by then Leader of the Majority, Hon. Aden Duale. It was introduced in Parliament following the 2012 Supreme Court Advisory Opinion, which required Parliament to enact legislation for the implementation of the Gender Principle by August 27, 2015. In terms of events that led up to this Bill, the history goes back to 2012, when the then Hon. Attorney General, Prof. Githu Muigai, moved the Supreme Court to render an Advisory Opinion as to whether Parliament should enact legislation giving effect to the Gender Principle before the first elections under the new Constitution, which were scheduled for March 2013.

The Supreme Court opined that the Gender Principle should be achieved progressively, hence Parliament did not have an obligation to enact the law giving effect to the Gender Principle before the 2013 General Elections. However, a deadline of August 27, 2015 was given. Pursuant to Article 261(2), the National Assembly on July 29, 2015 resolved to extend the deadline set by the Supreme Court by one more year to August 27, 2016.

The Duale I Bill proposed the lifting of the provisions of Article 177(1)(b) into Articles 97 and 98 and that a beneficiary of a special nominative seat would only be entitled to a maximum of two terms. It also provided that the affirmative action provisions

creating the special seats in the National Assembly, Senate and County Assemblies would lapse 20 years after the first elections following enactment of the Bill.

This Bill was not passed after Parliament failed to raise the two-thirds majority required to pass the proposed constitutional amendment as provided for in Article 256(1) (d).

v) Constitution of Kenya (Amendment) Bill, 2015 (Judith Sijeny Bill)

The Bill was introduced in the Senate on August 21, 2015 by Hon. Senator Judith Sijeny, as a private member's Bill. The main variation between the Bill and the Duale I Bill was that the Sijeny Bill provided that Parliament would review the provisions on special seats after 20 years to determine whether the Gender Principle could be achieved without the special seats. The second variation was that the Sijeny Bill did not propose to amend Article 177 on County Assemblies. The Bill failed due to lack of the required quorum to vote on it.

vi) The Constitution of Kenya (Amendment) (No. 6) Bill, 2015 (Aden Duale II Bill)

Popularly known as the 'Compromise Bill', the Bill contained 'minor' variations from the Duale I on the affirmative action clause lifted from Article 177(1)(b). for the National Assembly, the revised clause read as follows;

"(ca) the number of special seat members necessary to ensure that no more than two-thirds of the members elected under clause (1)(a) are of the same gender;"

For the Senate, the revised clause read thus;

(da) the number of special seat members necessary to ensure that no more than two-thirds of the members elected under clause (1)(a) are of the same gender;"

While Duale I Bill provided for the automatic lapsing of the affirmative action clauses for the National Assembly, Senate and County Assemblies after twenty years following enactment, the Compromise/Duale II provided that Parliament may enact legislation supported by two-thirds of all members of National Assembly extending the sunset clause by a further fixed period not exceeding ten years.

Despite publication, the Bill was not debated and, therefore, lapsed with the expiry of the 11th Parliament.

vii) The Constitution of Kenya (Amendment) Bill, 2018 (Aden Duale Bill)

This Bill was introduced to the National Assembly on February 12, 2018 by Hon. Aden Duale and had similar provisions with the Duale II Bill published on December 2, 2015.

Despite publication, the Bill was not debated and, therefore, lapsed with the expiry of the 12th Parliament.

viii) Constitution of Kenya (Amendment) Bill, 2019 (Gladys Boss Shollei Bill)

This Bill was introduced to the National Assembly on July 4, 2019 by Hon. Gladys Boss Shollei. It proposed to achieve the not more than two thirds gender principle in elective and appointive bodies as well ensure the membership of Parliament reflects the requirement of Article 54(2) of the Constitution that at least five per cent of the members in elective and appointive bodies be persons with disabilities.

Regarding the National Assembly, the Bill sought to amend Article 97 to increase the number of elected women members of the National Assembly from 47 to 136. This would be achieved by designating two adjacent constituencies in each county and three adjacent constituencies with the least number of constituencies in counties with odd number of constituencies. It further sought to delete Article 97(1)(c) and replace it with a provision for nomination of 22 persons with disabilities.

In the case of the Senate, the Bill sought to replace the Article 98(1)(a) with a provision for election of 94 Senators, one man and one woman from each of the 47 Counties. It also sought to delete Article 98(1)(b), (c) and (d) and substitute them with nomination of six Senators in accordance with Article 90, with four representing persons with disabilities and the other two representing youth.

In the County Assemblies, the Bill sought to limit the number of representative wards to 1,450 and provide for the election of one woman for at least every two wards in a county for purposes of gender parity and to remove the provision for post-election gender top-up seats.

The affirmative action clauses in the National Assembly, Senate and County Assemblies would lapse after 10 years following enactment of the Bill with an option that Parliament could extent the period by a further fixed term not exceeding 10 years through a Motion supported by not less than two-thirds of all members of the National Assembly and the Senate.

Despite publication, the Bill was not debated and lapsed with the expiry of the 12th Parliament.

ix) The Constitution of Kenya (Amendment) Bill, 2019 (Farhiya Ali Haji & Mutula Kilonzo Junior Bill)

This Bill, co-published by Hon Senators Farhiya Ali Haji and Mutula Kilonzo Junior sought to amend the Constitution to give effect to the two-thirds gender principle through the lifting of provisions of Article 177(1)(b) into Articles 97 and 98. It also sought to amend Article 81 by inserting a new clause that the State takes legislative, policy and other measures including the setting of standards to achieve the realization of the principle.

The Bill was not debated in the Senate and lapsed with the expiry of the 12th Parliament.

x) The Constitution of Kenya (Amendment) Bill, 2020 (The Building Bridges Initiative Bill)

The Building Bridges Initiative Bill (BBI Bill) was published by the promoters of the Building Bridges Initiative on November 25, 2020. Regarding the two thirds gender principle, the Bill provided the following;

- a) Amendment to Article 82 of the Constitution, mandating Parliament to enact legislation which imposes sanctions on a political party that fails to ensure that its list of nominated candidates complies with the Gender Principle.
- b) Amendment to Article 88 to mandate IEBC to ensure that not more than Two Third of the members of a political party are of the same gender.
- c) Amendment to Article 89 to increase the number of constituencies from 290 to 366 with aim of promoting equitable representation in the National Assembly and, in tandem, Article 97 was to be amended to increase the number of elected members of the National Assembly from 290 to 366. The amendment to Article 97 also provided for special top-up seats necessary to ensure that the Gender Principle is actualised. Further, the Bill provided that in filling the special top-up seats, first priority in the nomination shall be given to candidates who contested for the constituency seats but were not elected. The provision on top-up seats was capped at 15 years.
- d) Amendment to Article 98 so that Senate would comprise of 94 members, with each county represented by a man and a woman elected by the voters. This would have meant that each county would have two senators; a man and a woman, and the gender composition would, therefore, be 50:50.
- e) Amendment to Article 90 on allocation of party list seats to align it with the amendments under Articles 97 and 98. The amendment proposed that nomination seats in the National and County Assemblies be allocated on the basis of the total votes received as opposed to allocation based on the total number of seats won by a political party.

Although the BBI Bill had been passed by a Majority of the Counties, National Assembly and the Senate, it was challenged in the courts — from the High Court to the Supreme Court — and found to be unconstitutional for a number of reasons including that the President could not initiate constitutional amendments/changes through a popular initiative under Article 257. Judges also cited lack of public participation on the Second Schedule of the Bill that provided for 70 additional constituencies

xi) The Constitution of Kenya (Amendment) Bill, 2023 (Beth Syengo Bill)

This Bill, published by Hon Senator Beth Syengo, on March 29, 2023, was a replica of the Hon Senators Farhiya Ali Haji and Mutula Kilonzo Junior Bill, 2019, except that it provided that a person was only eligible to be nominated once to the National Assembly, Senate and County Assemblies. The Bill is yet to be tabled for debate before the Senate and its mover agreed to await the outcome of the MSWG proposal.

2.1.1.2 Judicial Interventions

Several Court Decisions have been reached on the subject matter since the promulgation of the Constitution 2010. See the table below.

Case Law on the Not More Than Two-Thirds Gender Principle in Political and Appointive Positions

CASE NUMBER AND PARTIES	SUMMARY OF KEY ISSUES	SUMMARY OF COURT FINDINGS
CREAW v Attorney General & Another Petition No 182 of 2015 Filed May, 2015	This petition was filed as a follow up to the advisory opinion issued by the Supreme Court where the court gave the National Assembly and the senate till 27/08/2015 to have enacted legislation that would give effect to the not more than 2/3 gender principle. The petitioners contended that the AG had failed in his responsibility as per Article 261(4) of the constitution by failing to prepare the relevant bill for tabling before parliament as required by the law to enable parliament enact legislation within the period specified and therefore violating Article 27(8) and Article 81(b) as read with Article 100 and the Supreme Court Advisory Opinion. The petitioners sought orders to have the AG and the CIC compelled to prepare the relevant bill for tabling in Parliament for purposes	The court agreed that the AG and CIC had failed in discharging their mandate and as much as they had argued that they had set in motion some processes for the legislation, nothing concrete had been done between the date of the Advisory opinion of 11/12/2012. The judge ordered that the respondents to prepare the relevant bill to be tabled in parliament within the next 40 days for the purposes of effecting the 2/3 gender principle, however amenable to tricks from the respondent in its suggestion that it was cognizant that the 27/08/2015 supreme court deadline was 60 days away and hoped that through the timeline, the National Assembly would use

	of implementation of Articles 27(8) and 81(b) of the constitution. The respondents argued that the petition was premature as of 27/08/2015 deadline had yet to lapse and that parliament still had time to extend the timeline for enacting legislation.	it to consider the extension of time compliance.
CASE NUMBER AND PARTIES	SUMMARY OF KEY ISSUES	SUMMARY OF COURT FINDINGS
National Gender & Equality Commission v Cabinet Secretary Minister of Interior & Coordination of National Government & 2 others Petition 12 of 2016 Adrian Kamotho Njenga v CS, Ministry of ICT Petition No 203 of 2016 Filed May, 2016	The ruling but the intent of the petition from the ruling was to challenge the amendments made to the National Police Service Act that would eventually undermine the quality guaranteed under the constitution for women in terms of the provision of Article 27(8). The petitioners sought a declaration of constitutional invalidity of the impugned amendments (Miscellaneous Amendment 2015, December). The then Deputy Inspector General of Police Ms. Grace Kaindi had just been relieved of her duties and a replacement for her in the interim had been given. The government however, while arguing that the replacement only in the interim also had an argument where it claimed that the Inspector General of Police and the deputy IG did not comprise of a full body and therefore the argument that the replacement should have been a man was misconceived. The petition filed seeking orders against the CS, ICT for violating Article 27 of the constitution	Justice Lenaola decided that the ultimate test of compliance on the gender ratio composition should be the substantive appointment process and not the shortlisting stage as he would not be privy to the deliberations made during the short listing stage. He however noted that out of the 28 people, only 9 women versus 19 men were shortlisted. It was held that the board of 4 females and 7 males read with the language of Article 27(4) understanding of what a body is properly constituted as no gender was falling below the 1/3 mark.

	in the constitution of the board of Communications Authority of Kenya and the petitioners wanted the court to compel CAK to comply with the 2/3 gender requirements. The respondents argued that the appointment of the requisite 7 members by the CS was in addition to the Chairperson of the board appointed by the president, 3 persons representing their respective permanent secretaries of the ministries and the 7 appointees by the CS to constitute a whole board. The CS, it was argued considered regional and gender balances as well as performance of Individual Candidates. In the end two women and 3 men were successful in compliance with the gender requirements. The respondent also claimed he had no control over who sat at the board as the representatives of the PS's and the chairperson who was appointed by the president. The respondent submitted that 4 of the 11 members of the board were women making the board gender principle compliant.	
CASE NUMBER AND PARTIES	SUMMARY OF KEY ISSUES	SUMMARY OF COURT FINDINGS
FIDA-K & 5 Others v Attorney General Petition 102 of 2011 Milkah Adhiambo Otieno & Another	FIDA-K filed this petition challenging the recommendations of Five Supreme Court Judges to the President for violating Article 27(4) of the Constitution. Of the 5 Judges recommended by the JSC only one was a woman bringing the total constitution of the supreme court	This petition was dismissed by the court arguing that the appointments had been made within the law and that until the state acted on policies and programmes as envisaged by Article 27(6) and 8 and the legislature had legislated

v AG & 2 others Petition 33 of 2011, Filed on 23/7/2011 In the Matter of the Principle of Gender Representation in the National Assembly and Senate	bench at only 2 women and 5 men. The court refused to delve into mathematical formulae introduced by the petitioners to ascertain the right percentages for anybody while trying to conceive the right number of men and women for the 2/3 gender rule to be ascribed to. Instead, the court focused on the meaning of Article 27 of the Constitution on its interpretation, meaning and effect in the circumstances at hand. It reckoned that judicial Appointments should be based on merit, non-discrimination and should reflect the overall diversity of the People of Kenya. The petitioners brought this petition seeking the declaration of the sugar board elections to be rendered null and void for the failure in putting appropriate measures to ensure women were elected to the board as they were sugarcane farmers and deserved to be represented on the board. At the time elections had just been concluded and no woman had been elected to sit on the board. This advisory was applied for by the Attorney General seeking guidance on whether articles 81(b) as read with 27(6)&8 Articles 198,97,98,197(b),116 &125 require progressive realization and the enforcement of the 1/3 gender rule or requires the same to be implemented during the general election to be held 4/03/2013(then).	accordingly to set the formulae mechanisms and standards to implement the spirit of the constitution within the time set frame. The court advised women to remain vigilant and keep the state on their toes in regards to legislation. The JSC had expressed legitimate discretion within the parameters of the law and that the petitioners had failed to prove otherwise. The court stated that Article 27 did not give an immediate and enforceable right to any particular gender in so far as the not more than 2/3 gender principle was concerned and it was unreasonable and unrealistic for the petitioners to expect that as the issue in court would/could be resolved through enabling legislation by parliament. The court agreed with the respondents that the petition had been filed prematurely as the board of 13 members was yet to be constituted and only then would the matter of compliance with Article 27(8) be conversed. The process of constituting the board was on going and had just been temporarily stopped by the court and that the other members who had been elected, five of them were men. The court instructed the respondent to ensure that the whole list of the board members would ensure to include that not more than the 2/3 gender principle was complied with. It was hoped
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		that the state with other agencies would undertake necessary legislative measure to address inequalities and marginalization of historically disadvantaged groups such as women. The decision stated that state had other measures apart from legislation to ensure the requirements of Article 27(8) were complied with in turn departing from the progressive tone set out earlier on the FIDA-K case. It was held that the not more than 2/3 gender rule as provided for by the constitution could not be enforced immediately and had to be applied progressively. The court gave the National Assembly and the Senate until 27/08/2015 to have put legislation on the principle as prescribed by the Article 100 of the constitution.
CASE NUMBER AND PARTIES	SUMMARY OF KEY ISSUES	SUMMARY OF COURT FINDINGS
CREAW & 8 others v AG & Another Petition 207 & 208 of 2012 Minister For Internal Security & Provincial Administration v CREAW & 8 others Civil Appeal No.218 of 2012	Among the issues being litigated was the deployment/ appointment of 47 county commissioners by the president 37 of whom were men and only 10 were women in clear contravention on the principle of gender equality for not meeting the not more than 2/3 threshold. The respondents alleged that they were not enough women qualified to be appointed as county commissioners in spite of conceding that they were at least 26 women who were District Commissioners who had the necessary paramilitary skills and leadership	The court while deciding on the progressive realization argument advance was that Article 21 of the constitution imposed as an immediate test on the state to adhere to the not more than 2/3 gender rule immediately and that the rights subjective to the progressive realization test were the Economic and Social rights as they required allocation of resources and therefore the states obligation were subject to availability of resources unlike appointments and the like.

	training. This was in spite of the respondents having picked from the 10 women from this number and yet they would have needed to pick only five more to meet the minimum threshold to meet Article 27(8) requirements. The court argued that the appointments had been done within the transition period of inception of the constitution of 2010 and strictly speaking the appointments as at the time, the president still had executive powers to issue such orders. On gender argument, the court held perhaps the judge was ahead of her time while issuing the lower court's decision. Suggesting that the immediate realization argument advanced was harsh and the progressive test would have been a better path and thus would not have rendered the Gazette Notice 6937 of 23/05/2012 unconstitutional, null and void.	
CASE NUMBER AND PARTIES	SUMMARY OF KEY ISSUES	SUMMARY OF COURT FINDINGS
Marilyn Kamuru Muthoni & 2 others v AG & Another Petition 566 of 2015 Filed and amended petition 8/01/2016	This petition was filed to contest the appointments to the cabinet by the president for contravening the 2/3 gender principle. The president went ahead to swear in new appointees as cabinet secretaries and hence the amended petition to challenge the cabinet as it is now for contravening the 2/3 gender principle. The respondent among other arguments of the cabinet not falling into the strict definition of a body as envisaged by Article 27(8) also brought up the progressive argument	Justice Onguto explained that the constitution prohibited the state from maintaining gender imbalance in appointive and elective positions and that the constitution did not impose a lesser duty on the president and the National Assembly, the court reiterated that article 27(4) on appointive positions could be realized immediately and, in any event, the not more than 2/3 gender principle provided a bare minimum.

	saying that the principle was one to be effected progressively.	
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2.1.1 The Renewed Commitment to the Gender Principle

The Kenya Kwanza Manifesto

The Kenya Kwanza Manifesto, also known as 'The Plan' noted that women remain largely excluded from participation and decision-making in governance and political institutions. To address this, the manifesto committed to ensuring the realization of the two-thirds gender rule in elective and appointive positions in the public sector within 12 months following election and ensuring that 50 per cent of Cabinet positions are held by women.

The Women Charter

The Kenya Kwanza Alliance further formalised its promise to the women's agenda through the Women's Charter by committing to addressing and championing women and girl rights. Notably, the charter affirmed Kenya Kwanza's commitment to the implementation of the not more than two thirds gender rule within the first three months of the administration and reserve half of its Cabinet positions for women.

The Presidential Memorandum to Parliament

In a memorandum dated December 9, 2022, addressed to the Speakers of Parliament, H.E. President Dr. William Ruto sought Parliament's consideration in addressing several issues, among them the enactment of a framework for implementing the Gender Principle.

The President proposed the following;

The proposed Formula to amend Article 97(3) of the Constitution, according to the President, should be based only on the number of members elected in the National Assembly from the constituencies and counties. That computation, based on the current numbers in the House, would have 97 MPs as a third of the 290 elected MPs, adding on to the 47 affirmative seats, popularly known as the Woman Representatives. The proposed constitutional amendments, according to the President, should be pursued without taking the Kenyan electorate through a referendum that is potentially divisive and disruptive months after the country came from a General Election.

Further, H.E. President William Ruto, on the of January 9, 2023, published the new organisation of his government, stating key roles of officials in his government under Executive Order No. 1 of 2023. In this Executive Order, the Ministry of Public Service, Gender and Affirmative Action, State Department of Gender and Affirmative Action was assigned the responsibility of ensuring compliance with affirmative action

principles as envisaged in the Constitution. Under the Executive Order No. 2 of 2023, the State Department of Gender and Affirmative Action is housed in the Ministry of Gender, Culture, The Arts and Heritage. This is the current Ministry that oversees the work of the MSWG on the Gender Principle.

2.1.3 The Establishment of the MSWG

The Cabinet Secretary for Ministry of Gender, Culture, the Arts and Heritage, Hon. Aisha Jumwa Katana on June 15, 2023 inaugurated the Multi-Sectoral Working Group (MSWG), which was tasked with the role of developing an enabling framework for the implementation of the not more than two thirds gender principle. This was followed by gazettelement of the MSWG through the Kenya Gazette published on August 15, 2023, for a period of six months and further, an extension for another six months vide Gazette No. 1770 dated February 8, 2024.

2.1.4 The National Dialogue Committee (NADCO) Process

The National Dialogue Committee (NADCO), a bipartisan parliamentary process, was initiated through a joint notification, No. 001 of 2023, dated May 19, 2023 to facilitate dialogue, build consensus and recommend appropriate constitutional, legal and policy reforms on issues of concern to the people of Kenya.

The committee identified key issues of concern from Kenyans that included the outstanding implementation of the gender principle. The MSWG, was called upon and it presented its interim findings to NADCO, with a caveat that it was engaging in public participation to seek more views from stakeholders, including citizens, organisations promoting the rights of vulnerable groups — including rights of persons with disabilities — marginalised groups and experts in elections, gender equality and human rights.

In its conclusion, NADCO took cognisance of the work of the MSWG on the Realisation of the Gender Principle. The committee recommended that the MSWG finalise its work and recommend a framework for implementation of the Gender Principle to Parliament.

Specifically, NADCO considered that the MSWG was best suited to continue with the process of finding the implementation framework of the Gender Principle. NADCO gave the following recommendations for consideration by the MSWG.

Option 1

1. Adopt the principle that is provided under 177 of the Constitution
 - a) On basis of proportional representation by use of party lists as provided for in Article 90 of the Constitution

- 
- b) The list to comprise candidates who stood for election with preference being given to candidates who received greatest number of votes, and

Option 2

- 2. Double the number of women seats from the counties to National Assembly to 94, retain the 290 elected, 12 nominated, use the top-up option after elections to address any shortages in the numbers.

CHAPTER THREE

COMPARATIVE JURISDICTIONS IN AFRICA

This chapter presents a comparative analysis of select jurisdictions in Africa to provide evidence-based insights and best practices on gender quotas mechanisms to promote equity in political and electoral processes. In majority of the case studies, African countries have adopted a first-past-the-post (FPTP) electoral system. Kenya has a Mixed Member Proportional Representation system.

Gender quotas have been adopted by countries globally to fast-track inclusion of women in political representation and decision making. Gender quotas break the cycle of male dominance in politics and address underlying biases and norms, thus giving women a fair chance to be visible and participate in public life.

Kenya's system combines the FPTP and the Proportional Representation (PR) for party lists seats as provided for Parliament in Articles 97(1) (c); 98 (1) (b), (c) and (d). County Assemblies operate under 177(1) (b) and (c).

The main issues that necessitate gender quotas include structural, political, cultural and socio-economic factors that create gender imbalances and exclusion. Most gender quota methods are either legislative, constitutional or voluntary.

The Constitution of Kenya, 2010, in Articles 97 (1) (b) and (c), 98 (1) (b), (c) and (d) and 177 (1) (b) and (c) provide for constitutional gender quotas in terms of reserved, nominative and special seats in Parliament and County Assemblies.

The table below presents an analysis of how select African countries are using gender quotas to promote gender equality and inclusion.

Table 3.1: Select African Countries Analysis on use of Gender Quotas

COUNTRY	MEASURES TAKEN TO PROMOTE GENDER EQUALITY		
	LEGAL	POLICY	ADMINISTRATIVE/ SANCTIONS
1. UGANDA 33.8 per cent representation.	Art. 78(1) of the Constitution² prescribes for one	Gender Equality strategy 2022-2025:⁴ Calls for affirmative action measures to ensure	There are not sanctions.

² See <https://www.parliament.go.ug/page/composition-parliament>

⁴ Available at <https://www.undp.org/sites/g/files/zskgke326/files/2023-02/UNDP%20UGANDA%20Gender%20Equality%20Strategy%202022-2025.pdf>

Reserves 112 seats for women in Parliament;¹ Also has electoral quota for women. Uganda system in the First-Past-the-Past (FPTP) system.	woman representative from each District³ Further that there is a Representatives of special interest groups in Parliament for the purposes of article 78(1)(c) of the Constitution. For the Uganda Peoples Defence Forces, there shall be ten representatives, at least two of whom shall be women. For workers, there shall be five representatives, at least one of whom shall be a woman.	more women participation in decision-making.	
2. UNITED REPUBLIC OF TANZANIA 37.4 per cent representation. Reserves 118 seats for women in Parliament. It uses the first-past-the-post system.	Art. 66 of the Constitution:⁵ Women members must make up to not less than 30 per cent in the National Assembly; The special seats for women are distributed among political parties in proportion to the number of seats awarded to them in	Election Regulations 2010: Every political party can submit to the electoral commission names of eligible women candidates for nomination as MP for special women's seats.⁶	There are no sanctions

¹ Data available at https://data.ipu.org/parliament/ug?chamber_id=13479

³ See also s.8 of the Parliamentary Elections Act 2005, available at <https://aceproject.org/ero-en/regions/africa/UG/uganda-parliamentary-elections-act-2005/>

⁵ Constitution of the United Republic of Tanzania, available at <https://rsf.org/sites/default/files/constitution.pdf>

⁶ Data available at <https://www.idea.int/data-tools/data/gender-quotas-database/country?country=221>

	Parliament. (Constitution, Articles 66 (1: b) and 78 (1)).	Tanzania Gender Equality Strategy 2022-2027 provides for gender equality in political processes as well.	
3. RWANDA 61.3 per cent representation. Women to occupy at least 30 per cent of positions in decision-making organs; It adopts the majority/plurality/the first-past-the-post-system but has reserved seats for District Council members.	Reserves 24 out of 80 seats for women in Parliament. ⁷ There are voluntary party quotas for women candidates. ⁸ Local levels elections adopt the majority/plurality/the first-past-the-post-method but have reserved seats for District Council members. One man and woman are elected to the District Council. In the council of Kigali, and there is a woman nominated from the National Women's Council. Each bureau of the council must be composed of at least 30 per cent of women.	Revised National Gender Policy 2021: ⁹ reaffirms the 30 per cent constitutional directive. National Gender Standards 2023: ¹⁰ For organisations to adopt and implement gender-sensitive policies and practices	Art 58 of the Constitution: Senate holds accountable a political organisation that violates obligations under Article 10.
4. SOUTH AFRICA	Art 6(1) of the African National	Has in place the South Africa	Office on the Status of

⁷ Data available at https://data.ipu.org/content/rwanda?chamber_id=13513

⁸ UN Women, Revisiting Rwanda five years after record-breaking parliamentary elections, available at <https://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament>

⁹ Revised National Gender Policy 2021, available at https://www.migepro.gov.rw/fileadmin/user_upload/Migepro/Publications/Guidelines/Revised_National_Gender_Policy-2021.pdf

¹⁰ UNDP, Rwanda leads the way in gender equality with first national gender standards in Africa, available at <https://www.undp.org/africa/press-releases/rwanda-leads-way-gender-equality-first-national-gender-standards-africa>

46.2 per cent representation. Does not have reserved seats in Parliament, but has an electoral quota for women, for political parties. ¹¹	Congress (ANC) Constitution: provides for a 50 per cent quota for women in all elected structures of the ANC. ¹²	National Policy Framework for Women's Empowerment and Gender Equality. ¹³	Women (OSW): ¹⁴ Was established in 1997 to promote, among others, affirmative action in government. There are no sanctions for non-compliance.
5. SENEGAL 46.1 per cent representation. Has political party quotas (50 per cent). It has a mixed system; Majority/Plurality party block vote and proportional representation	Has an electoral quota (50 per cent) for women, for political parties. Half of each party's candidates must be women. ¹⁵ Adopted Gender Parity Law in 2010. Gender Parity applies to all candidate lists, which must be alternatively composed by persons of both sexes. When the total of candidate list does not comply, parity is applied to even numbers immediately below.	Has in place a National Strategy for Gender Equality and Equity (SNEEG): Its mandate is to ensure the full participation of women and men in decision-making processes and equitable access to resources ¹⁶	If party does not comply, the party list of candidates may be rejected.

¹¹ Data available at https://data.ipu.org/parliament/za?chamber_id=13311

¹² ANC Constitution, available at <https://www.anc1912.org.za/wp-content/uploads/2021/01/ANC-Constitution-2017.pdf>

¹³ Available at <https://faolex.fao.org/docs/pdf/ssd148641.pdf>

¹⁴ See <https://evaw-global-database.unwomen.org/fr/countries/africa/south-africa/1997/office-of-the-status-of-women>

¹⁵ See http://archive.ipu.org/parline-e/reports/2277_b.htm

¹⁶ Equal Measures 2030, How can Senegal continue progress towards gender equality? Available at <https://www.equalmeasures2030.org/story/how-can-senegal-continue-progress-towards-gender-equality/#:~:text=In%20addition%20to%20ratifying%20several,and%20equitable%20access%20to%20resources>

6. NAMIBIA 44.2 per cent representation. Has voluntary political party quota.¹⁷ It also has Proportionate Representation.	The candidate preference is provided but each candidate list contains at least three women for elections at lower level (village councils and municipalities.	The National Gender Policy (NGP) of 1977¹⁸ Was revised and adopted in 2010. Section 3.3.2.7 aims to increase women's access to all levels of decision-making and participation in the political and public spheres.	There are no sanctions for non-compliance
7. MOZAMBIQUE 43.2 per cent representation. Has voluntary political party quota¹⁹ and legislated quotas at sub-national level. Voluntary quotas adopted by parties	Art 135 of the Constitution:²⁰ Provides for proportional representation. The political party, FRELIMO, has a voluntary quota of 40 per cent for women representation, but no other political party has this measure in place.²¹ FRELIMO has used gender quotas since 1994. The party's policy requires that 40	National Action Plan on Women, Peace and Security 2018-2022:²³ Focuses solely on increased representation of women in peace and security processes, with a proposed 30 per cent quota.	National Council for the Advancement of Women (CNAM):²⁴ Established in 2004, it coordinates gender mainstreaming and promotes gender policies.

¹⁷ Data available at https://data.ipu.org/parliament/na?chamber_id=13470

¹⁸ Available at https://mgepesw.gov.na/archive/-/downloads/-/document_library/53FAEAFee5nn/view_file/1461634

¹⁹ Data available at https://data.ipu.org/content/mozambique?chamber_id=13469

²⁰ Constitution of the Republic of Mozambique, available at https://cdn.accf-francophonie.org/2019/03/mozambique_const-en.pdf

²¹ Gender Links, Gender Parity in Mozambique Parliament elusive, available at <https://genderlinks.org.za/news/gender-parity-in-mozambique-parliament-remains-elusive/>

²³ National Action Plan on Women, Peace and Security, available at <https://1325naps.peacewomen.org/wp-content/uploads/2020/12/Mozambique-NAP-2018-2022.pdf>

²⁴ Country Gender Profile: Mozambique, available at https://www.jica.go.jp/Resource/english/our_work/thematic_issues/gender/background/c8h0vm0000anjqj6-att/mozambique_2015.pdf

	per cent of candidates to national assembly and local government should be women. In addition, the quota system was accompanied by a commitment to balance the distribution of men and women through the list. Currently, FRELIMO holds 191 seats out of a total of 250 in the national assembly, in effect a three-quarter majority.²²		
8. CABO VERDE 41.7 per cent representation. Has a political party quota of not less than 40 per cent representation.²⁵	Parity Law of 2019:²⁶ Parity exists when none of the genders has representation of less than 40 per cent and no more than 60 per cent.	National Gender Equality Plan 2021-2025:²⁷ Responds to three areas of women's empowerment; economic, physical and decision-making autonomy.	Sanction for non-compliance is the rejection of the party list by the Electoral Management Body. Article 415 (2) states that 'public funding will be awarded only to those political parties or coalitions whose lists presented for national elections, if elected, contain at least 25 per

²² <https://www.idea.int/data-tools/data/gender-quotas-database/country?country=152>

²⁵ Data available at https://data.ipu.org/parliament/cv?chamber_id=13361

²⁶ Cabo Verde – Parity Law for Gender Equity and Human Dignity, available at <https://www.nairobisummiticpd.org/commitment/cabo-verde-parity-law-gender-equity-and-human-dignity>

²⁷ See <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC207683/>

			cent women candidates’.
9. ETHIOPIA 41.3 per cent representation. There is no electoral quota system.²⁸ It has legislated quotas for single lower house and quotas for sub-national level.	The Constitution²⁹ calls for “affirmative measures” to enable women to compete and participate on the basis of equality with men in political life.	National Action Plan for Gender Equality 2006-2010:³⁰ It calls for enactment of gender-sensitive electoral laws. There are special campaign funds made available by the National Electoral Commission for women candidates.³¹	Chapter 7, Article 100. Government Funding: Amount and Eligibility Criteria The government shall grant annual financial support for political parties to enable them conduct legal operations and meet their obligations, based on the vote they win at Federal and State Council elections, the support and donations they receive from members and supporters, the number of female and disabled candidates they nominate as candidates, and other relevant criteria.

²⁸ Data available at https://data.ipu.org/parliament/et?chamber_id=13389

²⁹ Constitution of the Federal Democratic Republic of Ethiopia, see Art 35(3), available at <https://www.wipo.int/wipolex/en/text/584617>

³⁰ Available at <https://land.igad.int/index.php/documents-1/countries/ethiopia/legislation-and-policies-1/policies-1/271-national-action-plan-for-gender-equality-nap-ge/file>

³¹ Fifth National Report on Progress made in the Implementation of the Beijing Declaration and Platform for Action, 2019, available at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/64/National-reviews/Ethiopia.pdf>

10. BURUNDI 38.2 per cent representation. There is an electoral quota for women; one in four candidates on electoral lists must be a woman.³²	The Constitution:³³ A minimum of 30 per cent of the National Assembly members must be women.³⁴ A third of candidates on a party list must be women;³⁵ and a minimum of 30 per cent female representation is required in the Senate.³⁶	National Gender Policy 2012-2025:³⁷ It facilitates creation of a political environment conducive for the achievement of gender equality.	Electoral Administration may co-opt (add extra seats) to meet the reserved seats quota.³⁸
11. ANGOLA 33.6 per cent representation. Electoral quota for women provided for. At least 30 per cent gender representation in decision-making bodies at all levels.³⁹	Art. 20(2)(I) of the Law of Political Parties:⁴⁰ Provides for representations of women at not less than 30 per cent. Legislated quotas for the Single Lower House. Legislated quotas at the sub-national level and voluntary quotas adopted by political parties.	Relies on the 2013 National Policy for Gender Equality and Equity	No sanctions.
12. SOUTH SUDAN	Art. 16(4) of the Constitution:⁴¹ Calls	South Sudan National	No sanctions.

³² Data available at https://data.ipu.org/parliament/bi?chamber_id=13353

³³ Burundi Constitution, available at https://www.constituteproject.org/constitution/Burundi_2018

³⁴ Burundi Constitution, see Art 169.

³⁵ Burundi Constitution, see Art. 173.

³⁶ Burundi Constitution, see Art. 185.

³⁷ USAID, Burundi Gender Analysis Final Report 2017, available at <https://banyanglobal.com/wp-content/uploads/2017/07/USAID-Burundi-Gender-Analysis-Final-Report-2017.pdf>

³⁸ Data available at https://data.ipu.org/parliament/bi?chamber_id=13353

³⁹ Data available at https://data.ipu.org/parliament/ao?chamber_id=13319

⁴⁰ Law No 2/05 of 1 of July 2005, available at <https://aceproject.org/ero-en/regions/africa/AO/Law%20No%202%2005%201%20of%20July.pdf>

⁴¹ Constitution of South Sudan 2011, available at https://www.constituteproject.org/constitution/South_Sudan_2011

32.4 per cent representative. 83 seats in Parliament are reserved for women. Has an electoral quota.	for a 25 per cent quota for women in Legislative and Executive organs as an affirmative action tool. Constitution states that 'All levels of government shall: promote women's participation in public life and their representation in the legislative and executive organs by at least 25 per cent as an affirmative action to redress imbalances created by history, customs, and traditions'. National Elections Act:⁴² Provides for 25 per cent quota for women in National Legislature on the basis of proportional representation at the national level from closed party lists.⁴³ The electoral law adopted in 2012, which was implemented in the 2015 legislative elections, states that 'the National	Women's Strategy:⁴⁴ Reaffirms the commitment to promote women's representation, apart from the 25 per cent affirmative action strategy.	
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⁴² National Elections Act, No 39 of 2012, available at https://aceproject.org/ero-en/regions/africa/SS/south-sudan-the-national-elections-act-no.-39-of/at_download/file

⁴³ See Art. 60(2)(b)

⁴⁴ Available at https://www.kas.de/c/document_library/get_file?uuid=78fdebb6-65c1-4185-1a24-c02d25ba5bdb&groupId=252038

	Legislative Assembly is composed of the members elected as follows: 60 per cent of members shall be elected to represent geographical constituencies; 25 per cent representing women members shall be elected on the basis of proportional representation at the national level from closed party lists and 15 per cent shall be elected through proportional representation at the national level from closed party lists.’ (Article 60 (2), National Elections Act 2012.		
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i. Summary of the findings from the analysis

The select African countries above have used constitutional, legislative and/or voluntary quotas to increase the number of women in Parliament. Uganda and the United Republic of Tanzania, which have similar electoral systems as Kenya, have used constitutional provisions to reserve 30 per cent of seats for women. Tanzania, for instance, has reserved 118 seats for women, while Uganda has 112.

Rwanda, which is leading globally at 61.3 per cent of women in Parliament, combines both constitutional gender quotas with reserved seats. It has the Proportionate Representation (PR) administered in a one-party government system as opposed to Kenya’s first-past-the-post system in a multi-party political environment.

Some countries apply sanctions as enforceable mechanisms to guarantee more women seats in Parliament. In Rwanda, the Senate holds accountable a political organisation that violates obligations under Article 10, which is the constitutional provisions reserving mandatory 30 per cent of seats in decision-making bodies to

women. Rwanda has surpassed its own minimum target set in the Constitution at 30 per cent and currently, women representation stands at 61.3 per cent.

Senegal has political party quotas (50 per cent). It has a mixed system; majority/plurality party block vote and proportional representation. It has an electoral quota (50 per cent) for women, for political parties as half of each party's candidates must be women. In its sanctions, if a party does not comply, the party list of candidates may be rejected.

Namibia and Mozambique have voluntary party gender quotas with no sanctions. Similarly, Cabo Verde has political party quotas of not less than 40 per cent representation as provided in its parity law of 2019. The law states that parity exists when none of the gender has representation of less than 40 per cent and no more than 60 per cent. The sanction for non-compliance is the rejection of the party list by the Electoral Management Body.

Burundi, too, has electoral quotas for women; one in four candidates on electoral lists must be a woman. Burundi's constitution provides that a minimum of 30 per cent of the National Assembly members must be women and 1 in 3 candidates on a party list must be a woman. It also provides that a minimum of 30 per cent female representation is required in the Senate.

Angola has an electoral quota for women, with at least 30 per cent gender representation in elective bodies at all levels. Angola has legislated quotas both for the Single Lower House and sub-national level and voluntary quotas adopted by political parties in line with their Political Parties Act.

Ethiopia, on the other hand, has no electoral quota system in its constitution. However, it has legislated quotas for Single Lower House and legislated quotas for sub-national level. Its constitution calls for "affirmative measures" to enable women to compete and participate on the basis of equality with men in political life.

South Sudan's constitution also provides for electoral quotas. It promotes representation of women to at least 25% per cent and reserves 83 parliamentary seats for women.

ii. Learning Points for Kenya from the analysis

Electoral gender quotas are the most effective measures to include women in politics as seen from the approaches various countries have used. The Kenya Constitution 2010 provides for constitutional gender quotas in terms of reserved seats (National Assembly and Senate and County Assemblies) and nominations for special categories through nominations for all levels including county governments.

The **not more than two thirds** gender principle is provided for in Article 27(6) and (8) as well as 81(b) of the Constitution. There is clarity in its implementation for county assemblies in terms of Article 177(1) (b) and (c). However, there is no implementation clarity provisions of Articles 97 and 98. Parliament is yet to enact the law envisaged under Article 100.

The search for the implementation of the **not more than two thirds** gender principle has remained elusive since promulgation of the Constitution in 2010. As evidenced by the analysis, there is a lucuna in the Constitution, specifically in Articles 97 and 97 that needs to be cured by a constitutional amendment.

Use of voluntary quotas for political parties has failed in Kenya because majority of political parties do not present female candidates especially in their strongholds.

iii. Conclusion

The comparative analysis study demonstrates that countries with the First-Past-the-Post (FPTP) electoral system (Uganda and Tanzania) have achieved gender parity in representation through gender quotas in the constitution, enabling legislations, policy and administrative measures. Other additional measures, such as sanctions, have been used in enforcement and implementation tools to achieve gender quotas. Kenya must follow suit and get its constitutional gender quotas clear and support it with strengthening the Political Parties Act and the Election Act.

As a long-term measure, Kenya may consider adopting a pure Proportional Representation (PR) system. Its benefits would include the following:

- It is significantly much cheaper both for political parties and IEBC.
- It would involve less logistics for the political parties and IEBC.
- There will be no more of the current six party lists, depending on the design of the PR system.
- Most likely, there will be no need for boundary reviews. This will also avoid politics related to such review.
- Gender requirements will be achieved.
- Much higher likelihood to achieve the inclusion of SIGs.
- No major increase in the number of MPs. Number of members in county assemblies can be reduced as well.
- The winner takes it all mentality can change.
- All members elected will be equal.
- People will vote for parties and not for single individual candidates.
- It will be much easier for IEBC, ORPP and any other observers to monitor political party nominations and party lists.
- The PR system is much easier to understand as required in the Kenyan Constitution.
- It will reduce the cost of election for individual candidates (and the need to recover election costs once candidates are elected and financial losses for candidates not elected).

- There will be fewer disputes arising from allocation of seats from the party lists.

CHAPTER FOUR: PUBLIC PARTICIPATION

4.0 INTRODUCTION

This chapter presents analyses, findings and recommendations of public participation process undertaken by the MSWG. The public participation was conducted in compliance with provisions of Article 10 of the Constitution, which provides for national values and principles of governance that include patriotism, national unity, rule of law, democracy and participation of the people.

The MSWG initiated the public participation process through a call for written memoranda and oral submissions from stakeholders and a call for the public to participate. This was done by publishing public announcements in daily newspapers with nationwide circulation on October 9, 2023. The stakeholder engagement forums were held between November 14 and 17, 2023 at the Kenya National Library Service (Maktaba Kuu Building) in Nairobi. Written submissions were received by the secretariat throughout the period of public participation.

Stakeholders who presented their memoranda to the MSWG included representatives from diverse sectors; academia, women rights organisations, private sector, professional groups, civil societies organisations, political groups, organisations of/for persons of disabilities, religious organisations, trade unions, media and government institutions among others. These public engagements received wide coverage from national, community and social media.

The MSWG, through publications in the print media, radio talks, calls and online platforms, invited the public to give views on the implementation of the Gender Principle. The public participation was scheduled to run in various regions concurrently. Through the publication in the print media, the public was also given the opportunity to submit views through a designated email address – mSWG@gender.go.ke or by delivering written submissions to the secretariat hosted at the State Department for Gender and Affirmative Action.

The clustered regions visited were: Kajiado, Uasin Gishu, Embu, Garissa, Isiolo, Kilifi, Machakos, Nakuru, Kakamega, Kisumu and Nyeri. Participants were invited from neighboring counties. The attendees included women leaders, men, persons with disabilities, government officers and representatives of marginalised groups among others. Written submissions were also received.

These fora served as crucial platforms for the public to articulate their perspectives on gender parity in the political leadership of the country, with representation from the youth, PWDs and marginalised communities.

During the period scheduled for receiving views, Maendeleo ya Wanawake held a “mama” night on December 8, 2023 to discuss women rights and the framework

towards realisation of the Gender Principle among other agenda items. A total of 676 women delegates from all over the country were present and they endorsed the process of the realisation of the Gender Principle and approved the memorandum which was submitted to the MSWG. This proposal is among those analysed.

The amalgamated findings herein summarise a diverse range of viewpoints, including calls for amending the Constitution to provide for the Gender Principle, a call for gender parity, removal of cultural impediments, financial empowerment and proposed electoral system reforms. These collective narratives weave together the distinctive challenges and recommendations from each region, providing a strong foundation for legislative, policy and administrative processes aimed at fostering gender equity within Kenya's political landscape.

3.1 Analysis of stakeholder engagement forums' proposals.

3.1.1 Proposal touching on constitutional amendments and amendments or enactment of legislative framework

Stakeholders proposed constitutional and legal reforms to ensure the realisation of the Gender Principle. They proposed considerations to amend existing legislations to establish clear mechanisms for achieving gender balance in political representation.

Legal changes proposed included;

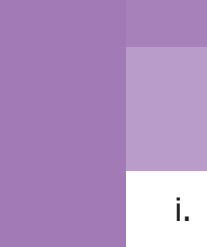
- i) Amending the Constitution
- ii) Modifying electoral laws and other relevant statutes
- iii) Amending party regulations to enforce compliance with the Gender Principle.

a) Constitutional Amendments Lifting Article 177 (1) (b) and (c)

Proposals were received calling for amendments to the Constitution of Kenya 2020, particularly Articles 97 and 98 to include provisions similar to Article 177 (1) (b) and (c).

The purpose of such amendment is to anchor the Gender Principle within the constitutional framework, making it a fundamental and binding aspect of the country's governance. Consequential amendments to related constitutional articles, such as Article 90, were also proposed to ensure consistency.

b) Changes to Electoral System

- 
- i. Participants proposed a comprehensive review of the electoral system to align it with the Gender Principle. Specific changes include;
 - Amendments to Article 82 of the Constitution
 - Introducing gender electoral units and
 - Modifying the nomination process to ensure gender balance.

The goal is to eliminate barriers within the electoral system that hinder the realisation of the Gender Principle. Proposal to consider shifting from the first-past-the-post (FPTP) to Proportional Representation (PR).

- ii. Participants proposed substantial amendments to the principles of the electoral system, suggesting a paradigm shift towards more inclusive practices. Among the proposals were the introduction of rotational constituencies, a concept which envisages constituencies alternating between male and female candidates in different election cycles. This progressive approach aims to gradually establish a more balanced representation, thus reducing gender disparities over successive electoral periods.

Participants recommended amendments to specific articles of the Constitution to facilitate the realisation of the Gender Principle. Some of these are:

- Amending Articles related to the electoral system, particularly Article 81. Participants proposed incorporating explicit measures that would ensure compliance with the Gender Principle in the nomination and election processes. This would involve specifying quotas or other mechanisms to promote gender balance in elective positions. A few respondents proposed the removal of the Gender Principle from elective positions and confining it to only appointive seats.
- Deletion of Article 81(b) from the Constitution to allow for political seats to be competitive.
- Amending Political Party requirement (e.g. Articles 91 and 92): There were proposals to amend Articles governing political parties' operations, such as Articles 91 and 92 of the Constitution. Participants called for clearer provisions compelling political parties to adhere to gender parity during nominations. Some proposals included application of sanctions for parties that fail to meet the stipulated gender requirements.
- Amend Articles specifying the composition and structure of the National Assembly and the Senate, including **Articles 97, 98, and 81**. The aim was to introduce explicit provisions that outline the required gender ratios (numerical numbers) within these legislative bodies, ensuring a more balanced representation of men and women.

- iii. **The Opposite Gender-Running Mates:** Another notable legislative suggestion was the introduction of opposite gender-running mates, especially at presidential and gubernatorial levels. This proposal seeks to address gender imbalance in Executive leadership positions by mandating that running mates be of the opposite gender, fostering a more equitable distribution of power.
- iv. **Making the Senate an equal house:** Suggestions were made to make the Senate and equal House to the National Assembly by amending Article 98 of the Constitution to allow every county to elect one man and one woman and doing away with the current nomination seats reserved for women and PWDs. Further it was proposed that political parties should be compelled to consider the inclusion of women and men in party candidate lists. These should be presented to meet the requirement of representation of Article 100, thus including young and older women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.
- v. **Reducing Constituencies:** Some participants advocated for the legislative reduction of the number of constituencies. The intention of this proposal is to streamline the electoral landscape, making it more manageable while concurrently fostering gender equality in representation.

c) **Gender Quota Systems/Temporary Special Measures and Leadership Pathways to Achieve Affirmative Action**

Participants proposed the following:

- i. **Introduction of Gender Quotas/TSMs):** Participants recommended legislative interventions to introduce gender quotas in the political system. This transformative measure proposes the establishment of predetermined percentages of seats reserved exclusively for women in legislative bodies, thus ensuring proportional representation and breaking down historical barriers.
- ii. **Hard Sanctions for Non-Compliance:** Since an electoral gender quota is the most effective measure to address the unequal representation of women's numerical numbers in political decision-making spaces, the call was to introduce stiffer sanctions against political parties that fail to comply. The recommendation was to provide IEBC with the legal mandate to reject a party list and bar non-complying parties from participating in that election.
- iii. **Political Party Regulations:** Participants called for amendments to the Political Parties Act to introduce stringent regulations ensuring compliance with the Gender Principle within political parties. Proposed changes include

sanctions for parties that fail to meet the gender quota during candidate nominations. By incorporating such amendments, the legislative process aims to influence the internal structures and practices of political parties, fostering gender inclusivity from the grassroots level. The sanctions could include empowering IEBC to reject the party list, imposing financial penalties for non-compliance and giving financial incentives for parties that comply. Financial incentives would be taken away from non-complying political parties that are otherwise entitled to receive political party funds.

- iv. **Eliminating Obstacles:** Calls were made for legislative measures aimed at eliminating structural and legal obstacles that impede fair representation for women. This involves creating legislative pathways that empower and support women in their ascent to higher political offices, thus fostering an environment conducive to gender parity.
- v. **Reviewing tokenistic nature of representation at the County Assemblies level is a key concern:** The current use of party lists has witnessed its abuse by political parties. The women nominated owe allegiance to their nominating political parties. This concern indicated the need to go beyond mere numbers and empower women to engage in meaningful competitive constituency-based elections to avoid tokenism and do away with patronage.
- vi. **Rotational System:** Participants emphasised a legislative proposal that focused on introducing a rotational system for constituencies to facilitate the realisation of the Gender Principle in the National Assembly and Senate. The rationale behind this legislative proposition lay in the participants' collective recognition of persistent gender disparities in political representation, with an acknowledgment that certain constituencies might consistently lack adequate representation from one gender. By advocating for a rotational approach, participants aimed to break away from static constituency allocations and introduce a dynamic system that alternates between male and female representatives over successive electoral periods.
- vii. **Legislating an active participatory process for affirmative action in nominating women candidates.** This may involve an administrative process of introducing specific legislation that mandates political parties to follow affirmative action measures in their nomination processes. The legislative framework may include guidelines on how parties can ensure fair representation of women across various categories. Women rights organisations proposed that nomination of women for political positions be coordinated by women rights organisations with national coverage.

d) Introduction of gender equality law to implement gender quotas as provided in the Constitution (e.g., Article 27 (6), (8), 177(1) (b) & (c).

Participants recommended full implementation of Article 27 and related provisions (81, 177 (1) (b) and (c) that introduce gender quotas in various aspects of governance through enactment of a gender equality law. This could involve specifying the percentage of seats reserved for each gender in legislative bodies, political party structures and other decision-making entities. The goal is to enforce a more equitable distribution of leadership positions and to implement Article 100 of the Constitution.

e) Promotion of inclusivity and diversity in proposed legislation

- i. **Amendments to achieve inclusivity:** Participants underscored the need for legislative amendments that actively promote inclusivity in electoral processes. This multifaceted endeavour involves revising existing laws to accommodate the unique needs and challenges faced by persons with disabilities, women and youth in the political arena. The envisioned legislative changes seek to create an environment where diverse voices are not only heard but also actively encouraged to participate in shaping the political landscape.
- ii. **Amendment to cater for women of various diversities:** Participants emphasised that there should be an amendment to the existing law to cater for women of various diversities e.g. women with disabilities, young women and women from marginalised communities.
- iii. **Enactment of legislation on marginalised groups (Article 100):** Suggestions were made to enact Article 100 to strengthen its implementation and related sections, focusing on strengthening affirmative action measures. This should include expanding the scope of affirmative action to cover a broader range of positions, both elective and appointive, and ensuring that these measures are more effectively implemented to address historical gender imbalances.

f) Term Limits for Women Representative Seats

Participants proposed introduction of a legislative proposal advocating for the implementation of **a one-term limit for Woman Representative** positions and the nominated Members of Parliament and County Assemblies. This suggestion is designed to create more opportunities for a diverse range of women to hold these positions, thus ensuring a broader and more dynamic representation of women in political leadership. The sunset clause would encourage a culture where the position of Woman Representative becomes more accessible to a wider array of qualified women, breaking the trend of prolonged incumbency.

This suggestion aimed to ensure that the position rotates among different women, providing opportunities for more women to actively participate in politics. By incorporating this amendment, the legislative process seeks to prevent the concentration of the Woman Representative position in the hands of a few individuals.

g) Gender Electoral Collage

Proposals were presented to establish gender electoral units with necessary constitutional amendments. This recommendation involves reshaping the electoral system by introducing gender-specific units to ensure compliance with the Gender Principle.

h) Implementation of the Campaign Financing Law's

Effective Enforcement: Participants proposed enactment of robust legislative measures to ensure effective implementation of campaign finance laws. This comprehensive approach includes stringent monitoring and enforcement of regulations to promote financial equity during election campaigns. By addressing financial barriers, these legislative initiatives aim to create a level playing field for women candidates.

Legislative adjustments were suggested concerning campaign finance law (pending implementation) to address the financial barriers faced by women during elections. Participants proposed changes to electoral laws to enforce equal access to campaign financing for both male and female candidates. This legal modification aims to level the playing field, ensuring that financial constraints do not disproportionately hinder women's participation in electoral processes.

i) Political Sanctions/Enforcement Mechanisms

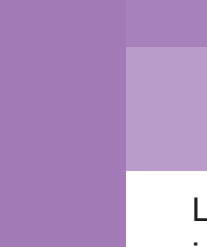
Stakeholder submissions proposed reforms for legislative enforcement mechanisms to ensure compliance with the Gender Principle. This involves specifying penalties or consequences for political parties or institutions that fail to meet the prescribed gender thresholds.

j) Enhancing NGEC's mandate

Participants proposed the enhancement of the mandate of the National Gender and Equality Commission (NGEC), through amendments to its legislative framework. The commission would be tasked with monitoring and ensuring implementation of the two-thirds gender principle across different sectors under Article 90, in consultation with IEBC.

Other suggestions included that NGEC be the neutral institution to oversee nominations that would be conducted by Women Organisations.

k) Empowerment of specific demographic groups



Legislative frameworks were suggested to empower specific demographic groups, including women, youth and persons with disabilities. For example, participants proposed amendments to existing laws to facilitate targeted interventions, such as affirmative action for women in leadership. They also recommended amendments to the Persons with Disabilities Act to enhance support for PWDs in various sectors. These changes aim to create a legal foundation for promoting the interests of these demographic groups through specific measures and initiatives.

I) Gender Balance in Appointive Positions

Legislative proposals should be enacted to include considerations for incorporating gender balance in appointive seats. This could entail amendments to laws regulating appointments in various sectors, ensuring that the principle extends beyond elective positions.

Policy and Administrative Framework Proposals

m) Gender-responsive policies and budgeting

Participants recommended gender responsive budgeting policies which should include allocation of funds to gender specific programmes. Participants made further proposals to amend existing laws to mandate the development and implementation of gender-responsive policies and budgeting. For example, they proposed revisions to the Public Finance Management Act to include specific clauses requiring government agencies to conduct gender impact assessments for all policies and budgetary allocations. This policy change would aim at ensuring that financial resources were allocated equitably to address the diverse needs of both men and women.

n) Compliance with International Treaties and Conventions

Stakeholders suggested enhanced implementation of international conventions and treaties which Kenya has ratified and which promote gender equality and commit the country to specific actions and reforms such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women and Girls (Maputo Protocol) and the International Conference on Population and Development (ICPD Cairo) and the UN Sustainable Goals, especially SDG 5 on gender equality and empowerment of women, among others.

o) Awareness and Sensitisation Campaigns

The stakeholders proposed implementation of extensive awareness campaigns to educate the public on the Gender Principle. The intention is to bring about a mindset shift and enhance understanding among citizens about the importance of gender diversity in political representation.

p) Robust Reporting Framework

This advocates for development of a robust reporting framework to provide gender statistics and disaggregated data. This framework would facilitate monitoring and evaluation of progress in achieving gender balance, ensuring transparency and accountability in the implementation process.

q) Capacity Building

Proposals were presented for training and support of female political candidates. This policy aims to enhance the skills and capabilities of individuals seeking elective positions, with a focus on ensuring that women candidates are well-prepared for political engagement.

r) Funding and Resourcing

Recommendations were made on the allocation of funds to support the implementation of the Gender Principle during political campaigns. Participants suggested financial support as a means to overcome economic barriers that disproportionately affect women candidates.

s) Civil Society and Stakeholder Involvement

It was suggested that there is need to encourage active engagement of Civil Society Organisations (CSOs) and collaboration with various stakeholders in the implementation process. This approach emphasises the importance of partnerships to amplify efforts and ensure a collective approach to achieving gender balance.

t) Collaboration with Stakeholders

The proposal highlighted the importance of collaborating with stakeholders in the implementation process. This administrative suggestion involves building partnerships with various entities to ensure a comprehensive and inclusive approach to gender representation.

It highlighted the significance of international collaboration by engaging with CSOs and stakeholders globally. The proposal recommended that international partnerships provide additional support, resources and insights to bolster domestic implementation of gender balance initiatives.

u) Combatting campaign related GBV

Gender-Based Violence (GBV) was identified as a major barrier for women's participation in politics. The stakeholders proposed the development and enforcement of mechanisms to prevent and respond to gender-based violence. This policy will create a secure environment for women in politics.

v) Mentorship Programmes

This proposal recommended the establishment of mentorship programmes to bridge the intergenerational gap. This approach acknowledges the importance of mentorship in nurturing young leaders and ensuring a continuum of women's participation in politics.

w) Affirmative Action Programmes

Stakeholders recommended that the government implements targeted Affirmative Action programmes focusing on marginalised groups. This policy aims to address historical discriminations and inequalities by providing specific support to communities that have been traditionally marginalised.

x) Data Collection and Analysis

Proposals on investment in data collection and analysis systems to provide accurate and up-to-date information on gender representation. This proposal emphasises the importance of data-driven decision-making and accountability in monitoring progress.

y) Intersectionality and Inclusivity

Stakeholders proposed recognising the intersectionality of gender with other factors such as age, disability, ethnicity and socioeconomic status. This approach underscores the need for inclusive policies that address the unique challenges faced by marginalised women within various groups.

z) Advocacy for Gender-responsive Budgeting

This approach advocates for gender-responsive budgeting to allocate resources specifically aimed at addressing disparities in gender representation. This proposal emphasises the importance of financial planning that considers and addresses gender-based imbalances in political processes and campaigns.

aa) Monitoring and Evaluation Mechanisms

Proposes the development of mechanisms for monitoring and evaluating progress in implementing the Gender Principle. This involves administrative structures to assess and report on compliance with gender representation requirements.

bb) Continuous Civic Education Programmes

Participants proposed continuous civic education programmes as an administrative measure to raise awareness and promote understanding of gender issues. By conducting regular civic education initiatives, administrative efforts seek to inform the public about the importance of the Gender Principle, dispelling myths and fostering a more inclusive and gender-sensitive political environment.

3.1.2 Establishing the most viable proposal from the Public Engagement

Findings from the public hearings highlight a collective concern for the effective implementation of the Gender Principle in Kenya's political landscape. The diverse proposals emphasise legislative, policy and administrative measures aimed at overcoming existing challenges, such as the patriarchal mindset, electoral system inadequacies and lack of political will. The proposals advocate for comprehensive legal reforms, electoral system reviews, affirmative action in nominations and the establishment of specific administrative structures to monitor and evaluate gender representation. Additionally, the importance of collaboration with civil society organisations, stakeholders and targeted support for marginalised communities, particularly indigenous women, emerges as pivotal for achieving meaningful gender equity in political decision-making.

These proposals collectively advocate for a holistic strategy involving legal reforms, policy implementation, awareness campaigns and collaborative efforts to ensure the realisation of the Gender Principle.

The findings below summarise the key proposals to be considered for the crafting of a viable formula to realise the Gender Principle.

a) Gender Top-Up Mechanism

- i. Lift Article 177 (1) (b) and write it into Article 97 and 98 as a gender top-up mechanism to ensure compliance with the constitutional threshold on the Gender Principle. This will borrow from the county assemblies' model.
- ii. All affirmative action seats to be temporary and one person not to be nominated more than once, by introducing a limiting clause in the Elections Act.
- iii. Operationalise the campaign financing law.
- iv. Introduce, through the Political Party's Act, sanctions for noncompliance with the Gender Principle for all political parties, including rejection of party candidate lists and withholding of the political party funding, until they comply.

b) Avoidance of Referendum and Sunset Clauses

Drawing from the proposals, participants cautioned against having a sunset clause. Further, they emphasised implementing the gender parity measures through legislative means without resorting to a referendum. Legislative amendments under Article 256 were proposed to expedite the process and avoid potential delays.

Due to structural barriers and the fact that the 33 per cent has not been achieved in Parliament 14 years after promulgation of the Constitution, it is ideal not to introduce the sunset clause. It is important to adopt the continuous review and monitoring of the implementation process on the affirmative action without imposing arbitrary deadlines.

c) Electoral System Reforms

Participants proposed changes to the electoral system, including adopting Proportional Representation systems as a means enforcing the two-thirds gender rule through nomination processes.

While the PR system is recommended, this can only be long-term, involving an elaborate amendment to the Constitution.

d) Gender Representation in Appointive Seats

It is apparent that the gender principle has not been realised in appointive seats as well despite the constitutional provision. Political goodwill by the Executive is required to implement the Constitution fully.

e) The Opposite Gender Rule

While the proposal is noble, it is important to consider minimal amendments to the Constitution. The challenge has been the fewer numbers of women elected on constituency-based seats. In the immediate, it may be necessary to limit the amendments to Articles 97 and 98 only. This proposal could be considered as a long-term solution.

f) Proposal to Designate NGEC or women's rights organisations to oversee the gender nomination/elections

The proposal goes against the principle of Kenya's democracy as provided for by the Constitution. In accordance with Article 90, the nomination and drawing of special seats party lists is the preserve of political parties.

This proposal is, therefore, not viable.

g) Legal Framework on Gender Equality:

The call for a robust legal framework to enforce gender parity is a welcome move. The SDGAA, together with the Hon Attorney General's office, to consider proposing a gender equality law in the long term.

h) Proposal on Gender and Diversity Law

The law to activate Article 100 of the Constitution has not been enacted. Parliament as currently constituted is, therefore, unconstitutional. Parliament must be held to account for failure to enact the requisite legislation. By extension, this includes the legal framework on the Gender Principle. The leader of the majority should be notified to immediately commence the process of enacting the law.

Considerations on administrative measures

a) Public Awareness and Advocacy:

Raising public awareness about gender inequality and women's representation in leadership roles through collaborative efforts with civil society organisations (CSOs) and media campaigns will translate into an increase in numbers of women vying for various seats. It is an avenue to sensitise citizens on the need to vote in more women.

b) Engagement of Men as Allies:

Initiatives to engage men in the gender equality discourse, educating them about the benefits of gender equality and encouraging advocacy for women's rights to challenge traditional gender norms is important and ought to be integrated in all gender programming.

c) Monitoring, Evaluation and Reporting:

There is need to implement robust monitoring and evaluation mechanisms to track progress on gender equality initiatives effectively. These should include regular reporting on women's representation and leveraging technology for engagement. This option is recommended.

d) Civic Education and Awareness Campaigns

Promotion of civic education and awareness campaigns to challenge societal norms perpetuating gender-based discrimination is necessary to increase the number of women presenting their candidature for various political seats. This can be achieved by utilising public outreach programmes, workshops and media campaigns.

e) Reporting and Accountability Mechanisms:

It is necessary to establish reporting and accountability mechanisms to track gender equality progress, including regular reporting on indicators and transparent mechanisms for stakeholders to monitor and advocate for reforms.

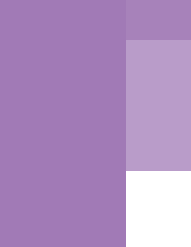
i) Media Use

Use media platforms to debunk perception that the Gender Principle is a women's agenda. Instead, the correct information needs to be provided that it is a developmental gender issue.

j) Toolkits for Monitoring/Vetting and Approval of Nominees

Proposed establishment of toolkits that enhance the monitoring and approval processes for the composition of elected individuals. This aims to facilitate the inclusion of women in local governance and align with the spirit of the Constitution.

k) Financial Incentives and Security



Encourage the Government to foster a level playing field by providing incentives and waivers to address financial inequalities between men and women during elections. Ensuring security during electioneering period is crucial to create a safe environment for female candidates.

l) Strengthening Women Voices

Promote initiatives that strengthen the voices and platforms of women and citizens. This includes petitioning government officials, such as the President, governors and MPs to nominate individuals in line with constitutional requirements.

m) Advocacy and Public Education Campaigns

It is important to develop an advocacy campaign and use vernacular stations and social media to communicate with the citizens promoting the gender agenda. This will include profiling success stories. Use the media once the implementation framework is agreed on to create awareness, highlight gender disparities and showcase successful stories in the process. This will promote public education.

n) Dealing firmly with Election-related GBV

There is urgent need to strengthen the institutional mechanisms of dealing with GBV in elections.

CHAPTER FIVE:

FRAMEWORK FOR THE IMPLEMENTATION OF THE NOT MORE THAN TWO-THIRDS GENDER PRINCIPLE

5.1 INTRODUCTION

This chapter discusses proposals received and processed by the MSWG and the previous proposals that had been received and reviewed by the Technical Working Group (TWG), which MSWG still found relevant on the implementation of the Gender Principle in Parliament. MSWG analysed the viability, simplicity, applicability, merits and demerits (if any) among other considerations of all the proposals.

The MSWG has identified the most viable options for consideration in actualising the gender principle, which it presents to Parliament for consideration.

5.2 PROPOSALS RECEIVED BY MSWG

The findings from the engagements with experts and the public present a collective concern for the effective implementation of the **not more than two-thirds gender principle** in Kenya's political landscape. The diverse proposals emphasise **legislative, policy and administrative measures** aimed at overcoming existing challenges, such as the patriarchal mindset, electoral system inadequacies and the lack of political will.

The proposals advocate for comprehensive legal reforms, electoral system reviews, affirmative action in nominations and the establishment of specific administrative structures to monitor and evaluate gender representation. Additionally, the importance of collaboration with civil society organisations, stakeholders and targeted support for marginalised communities, particularly indigenous women, emerges as pivotal for achieving meaningful gender equity in political decision-making.

1. Review of legal Framework /Constitutional Amendments:

- i. Proposals called for amendments to the Constitution of Kenya 2010, particularly articles 97 and 98 to include provisions similar to Article 177 (1) (b) and (c). The purpose is to anchor the **not more than two-thirds gender principle** within the constitutional framework, making it a fundamental and binding aspect of the country's governance. Consequential amendments to related constitutional articles, such as Article 90, may be proposed to ensure consistency with the political party lists.

- ii. Further proposals recommended review of the Political Parties Act and the Elections Act to anchor clarity and sanctions to ensure the realisation of the Gender Principle.

The objective is to amend existing legislation to establish clear mechanisms for achieving gender balance in political representation. If political parties fail to comply, there are sanctions that would include having their party lists rejected.

- iii. The consequential effect would be to review other relevant existing legislation to include modifications to comply with the gender principle.

2. Electoral System and Political Parties and Sanctions

- i. Proposals advocated for a comprehensive review of the electoral system to align it with the Gender Principle.
- ii. Specific changes proposed include amendments to Article 82 of the Constitution, introducing gender electoral units and modifying the nomination process to ensure gender balance. The goal is to eliminate barriers within the electoral system that hinder the realisation of the gender principle.
- iii. That Political Parties be required to submit compliant party lists to the Independent Electoral and Boundaries Commission (IEBC), failing which IEBC's mandate to review the said lists from political parties be expanded to not only reject in totality non-compliant list(s), but also issue sanctions to non-compliant political parties.
- iv. That all party lists under Article 90 to commence with a woman nominee and not a man. This will create room that increases the number of women nominated to the assemblies through the party list and, in the long run, reduce the number of women needed to top up the assembly for it to be compliant.
- v. That the number of elective seats be recommended to be 50:50 at Senate (double (elect male and female) per county) and National Assembly.
- vi. That the number of counties, constituencies and county assemblies is high and there is need to review them downwards.
- vii. Amendment to provide that legislative mechanisms to stipulate opposite gender variations for presidential and gubernatorial running mates.
- viii. That the Office of the Registrar of Political Parties be given power to deregister parties that are not compliant with the gender principle while developing their rules, constitutions and generating their lists of nominees for elections.
- ix. Proposals were made for Kenya to consider shifting from the first-past-the-post (FPTP) to Proportional Representation (PR).

3. Nomination and Affirmative Action

Proposals focused on legislating an active participatory process for nominating women candidates. This, the stakeholders, suggested could include introducing amendments to the Political Parties Act to ensure candidates' party lists comply with the Gender Principle.

4. Sunset Clause:

Discussions on the absence of a sunset clause suggested considering legislative provisions that determine the temporal scope of the proposed changes. Some stakeholders considered that a sunset clause, if introduced, would specify whether the gender principal implementation measures are time-bound or continue indefinitely until gender balance is achieved. However, the majority were opposed to introducing a sunset clause. The compromising view was that the law should consider putting a cap to term limits for beneficiaries of affirmative action to not more than two terms.

5. Administrative Processes

- i. That there is consideration to have a gender related fund within the political party's fund or have the same provided for separately under the Political Parties Act to enable promotion of gender-related activities.
- ii. That there is a need to have solid indicators to measure the progression of the Gender Principle in the public service reported within set timelines. There should be a reporting mechanism and form of sanction(s) when not adhered to.
- iii. That the Gender Principle be integrated in the education curriculum to promote equity from formative years, which will enhance the comprehension of gender parity issues.
- iv. The Gender Principle be implemented during recruitment and in career progression at various levels of government. This will give the Government the moral authority to also demand for it from the private sector.

6. Appointive Seats Gender Considerations:

Proposals made included consideration for incorporating gender balance in appointive seats. This could entail amendments to laws regulating appointments in various sectors, ensuring that the principle extends beyond elective positions.

A further proposal made was to have legislation providing for 50:50 gender balance ratios in appointive positions. That the Gender Principle be implemented in all sectors,

not just elective seats. That employment to consider a balance between men and women while considering special interest groups.

Analysis

- i. MSWG welcomes the proposal to lift Article 177(1) (b) and write it in Article 97 and 98 as most viable.
- ii. Further, that the consequential amendments of the Article 90 of the Constitution is recommended. Amendments to the Political Party and Election Acts be introduced in Parliament to support the proposal above.
- iii. The Team finds that the country is not ready to always vote in women and introducing a sunset clause would be detrimental. It recommends that the sunset clause will be counterproductive and should not be introduced.
- iv. MSWG recommends the proposed Constitution amendment be by way of a parliamentary initiative.
- v. In the spirit of not being too disruptive to the structure of the Constitution, MSWG recommends the amendments to the Constitution should not include the opposite gender rule touching on gubernatorial and presidential positions rule as suggested by stakeholders.
- vi. MSWG finds all the administrative proposals submitted to be valid and endorses the same for consideration by the relevant institutions.

5.3 PREVIOUS PROPOSALS AS RECEIVED AND PROPOSED BY TWG

Since the promulgation of the Constitution in 2010, there have been various efforts aimed at establishing legal, policy and administrative frameworks for the implementation of the Gender Principle as envisaged under Article 27(8) and 81(b). However, none of these efforts have borne fruit. These proposals included:

- i. Gender Top-up Through Party Lists
- ii. Doubling the County Woman Member to the National Assembly seats
- iii. Tripling the County Woman Member to the National Assembly seats
- iv. Proportionate increase of the County Woman Member to the National Assembly seats
- v. Gender quota for party strongholds
- vi. Rotational seats for affirmative action
- vii. Best runner-up

- viii. Reconfiguration of constituencies
- ix. Voting for a party ticket (twinning)
- x. Gender incentives

5.2.1 Gender Top-Up through Party Lists

a) Analysis

This proposal utilises the self-regulating mechanism set out in Article 177(1) of the Constitution. This is a topping-up mechanism, where members are proportionately nominated from qualifying political parties to meet the two-third-gender threshold.

It is proposed that the current architecture of Articles 97 and 98 on the composition of the National Assembly and the Senate is maintained by retaining the 47 elective seats for women under Article 97 (1) (b) and the 12 nominative seats for Special Interest Groups under Article 97 (1) (c) in the National Assembly and the 16 nominative seats for women under Article 98(1) (b), two nominative seats for the youth under Article 98 (1) (c) and two nominative seats for persons with disabilities under Article 98 (1) (d) in the Senate.

The proposed amendment in the case of the National Assembly under Article 97 should read;

“the number of special seat members necessary to ensure that no more than two-thirds of the membership of the National Assembly is of the same gender”

For the Senate, the proposed amendment under Article 98 should read;

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

b) Calculation of the Top-Up numbers for the National Assembly

- The total membership of the National Assembly = $290 + 47 + 12 = 349$
- Based on the assumption that no woman is elected to office, there would be $290 \text{ men} + 47 \text{ women} + 12 \text{ men} = 302 \text{ men} + 47 \text{ women}$.
- The constitutional threshold is not more than two-thirds of either gender.
- Since the ratio of men:women is 302:47, then 302 men form the two-third. i.e. $302 \text{ men} = \frac{2}{3}$, therefore $\frac{1}{3}$ women would be $= \frac{1}{3} \times \frac{3}{2} \times 302 = 151 \text{ women}$.
- The minimum gender ratio in the National Assembly that would meet the Gender Principle ought to be men:women = 302:151.

- However, there are 47 women members that are guaranteed, the balance therefore would be $151 - 47 = 104$ women.
- The size of the National Assembly would therefore be as follows; 290 men + 47 women + 12 men + 104 women (top up party list) = 453 members.
- Out of the 453 total membership of the National Assembly, 302 would be men ($302/453 = 66.67$ per cent) and 151 women ($151/453 = 33.33$ per cent), which is within the constitutional threshold.

c) Calculation of the Top-Up Number for the Senate

- The total membership of the Senate = $47 + 16 + 2 + 2 = 67$.
- Based on the assumption that no woman is elected to office, there would be 47 men + 16 women + 2 men + 2 women = 49 men + 18 women.
- The constitutional threshold is not more than two-thirds of either gender.
- Since the ratio of men:women is 49:18, then 49 men would form the two-thirds, i.e. $49 \text{ men} = \frac{2}{3}$; therefore $\frac{1}{3}$ women would be $= \frac{1}{3} \times \frac{3}{2} \times 49 = 24.5$ (rounded off to 25 women).
- The minimum gender ratio in the Senate to meet the Gender Principle ought to be men:women = 49:25.
- However, there are 18 women Senators that are guaranteed, the balance would therefore be $25 - 18 = 7$ women.
- The size of the Senate would therefore be as follows; 47 men + 16 women + 2 men + 2 women + 7 women (top up party list) = 74
- Out of the 74 total membership of the Senate, 49 men ($49/74 = 66.21$ per cent) and 25 women ($25/74 = 33.78$ per cent), which are within the constitutional threshold.

d) Allocation of the Top-Up Numbers

- The topping-up number of 104 women (in the case of the National Assembly) and seven women (in the case of the Senate) would be allocated by IEBC to qualifying political parties proportionate to their strength in the relevant House.
- The names would be drawn by the IEBC from the respective Party List of the political party in the order of priority.

e) Merits and Demerits

This proposal is a pre-election mechanism and requires a Constitutional amendment through a parliamentary initiative and does not require a referendum as it does not touch on the matters in Article 255(1) (a-j). It also requires amendments to the Elections Act, 2011 and Political Parties Act, 2011.

Merits	Demerits
• It has already worked in the election of special interest groups to the County Assembly. • It is guaranteed to secure the two-third-gender threshold. • It will take into account and appreciate the women already elected and nominated from the party lists.	• Having additional members of Parliament has additional cost implications. • The additional members will only be known after the election.

5.2.2 Doubling the County Woman Member to the National Assembly seats

a) Analysis

This proposal seeks to double the number of 47 women seats from the counties to the National Assembly from 47 to 94, while retaining the 290 elected from the constituencies and the 12 nominated from the party lists.

Several countries around the world have implemented this concept of reserving seats in their electoral systems. Kenya is one of them under Article 97(1) (b) where 47 women seats in the National Assembly are reserved for the 47 counties. Other countries that have embraced this method include Uganda (one reserved seat for women in each of the 136 districts), Tanzania (15 seats set aside for women out of 255), Eritrea (10 seats of the total 105), Bangladesh (50 seats out of 350 reserved for women), Afghanistan (64 seats in the lower house are reserved for women), Belgium (17 seats are reserved for the Flemish and minority communities), and Argentina (30 per cent is a compulsory quota for women).

In a scenario (Scenario 1), where all the 290 elected and the 12 nominated are men, this option would result in a total of 453 members of the National Assembly with 151 women members to achieve the Gender Principle. In another scenario (scenario 2), where all the 290 elected and six out of the 12 nominated members are men and six are women (which is guaranteed if the top candidate of the 12 members party lists must be women), this would give a total of 444 members of the National Assembly with 148 women members to achieve the Gender Principle.

With 94 women elected from the counties to the National Assembly, in the first scenario, there will be a shortage of 57 women to meet the Gender Principle. In the second scenario, with 94 women elected from the counties to the National Assembly and six from the party lists, there will be a shortage of 48 women to meet the Gender Principle. This mechanism does not, therefore, guarantee the attainment of the Gender Principle. However, whichever scenario is adopted, the shortage in the gender composition can be addressed by introducing the gender top-up list. The option would require a constitutional amendment to Article 97(1)(b).

b) The Senate

The proposal of doubling 47 County Women Seats in the National Assembly cannot apply to the Senate. The alternative equivalent of this option is to increase the number of women nominated under Article 98(1)(b) from 16 to 23 women proportionately to qualifying political parties. If this equivalent is considered, this option would guarantee the gender principle in the Senate. Such an amendment would not require a referendum as it does not touch on the matters in Article 255(1) (a-j). The amendment would be by way of a parliamentary initiative and would require a two-third majority in Parliament for its passage.

c) Merits and Demerits

This proposal does not require a referendum as it does not touch on the matters in Article 255(1) (a-j). The amendment would be by way of a Parliamentary initiative and would require a two-third majority in Parliament for its passage.

Merits	Demerits
• It guarantees the increase of women representation. • The additional women are through elections, meaning they are popular with the electorate.	• It does not secure the two-third gender threshold. • Political parties have limited role in determining who gets the affirmative action seats as majority would be directly elected

5.2.3 Tripling the County Woman Member to the National Assembly seats

a) Analysis

This proposal seeks to triple the number of 47 women seats from the counties to the National Assembly from 47 to 141, while retaining the 290 elected from the constituencies and the 12 nominated from the party lists. In the first scenario, where all the 290 elected and the 12 nominated members are men, this option would result in a total of 453 members of the National Assembly with 151 women members required to achieve the one-third gender threshold. In a scenario where no woman is elected or nominated, it would result in 10 women members short of the minimum threshold.

In the second scenario, where all the 290 elected and six out of the 12 nominated members are men (and six are women), this would result in a total of 444 members of the National Assembly with 148 women members required to achieve the one-third gender requirement. This scenario would result in a shortage of one-woman member short of the threshold.

b) Merits and Demerits

This proposal has similar merits and demerits with the doubling proposal discussed above save to note that by tripling the County Woman Member to the National Assembly seats, there will be more reserved seats for women directly elected by the electorate. In the case of the Senate, the proposal to increase the number of women nominated under Article 98(1)(b) from 16 to 23 would guarantee achievement of the principle in the Senate.

5.2.4 Proportionate increase of the County Woman Member to the National Assembly seats

a) Analysis

This proposal increases the number of county woman members to the National Assembly from 47 to 144. The increase of the 97 seats ($144-47=97$) is proportionate to the number of constituencies within the respective counties as per the calculations below;

County No.	Name of County	Number of Constituencies	Proportional Distribution of constituencies (constituency $X \times 100\%$) 290	Number of additional County woman members to the National Assembly
1	Mombasa	6	2.06897	2
2	Kwale	4	1.37931	1
3	Kilifi	7	2.41379	2
4	Tana River	3	1.03448	1
5	Lamu	2	0.68966	1
6	Taita/Taveta	4	1.37931	1
7	Garissa	6	2.06897	2
8	Wajir	6	2.06897	2
9	Mandera	6	2.06897	2
10	Marsabit	4	1.37931	1
11	Isiolo	2	0.68966	1
12	Meru	9	3.10345	3
13	Tharaka-Nithi	3	1.03448	1
14	Embu	4	1.37931	1
15	Kitui	8	2.75862	3

16	Machakos	8	2.75862	3
17	Makueni	6	2.06897	2
18	Nyandarua	5	1.72414	2
19	Nyeri	6	2.06897	2
20	Kirinyaga	4	1.37931	1
21	Murang'a	7	2.41379	2
22	Kiambu	12	4.13793	4
23	Turkana	6	2.06897	2
24	West Pokot	4	1.37931	1
25	Samburu	3	1.03448	1
26	Trans Nzoia	5	1.72414	2
27	Uasin Gishu	6	2.06897	2
28	Elgeyo/Marakwet	4	1.37931	1
29	Nandi	6	2.06897	2
30	Baringo	6	2.06897	2
31	Laikipia	3	1.03448	1
32	Nakuru	11	3.79310	4
33	Narok	6	2.06897	2
34	Kajiado	5	1.72414	2
35	Kericho	6	2.06897	2
36	Bomet	5	1.72414	2
37	Kakamega	12	4.13793	4
38	Vihiga	5	1.72414	2
39	Bungoma	9	3.10345	3
40	Busia	7	2.41379	2
41	Siaya	6	2.06897	2
42	Kisumu	7	2.41379	2
43	Homa Bay	8	2.75862	3
44	Migori	8	2.75862	3
45	Kisii	9	3.10345	3
46	Nyamira	4	1.37931	1
47	Nairobi	17	5.86207	6
		290	100.0000	97

In a scenario (Scenario 1) where all the 290 elected and the 12 nominated members are men, this would give a total of 453 members of the National Assembly with 151 women members required to achieve the one-third gender requirement. In this scenario, this option of proportionate county woman seats would not guarantee the two-third threshold being met.

In a scenario where all the 290 elected and six out of the 12 nominated members are men and six are women (which is guaranteed if the top candidate of the 12 members party lists must be a women), this would give a total of 444 members of the National Assembly with 148 women members to achieve the one-third gender requirement. Under this scenario, this option would guarantee the two-third threshold.

There are several ways of achieving the additional 97 women members in the National Assembly, including through party lists proportionate to the seats won by a political party or votes garnered by a political party, party tickets, delimitation of counties into the number of proposed additional seats which would require amendment of Article 89 (2) of the Constitution or through picking the candidates with the highest votes in order of priority according to the number of additional seats required per county. There would be need for consensus on which method of the three illustrated above to apply if at all. Whichever method is preferred, it should be one that presents an objective criterion to the distribution of the additional seats.

b) Merits and Demerits

This proposal does not require a referendum, as it does not touch on the matters in Article 255(1) (a-j). The amendment would be by a parliamentary initiative and would require a two-third majority in Parliament for its passage.

Merits	Demerits
• The proposal guarantees attainment of the Gender Principle. • An objective criterion is used to distribute additional women representatives to all counties. • The increase in the number of women is proportionate to constituencies in the respective counties, which will reflect the density of the population.	• Having additional Members of Parliament has additional cost implication. • Might raise a debate of the criteria suggested for the allocation of the number of seats to the respective counties by political parties.

5.2.5 Gender Quotas for Party Strongholds

a) Analysis

This proposal seeks to have the Elections Act amended to provide for preservation of quotas for women nominees in party strongholds. Introducing “stronghold” means that a political party should include both genders in each of the single majority electoral constituencies where the party is most likely to win in elections.

A 'party stronghold' must be defined using an objective threshold. This could be the strength of the party in the previous election, thereby increasing their chances of election considerably, even if the seat may be lost to another party at the subsequent election. The following observations are made:

It is noted that the concept of 'party stronghold' is amorphous and changes with time and political dynamics; a strong political party today may not be strong tomorrow and a weak or a non-existent one can be very strong in the next election.

A stronghold may also be determined using opinion polls taken close to the political party nomination. The outcome of an opinion poll, however, may be perceived as subjective and, therefore, not credible for purposes of determining the areas that form a party's stronghold. Having this kind of uncertainty and subjectivity in the implementation of a law is not advisable and may cause confusion in elections.

From all the documentation available, we have not identified any country that has adopted this mechanism as a form of gender quota to enhance women representation in the Legislature. This proposal is a pre-election mechanism and would require an amendment to the Elections Act, 2011 as well as an amendment to Article 97(2) of the Constitution.

b) Merits and Demerits

While this mechanism may secure more women representation in the Legislature, it does not guarantee the achievement of the two-third threshold. Furthermore, reserving party strongholds purely for one gender may be challenged as being discriminatory and, therefore, unconstitutional.

5.2.6 Rotational seats for affirmative action

a) Analysis with respect to the National Assembly

In a scenario where;

- None of the 290 constituencies would elect a woman
- None of the 12 special seats to be filled through nomination would be given to a woman (this is possible if all political parties had prioritised a man on top of the political party list and each party gets only one slot hence only men would be nominated), the way to cure this is to make it mandatory for each political party to have the name of a woman as the first name on the political party list, in all their party lists.
- That the only guaranteed seats for women are the 47 county woman members to the National Assembly.

In that event the calculations work out as follows –

- The total membership of the National Assembly = $290+47+12=349$
- In a scenario of 290 men + 47 women + 12 men = 302 men + 47 women
- 47 women out of 349 would give 13.46 % of the National Assembly. The constitutional threshold is at least two-thirds of either gender – 66.67 per cent (or one-third of either gender – 33.33 per cent).
- This results in a shortage of 19.87 per cent, which is 69.35 seats = rounded off to 70 seats short.
- The proposal would, therefore, result in at least 70 additional seats for women, which will give $70+47=117$ seats (33.5 per cent, slightly over one-third). This is within the constitutional threshold.

The 70 seats short is approximately a quarter of 290 ($290/70=4.14$). In the case of the National Assembly, the proposal is to reserve a quarter of the constituencies for women contestants.

The implementation of this option proposes clustering of the 290 constituencies into groups of four, where each of the four constituencies in a cluster is guaranteed of electing a woman member in four election cycles. The use of lots is proposed to determine the constituencies in the cluster that would be earmarked as woman-only constituencies for an election cycle.

b) Analysis with respect to the Senate

In the event none of the 47 counties elects a woman;

- 16 women senators nominated by qualifying political parties.
- Two women senators nominated by qualifying political parties to represent persons with disability and youth as special interest groups.

The calculations work out as follows:

- The total membership of the Senate = $47+16+2+2=67$
- In a scenario of 47 men + 16 women + 2 men + 2 women = 49 men + 18 women
- 18 women out of 67 gives 26.87 per cent of the Senate. Similarly, 49 men out of 67 gives 73.13% per cent. The constitutional threshold is at least two-thirds of either gender – 66.67 per cent (or one-third of either gender – 33.33 per cent)
- This results in a shortage of 6.47 per cent, which is 4.33 seats = rounded off to five seats short.

- This proposal would, therefore, result in at least five additional seats for women, which will give $5+18=23$ seats (34.33 per cent, slightly over one-third). This is within the constitutional threshold.

The five seats short should be recovered from the 49 seats, which form 73.13 per cent of the total membership of the Senate. 47 of the 49 seats are the senators elected from each of the 47 counties. Applying the rotational mechanism to the Senate, it would require that five out of the 47 counties be reserved for women candidates in every general election. This cycle will go on for 10 electoral cycles to give an equal chance to all the 47 counties. i.e. $47/5 = 9.4$, approximately 10.

c) Merits and Demerits

The rotational mechanism is a pre-election mechanism and guarantees achievement of the Gender Principle in both Houses of Parliament. It would require amendments to the Constitution and to the Elections Act, 2011. It, however, poses several problems.

First, what criteria would be used to cluster the constituencies or counties into woman-only constituencies or counties? In the case of the National Assembly, how would the 290 constituencies be clustered into groups of four? What criteria would be followed in clustering these constituencies? Or in the case of the Senate, how are the five counties be determined?

Are the constituencies listed numerically from constituency No. 1 to 290, constituencies 1-4 forming the first cluster, constituencies 5-8 forming the second cluster etc. or would they be selected randomly? The linear listing of constituencies is not based on any objective criterion. Linear selection would, therefore, be contested. In the case of the National Assembly, would the constituencies be clustered within their counties and selected randomly? What criteria would be used to cluster constituencies in counties? What of the counties that have less than four or more than four constituencies? Which counties would be merged? This would lead to a situation where counties with a maximum of four constituencies would be fated to elect only women legislators

If the selection of the constituencies or counties is random, i.e. by use of lots, who would draw the lots? Would it be current members of the respective House or the IEBC? Even if the function was to be the responsibility of IEBC, it would require a constitutional amendment to Article 88(4) or 89 of the Constitution to give it constitutional underpinning. There are those who propose that the Registrar of Political Parties do the selection, in which case an amendment to the Political Parties Act, 2011 would be necessitated. Regardless of the agency to undertake this task, there should be in place an objective criterion that would guide the selection process.

The process of clustering or determining which constituencies or counties should be earmarked as 'women-only' is a political decision which requires consensus from all concerned. This option would require constitutional and statutory amendments.

While the rotational proposal may be theoretically possible having taken into account the above questions, its constitutionality may be challenged on whether limiting one gender to contest elections falls within the permissible limits of Article 25(2) of the Constitution. i.e. whether the limitation –

- Restricts only the female gender to contest for elections;
- Will restrict some sitting Members of Parliament from running for re-election in the same constituencies, if these constituencies are designated as women-only and the sitting member is a man;
- Contravenes the provision of Article 97(2) of the Constitution, which provides that nothing in that Article shall be construed as excluding any person from contesting an election in the 290 constituencies; or
- Contravenes provisions of Article 38(3)(c) of the Constitution, which provides that every adult citizen has the right, without unreasonable restrictions to be a candidate for public office, or office which the citizen is a member and, if elected, to hold office.

This proposal is too restrictive and is, therefore, not recommended.

Other renditions of the rotational mechanism were proposed for the National Assembly. One proposal is based on the ratio of women to men in the constituencies – that 90 out of the 290 constituencies with the highest number of women populations be reserved for women.

In terms of legitimacy of elections, voter turnout is a more acceptable gauge than the population of the electoral area. The proposal could, therefore, be modified to reserving 90 constituencies with the highest proportion of women registered voters to be women-only constituencies. The other proposal is to reserve three slots in each of the 47 counties for women candidates to the National Assembly ($3 \times 47 = 141$), in effect, earmarking 141 constituencies as women constituencies. However, the problems of selecting the constituencies will also apply here. And what happens to a county such as Lamu with only two constituencies?

Whichever way the proposal is looked at, it is likely to create permanence of the situation due to the size of women in those particular constituencies, until the situation is reversed. This is a long-term situation and will require drastic measures for the situation to change — such as radical reduction in registration of women voters. These constituencies will, therefore, have women candidates for a long time.

5.2.7 Best runner-up

a) Analysis

This proposal only kicks in after the election and is, therefore, a post-election mechanism. Once all the IEBC has received all the election results, it will calculate the number of women elected and the number of men elected. When the results show that less than one-third women have been elected to the National Assembly and the Senate, the winning candidate in a number of constituencies or counties, as the case may be, who are identified through specific criteria, will be replaced with the best runner-up candidate from that constituency or county. This means that the woman candidate with the strongest electoral support from that same constituency or county will be declared elected Member of Parliament.

b) Merits and Demerits

This mechanism will guarantee the two-third-gender threshold but it carries the risk of changing the composition of the Parliament or affecting the strength of a political party in Parliament. Furthermore, it may not be an attractive option for political parties, where a party spends a lot of time and money campaigning for its candidate, just to give up their seat to a candidate from another party to cater for the gender gap. This option is, therefore, not recommended.

5.2.8 Reconfiguration of Constituencies

a) Analysis

Two methods are proposed under this formula. The first one is to do away with the 290 constituencies and instead elect two members to the National Assembly — a man and a woman — from the 47 counties to the National Assembly, each county constituting a single member constituency (94 MPs). For the special seats under Article 97(1)(c), reduce the number from 12 to six members to represent other special interest groups, including the youth, persons with disabilities, minorities and marginalised groups and communities. This method reduces the size of Parliament to 100 and would guarantee 50:50 representation of both genders way past the constitutional threshold. There would be no difference of the electoral system at the Senate and National Assembly as both use counties as the primary constituency. It also means we do away with the current constituencies' boundaries. However, this will require a constitutional amendment.

The second method is that we reduce the constituencies from 290 to 150, elect two members — a man and a woman — to the National Assembly, which would produce 300 MPs. For the special seats under Article 97(1)(c), nominate 20 members to represent other special interest groups, including the youth, persons with disabilities,

marginalised groups and communities and minorities. This method would reduce the size of the National Assembly to 320 from 349.

Both methods require amendment of Article 89(1) on boundaries which are to be reviewed in every eight-12 years and does not touch on the Senate.

This proposal does not require a referendum as it does not touch on the matters in Article 255(1) (a-j). The amendment would be by way of a parliamentary initiative and would require a two-third majority in Parliament for its passage.

b) Merits and Demerits

Merits	Demerits
• The proposal guarantees attainment of the Gender Principle. • The first method considerably reduces the size of National Assembly, hence the wage bill.	• It seeks to fundamentally amend the current electoral system. • Reduces the level of representation in the current electoral system. • It is too disruptive

5.2.9 Voting for a Party Ticket (Twinning)

a) Analysis

In this proposal, political party candidates (excluding independent candidates) contest as pairs/twins and voters vote for the ticket and for the candidates. In the case of the National Assembly, for each of the 290 constituencies, and in the case of the Senate, for each of the 47 counties, the candidates run on a ticket of one-woman and one-man or one-man and one-woman, ranked as number one and two. This ranking is the political party's choice through the party primary and is similar to the ranking in presidential or governor elections, where the ticket is for the candidate (number 1) and the deputy (number 2). A vote to the ticket is a vote to both candidates.

In this post-election mechanism, once all the election results have been received by the IEBC, the IEBC will calculate the number of men and women elected from the winning party tickets, considering candidate number 1 on each ticket. In the scenario where the political parties get the required members elected of both men and women to Parliament to comply with the two-third-gender requirement, candidate number 1 from each of the winning tickets will be the respective Member of Parliament. If the results of all the elected members indicate that the two-third-gender threshold has been maintained, this affirmative action mechanism will not be activated. This option gives political parties the prime opportunity and responsibility to secure the gender

requirement. At the same time, this option will, in the case where the political party does not secure the gender requirement, make sure that the constitutional gender requirement is achieved through affirmative action. This option is only activated during the process of allocation of seats, if need arises.

In the scenario where political parties do not secure the two-third-gender requirement, affirmative action kicks in. When the result shows that there is less than one-third of women among the elected representatives (number 1 candidates on the tickets), the number of constituencies required to achieve the gender requirement will be subject to affirmative action, meaning that candidate 2 (the women) on the party ticket, will be the elected representative to Parliament.

This option guarantees that the gender threshold is attained and does not interfere with the political party strength after the election. Further, this option does not increase the size of Parliament.

There are alternative methods for implementing the Party Ticket/Twining Option.

In the event that political parties, through elections, do not elect the required number of both gender to Parliament to meet the two-third threshold, the allocation of the seats under the Party Ticket Option, may be done in one of the following ways:

b) Method 1

- a) After tallying all the results
 - (i) in case of the National Assembly, the proportionate number of men and women elected is determined from among the $290 + 47 + 12 = 349$;
 - (ii) in case of the Senate, the proportionate number of men and women elected is determined from among the $47 + 16 + 2 + 2 = 67$.
- b) If the two-third-gender threshold is met, this affirmative action mechanism is not activated. If not, the number of seats required to meet the threshold is determined. Based on the current context, additional number of women will be required to meet the threshold;
- c) All constituencies that have elected a man (number 1 on the ticket) are identified and organised, according to the following criteria –
 - (i) the percentage share of the votes cast; (not recommended);
 - (ii) the percentage share of the registered voters; (not recommended);
 - (iii) the ticket with the lowest margin of victory; this is the percentage share of the number of votes of the winning ticket against the number of registered voters in that constituency; the percentage share of the first runner's up ticket against the total number of votes in that constituency is then calculated; the proportional percentage margin of the differences is then recorded in descending order for all the constituencies where a man was elected. (recommended);

- d) The affirmative action is then activated on the ticket with the smallest margin in percent ('weakest' winning tickets) according to the ranking – from the bottom-up;
- e) This process is repeated until the threshold is met.

c) Method 2

This method is applicable for the election to the National Assembly and the Senate.

In the Case of the National Assembly:

- a) After tallying all the results, proportionate number of men and women elected is determined from among the $290 + 47 + 12 = 349$;
- b) The proportional representation in the assembly is then determined, i.e. the percentage of seats won by each of the political parties. (Example: Party A won 98 out of the 349 gives 28.08 per cent of the total seats. Party B won 86 out of the 349 gives 24.64 per cent of the total seats. Party C won 50 out of the 349 gives 14.32 per cent of the total seats, etc.);
- c) One third of either gender in the National Assembly is 117 seats out of the 349. This means that 117 seats must be of the gender with the lowest number in representation. In the current situation, this is 117 women;
- d) The 117 seats for women members in the National Assembly will be shared proportionately by all the political parties in the Assembly, based on the number of seats won by each of the parties (under (b));
- e) Steps (a) to (d) are illustrated below –

Political Party	Seats Won by a Political Party out of the Total of 349	Total Percentage Share of Seats Won by a Political Party out of the Total of 349	Percentage Share of the Minimum number of Women Seats that a Political Party should have in the National Assembly (minimum number being 117)
Party A	98	28.08%	32.8 seats = 33 seats
Party B	86	24.64 %	28.8 seats = 29 seats
Party C	50	14.32 %	16.7 seats = 17 seats
Party D	27	7.73 %	9.0 seats = 9 seats
Party E	22	6.30 %	7.3 seats = 7 seats
Party F	20	5.73 %	6.7 seats = 7 seats
Party G	16	4.58%	5.3 seats = 5 seats
Party H	12	3.43 %	4.0 seats = 4 seats

Party I	9	2.57 %	3.0 seats = 3 seats
Party J	7	2.00 %	2.34 seats = 2 seats
Party K	2	0.57 %	0.6 seats = 1 seat
	349	100.00%	117

- f) The next step is to find out how many women representatives have been elected among the three categories; those directly elected from single-member constituencies, the women-only county seats, the women elected from the party list to represent the special groups such as youth, workers and persons with disabilities. i.e., $290+47+12 = 349$ for each of the parties. This is illustrated below –

Political Party	Women representatives Among the 290	Among the 47	Women representatives Among the 12	TOTAL
Party A	4	22	3	29
Party B	8	14	2	24
Party C	6	4	1	11
Party D	4	2	0	6
Party E	5	1	0	6
Party F	3	1	0	4
Party G	3	1	0	4
Party H	2	1	0	3
Party I	3	0	0	3
Party J	1	0	0	1
Party K	0	1	0	1
	290	47	6	92

- g) The next step is to combine women seats to be produced by each political party (under (e)) with women seats already produced by each political party (under (f)) as illustrated below –

Party	Percentage Share of the Minimum	Women seats already won by a political party	Women seats for affirmative action
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	number of Women Seats out of 117 (see (e))	(see (f))	
Party A	33	29	4
Party B	29	24	5
Party C	17	11	6
Party D	9	6	3
Party E	7	6	1
Party F	7	4	3
Party G	5	4	1
Party H	4	3	1
Party I	3	3	0
Party J	2	1	1
Party K	1	1	0
	117	92	25

- h) For each political party, all constituencies that have elected a man (number 1 on the ticket) are identified and organised, according to the following criteria –
- (i) the percentage share of the votes cast; (not recommended);
 - (ii) the percentage share of the registered voters; (not recommended);
 - (iii) the ticket with the lowest margin of victory; this is the percentage share of the number of votes of the winning ticket against the number of registered voters in that constituency; the percentage share of the first runner's up ticket against the total number of votes in that constituency is then calculated; the proportional percentage margin of the differences is then recorded in descending order for all the constituencies where a man was elected. (recommended);
- i) For each of the political parties, the affirmative action is then activated on the ticket with the smallest margin in percent ('weakest' winning tickets) according to the ranking – from the bottom-up. For example, Party A will be subject to four constituencies for affirmative action – meaning the four at the bottom of party A constituency list;
- j) This process is repeated until the threshold is met.

In the Case of the Senate:

- a) After tallying all the results, proportionate number of men and women elected is determined from among the $47 + 16 + 2 + 2 = 67$;
- b) The proportional representation in the assembly is then determined, i.e. the percentage of seats won by each of the political parties. (Example: Party A won 22 out of the 47 gives 32.84 per cent of the total seats. Party B won 18 out of

the 47 gives 26.87 per cent of the total seats. Party C won 12 out of the 47 gives 17.91 per cent of the total seats, etc.);

- c) One-third of either gender in the Senate is 23 seats out of the 47. This means that 23 seats must be of the gender with the lowest number in representation. In the current situation, this is 23 women;
- d) The 23 seats for women members in the Senate, will be shared proportionately by all the political parties in the Senate, based on the number of seats won by each of the parties (under (b));
- e) Steps (a) to (d) are illustrated below –

Political Party	Seats Won by a Political Party out of the Total of 67	Total Percentage Share of Seats Won by a Political Party out of the Total of 67	Percentage Share of the Minimum number of Women Seats that a Political Party should have in the Senate (minimum number being 23)
Party A	21	31.34%	7.21seats = 7 seats
Party B	18	26.87%	6.18 seats = 6 seats
Party C	12	17.91%	4.58 seats = 5 seats
Party D	8	11.94%	2.75 seats = 3 seats
Party E	7	10.45%	2.40seats = 2 seats
Party F	1	1.49%	0.34 seats = 0 seats
	67		23 seats

- f) The next step is to find out, for each of the political parties, how many women representatives have been elected among the four categories; those directly elected from single-member counties, the women party list, the party list to represent youth and the party list to represent persons with disabilities. i.e., $47 + 16 + 2 + 2 = 67$. This is illustrated below

Political Party	Women representative Among the 47	Among 16	Women representative Among the 2	Women representative Among the 2	TOTAL
Party A	1	5	0	0	6
Party B	1	4	0		5
Party C	0	4		0	4
Party D	1	2			3
Party E	0	1			1

Party F	0	0
	3	16
		19

- g) The next step is to combine women seats to be produced by each political party (under (e)) with women seats already produced by each political party (under (f)) as illustrated below –

Party	Percentage Share of the Minimum number of Women Seats out of 23 (see (e))	Women seats already won by a political party (see (f))	Women seats for affirmative action
Party A	7	6	1
Party B	6	5	1
Party C	5	4	1
Party D	3	3	0
Party E	2	1	1
Party F	0	0	0
	23		4

- h) For each of the political parties, all counties that have elected a man (number 1 on the ticket) are identified and organized, according to the following criteria –
- (i) the percentage share of the votes cast; (not recommended)
 - (ii) the percentage share of the registered voters; (not recommended)
 - (iii) the ticket with the lowest margin of victory; this is the percentage share of the number of votes of the winning ticket against the number of registered voters in that county; the percentage share of the first runner's up ticket against the total number of votes in that county is then calculated; the proportional percentage margin of the differences is then recorded in descending order for all the counties where a man was elected. (recommended);
- i) For each of the political parties, the affirmative action is then activated on the ticket with the smallest margin in percent ('weakest' winning tickets) according to the ranking, from the bottom-up. For example, party A will be subject to 1 county for affirmative action, meaning the county at the bottom of party A county list;
- j) This process is repeated until the threshold is met.

d) Merits and Demerits

While this method is more complicated than the first, it distributes the affirmative action women seats proportionately to all qualifying political parties, and uses a non-partisan criterion based on the mathematical formula. Further, this approach provides a stronger incentive for political parties to ensure that they nominate more women who would also get elected, because for every woman elected into office, there would be less seats in the party subjected to affirmative action, or even none.

5.2.10 Gender Incentives

a) Analysis

Another way of incorporating voluntary gender quotas is through incentives. A proposal to increase a percentage share of State funding to political parties with increased number of women elected is one way of providing such incentives. This proposal was made prior to the enactment of the Political Parties Fund, 2011, but was not considered by Parliament. This method has worked in other countries, such as Burkina Faso, Herzegovina, Bolivia and Bosnia, in increasing women representation in Parliament. It is proposed that this be reintroduced to complement any legal quota option that may be preferred.

It is recommended that the gender voluntary quotas that currently exist in the Political Parties Act be strengthened with incentives such as a proportionate increase in the share of the State funding to encourage political parties to nominate women who stand a chance of being elected, rather than simply to comply with statutory obligations.

It is, therefore, proposed that Section 25 (1) of the Political Parties Act, 2011 be amended to provide for financial incentives for political parties bringing women of the gender in minority to Parliament. For example, 10 per cent of the Political Parties Fund be designated for this purpose and allocated to the qualifying parties.

After the election, the total number of women elected to the National Assembly and the Senate is identified as X. The 10 per cent of the Fund is then divided with X – giving the amount of Y for each woman representative. Y amount is multiplied with the number of women elected for each of the political parties in Parliament (National Assembly and Senate together).

b) Merits and Demerits

On its own, the mechanism would not guarantee the two-third gender principle, but would considerably enhance women representation in Parliament. This mechanism is, therefore, recommended to complement any other legal quotas that may be considered.

5.4 EMERGING PROPOSALS

The MSWG received a myriad of proposals on how to achieve the Gender Principle. Whilst some of the views proposed were not new, others were novel as summarised herein below;

- a) That Political Parties be required to submit compliant party lists to the Independent Electoral and Boundaries Commission's (IEBC), failing which IEBC's mandate to review the said lists from political parties be expanded to not only reject in totality non-compliant list(s), but also issue sanctions to non-compliant political parties.
- b) That there be a legislative provision of 50:50 ratios in appointive positions and provide legislative mechanisms to stipulate opposite gender variations for presidential and gubernatorial running mates.
- c) That the Gender Principle be implemented in all sectors, not just elective seats.
- d) That employment to consider a balance between men and women while considering special interest groups.
- e) Integrating the Gender Principle in the education curriculum to promote equity from the formative years which will enhance the comprehension of gender parity issues.
- f) That all party lists under Article 90 to commence with a woman nominee and not a man. This will create room that increases the number of women nominated to the assemblies through the party list and in the long run reduce the number of women needed to top up in the assembly for it to be compliant.
- g) That the number of elective seats be recommended to be 50:50 at Senate (double (elect male and female) per county) and National Assembly. That the number of the Counties, Constituencies and County assemblies is high and there is need to review them downwards.
- h) That the Office of the Registrar of Political Parties be given power to deregister parties that are not compliant with the gender principle while developing their rules, constitutions and generating their lists of nominees for elections.
- i) The Gender Principle be implemented during recruitment and in career progression at various levels of government. This will give the government the moral authority to also demand for it from the private service.

- j) That there is a need to have solid indicators to measure the progression of the gender principle in the public service reported within set timelines. There should be a reporting mechanism and a form of sanction(s) when not adhered to.
- k) Need to enhance the budget of Ministries Departments and agencies (MDAs) to ensure Gender Responsiveness. A proposal that all MDAs should allocate at least two per cent of their budgets to gender related activities.
- l) That there be consideration to have a gender related fund within the political party's fund or have the same provided separately under the political party's act to enable promotion of gender related activities.

5.5 PROPOSED LEGISLATIVE FRAMEWORK

From the foregoing analysis of previous and emerging proposals, the MSWG recommends the **GENDER TOP-UP THROUGH PARTY LISTS**.

After the General Election, the missing gender necessary to meet the Gender Principle in the National Assembly and Senate shall be topped up using the zebra party lists provided through Article 90 (1). Whereas currently, the missing gender has been women, it is necessary that the gender top up list be in zebra format so that should the missing gender in future be men, they get nominated accordingly using the same list.

For the special seats to meet the principle, we propose that Article 90 is amended to ensure that the nomination facilitates a candidate to go into an election competitive seat after two terms.

To ensure the 13th Parliament is compliant with the Gender Principle, eligible political parties shall submit to IEBC party lists for allocation in accordance with Article 90, from where nominations will be undertaken. The 13th Parliament currently has a shortfall of 50 women in the National Assembly and two in the Senate.

The current numbers in Parliament below demonstrates what the required top-up numbers of women are needed to make the 13th Parliament compliant with the Gender Principle.

The National Assembly

In the 13th Parliament, 262 men were elected from the constituencies under Article 97(1)(a) and six nominated under Article 97(1)(c) totaling to 268, which constitutes 76.79 per cent of the total membership. Another 28 women were elected from the constituencies under Article 97(1)(a), 47 elected under Article 97(1)(b) and six nominated under Article 97(1)(c), totaling to 81, which constitutes 23.20 per cent. Men being the majority gender, 268 would constitute the majority gender which ought

not surpass two-thirds of the membership hence 134 ($268/2$) women required to meet gender principle. Because we already have **81** in the National Assembly ($30+47+6$), the missing number of women required to meet the gender principle is **53** ($134-81$).

The Senate

For the Senate, 44 men were elected from the counties under Article 98(1)(a), one nominated Article 98(1)(c) and one nominated under Article 98(1)(d) totaling to 46 which constitutes 68.65 per cent of the total membership. Three women were elected from the counties under Article 98(1)(a), 16 nominated under Article 98(1)(b), one nominated Article 98(1)(c) and another nominated under Article 98(1)(d), totaling to 21, which constitutes 31.34 per cent. Men being the majority gender, 46 would constitute the majority gender which ought not surpass two-thirds of the membership hence **23** ($46/2$) women are required to meet gender principle. Because we already have 21($3+16+2$), the missing number of women required to meet the gender principle is **2** ($23-21$).

CHAPTER SIX:

CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

Based on the findings from stakeholder consultations, public participation, literature review and technical expertise received on the implementation of the **not more than two-thirds Gender Principle**, the MSWG recommends legal, policy and administrative measures designed to promote implementation of the Gender Principle. This chapter present a summary of the recommendations already analysed in Chapters Four and Five as a way of concluding observations.

6.2 RECOMMENDATIONS

6.2.1 CONSTITUTION AND LEGISLATIVE AMENDMENTS PROPOSED

a) Constitutional Amendment to provide for Gender top up

This recommendation guarantees attainment of the Gender Principle through allocating special seat members necessary to ensure that the Gender Principle is upheld. This will entail adopting and applying the framework in place at the County Assembly to the Senate and the National Assembly. The proposal is in the following terms that are reduced in a draft constitutional amendment as annexed.

- (a) Amending Article 90 to accommodate proposals to amend Articles 97 and 98 accordingly;
- (b) Amending Article 97 to provide for a formula to nominate additional special seat members of the National Assembly if, after declaration of results following a General Election, the membership of the National Assembly does not conform to the constitutional principle that not more than two-thirds of the members are of the same gender;
- (c) Amending Article 98 to provide for a formula to nominate additional special seat members of the Senate if, after declaration of results following a General Election, the membership of the Senate does not conform to the constitutional principle that not more than two-thirds of the members are of the same gender; and
- (d) Inserting a transitional clause in Article 98A to enable the current Parliament to conform with the requirements of Article 81(b).

The structure of the Bill is as follows:

Clause 1 provides for the title of the Bill.

Clause 2 proposes to amend Article 90 to require that the election for the special seats to be added in the National Assembly and Senate shall be on the basis of proportional representation by use of party lists.

Clause 3 proposes to amend Article 97 to provide the number of special seat members necessary to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender. The amendment is intended to take effect only if the membership of the National Assembly does not conform to the constitutional principle, that no more than two-thirds of the members of the House are of the same gender.

Clause 4 proposes to amend Article 98 to provide the number of special seat members necessary to ensure that no more than two-thirds of the membership of the Senate are of the same gender. The amendment is intended to take effect only if the membership of the Senate does not conform to the constitutional principle that no more than two-thirds of the members of the House are of the same gender.

Clause 5 proposes to insert a new Article 98A to enable parliamentary political parties to prepare fresh party lists for nomination of special seat members necessary to ensure that no more than two-thirds of the membership of the current Parliament are of the same gender.

None of the proposed amendments relate to the matters set out under Article 255 (1) and therefore need not be approved by a referendum.

The enactment of this Act shall occasion additional expenditure of public funds, which shall be provided for in the estimates.

b) Amendment to the Elections Act

The MSWG recommends specific amendment to the Election's Act specifically Sections 31, 35A and 36 in the terms annexed hereafter.

The principal object of this Bill is to amend the Elections Act (Cap 7) to provide that:

- a) A political party shall ensure that the names of the party candidates submitted to the Electoral Commission under this section in a General Election for parliamentary and county elections complies with the principle that not more than two-thirds shall be of the same gender.
- i. A party list submitted for persons with disabilities shall be accompanied by a certification from the National Council for Persons with Disabilities.
- b) Disputes arising out of the certification of a party list shall be referred to the Electoral Commission's Dispute Resolution Committee.
- c) A party list for special seats under Section 36 shall commence with the name of a female candidate and alternate between male and female candidates in the priority in which they are listed.
- d) The Independent Electoral and Boundaries Commission shall draw from the list four special seats members in the priority given by the party in the following order—

- i. persons with disabilities
- ii. youth;
- iii. marginalised groups, including ethnic and minorities.

The structure of the Bill is as follows:

Clause 1: Provides for the citation of the Bill.

Clause 2: Seeks to amend Section 31 by inserting a new sub-section after sub-section (2F) requiring political parties to ensure that the names of the party candidates submitted to the Electoral Commission in a General Election for parliamentary and county elections comply with the principle that not more than two-thirds shall be of the same gender.

Clause 3: Amends section 35A of the principal Act to provide for certification of persons with disabilities and to refer disputes arising from the certification process to the IEBC Committee in the first instance.

Clause 4: Amends section 36 of the Act to provide that special seat party lists commence with the name of a female candidate and alternate between male and female candidates in the priority in which they are listed. This Clause also provides that the Commission shall draw from the list four special seats members in the priority given to persons with disabilities, youth, marginalised groups including ethnic and minorities.

The Bill does not delegate any legislative powers and does not limit any fundamental rights and freedoms.

The Bill is a Bill concerning county governments. It contains provisions relating to the election of Members of County Assemblies.

The enactment of this Act may occasion additional expenditure of public funds, which shall be provided for in the estimates.

c) **Amendment to the Political Parties Act**

The MSWG recommends the amendment of the Political Parties Act to provide for establishment of Women Inclusion and Political Participation Fund for purposes of financing education and training, mentorship and capacity building, including the support for women seeking elective positions.

The principal object of this Bill is to amend the Political Parties Act, (Cap 7D) to establish the Women's Inclusion and Political Participation Fund as the institutional framework for equipping more women to successfully contest legislative seats in greater numbers.

This initiative has the potential to eliminate the necessity for top-up nominations in future. The Bill seeks to capture the proper spirit of affirmative action and promote the essence of the greater gender inclusion agenda.

It is expected that the provisions of the funds will be an incentive to equip and promote more women to run for office which, in a few election cycles, ought to bring the number of women contesting and winning elections to at least the same level as men. Notably, the Gender Principle is a mathematical ratio process. The more women get elected, the fewer requirement there will be for top-up seats.

d) The enactment of Equality Law

The MSWG recommends that as a long-term consideration, Parliament enacts a gender equality law that will holistically implement Article 27 of the Constitution.

e) Enact Article 100 Legislation

The Constitution require Parliament to enact legislation to promote representation of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities to Parliament. Within the transitional clause, the law was to be in place within five years after promulgation of the Constitution. To date, the law has not been put in place. It is an opportunity for Parliament to move with speed and enact the said law.

6.2.2 ADMINISTRATIVE RECOMMENDATIONS

The MSWG makes administrative recommendations aimed at achieving gender equality and empowerment of women and girls. Further, they aim at creating an enabling environment for women to actively engage in politics in Kenya at all levels. These include the following:

Combatting campaign-related Gender-Based Violence

Gender-Based Violence has been identified as a major barrier for women participation in politics. Based on this finding, the Working Group recommends development and enforcement of mechanisms to prevent and respond to gender-based violence. This policy will create a secure environment for women involved in politics.

Implementation of the Campaign Financing Law

It was noted that there was no gender parity in the political landscape with regard to financial equality during campaigns and elections.

The Working Group recommends full implementation of the legislative measures in place to ensure gender parity in campaign financing. This comprehensive approach includes regulations to promote financial equity during election campaigns.

a) Robust Reporting Framework

A framework is important to facilitate the monitoring and evaluation of progress in achieving gender balance and ensuring transparency and accountability in the implementation process.

The working group proposes the development of a robust reporting framework, providing gender statistics and data with regard to public offices and gender representation.

b) Gender-responsive Budgeting

The Working Group recommends allocation of resources with the intention of addressing disparities in gender representation. This proposal would include allocation of funds to gender specific programmes. This would, therefore, call for development of a policy on gender-responsive budgeting which takes into consideration gender-based imbalances in political processes and campaigns.

c) Strengthening County Gender Sector Working Groups (CGWGs)

The Working Group recommends enhancing the capacity and effectiveness of County Gender Sector Working Groups. This would involve providing sufficient resources and training to these groups and support them in actively promoting and the implementation of the Gender Principle at the county level.

d) Establishment of Gender Desks in Public Institutions

The Working Group recommends the administrative establishment of gender desks within public institutions to serve as focal points for addressing gender-related concerns, ensuring compliance with gender equality principles and facilitating the integration of gender perspectives into institutional policies and practices.

e) Sensitisation of gender equality in schools

Administrative actions were recommended to introduce sensitisation programmes on gender equality in educational institutions. This involves incorporating gender equality topics in school curricula, creating awareness among learners about the significance of balanced gender representation and challenging traditional gender norms from an early age. The administrative focus on education aims to instill values of inclusivity and equality among the younger generation.

f) Advocacy and Public Education Campaigns

It is important to develop an advocacy campaign and use vernacular stations and social media to communicate with citizens to promote the gender agenda. This will include profiling success stories. Use the media once the implementation framework is agreed on to create awareness, highlight gender disparities and showcase successful stories as part of the process of promoting public education.

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Multi-Sectoral Working Group
on the realisation of the not more than
two thirds gender principle

