



NGEC

National Gender and
Equality Commission

Journey to Gender Parity in Political Representation

Search of a framework
for the realisation of the
not more than two-thirds
gender principle in Kenya



2012-2018 *The Journey Continues*



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Table of Contents

Abbreviations	iv
Foreword	vi
Acknowledgements	viii
1.0 BACKGROUND	1
1.1 Journey towards realisation of the not more than two-thirds gender principle in elective positions in Parliament: A synopsis	4
1.2 The move to seek Advisory Opinion from the Supreme Court	5
2.0 TECHNICAL WORKING COMMITTEE (TWG)	8
2.1 Stakeholders Engagement	12
2.2 Meetings with the Departmental Committee on Justice Legal Affairs chaired by Hon. Samuel Chepkonga	13
2.3 Consultation with the Senate Committee on Legal Affairs and Human Rights	14
2.4 The process leading to publication of Bill to give effect to the proposal by TWG	14
2.4.1 The cost of implementing the not more than two-thirds gender principle	14
2.4.2 Development of communication and lobbying strategy	15
2.4.3 Launch of the 'Tubadili Tusitawi Pamoja' campaign	15
2.4.4 KEWOPA intervention	15
2.4.5 The Hon. Samuel Chepkonga Bill	17
2.4.6 The Constitution Amendment Bill No.4 of 2015: The TWG Bill or the Duale 1 Bill	19
3.0 LOBBYING STRATEGIES TO SUPPORT THE DUALE BILL	23
3.1 Media engagements	24
3.2 Engaging religious leaders	26
3.3 Engagements with constitutional commissions and independent office holders, civil society organisations, professional bodies and private sector	27
3.4 Engagement with Parliament	31
3.5 Lobbying President and Deputy President and other senior politicians	31
3.6 Lobbying county government	32
3.7 Lobbying at regional and international levels	33
3.8 The Sijeny Bill	33
3.9 'The Compromise Bill' – Constitutional Amendment Bill No.6 of 2015	34
3.10 The Constitution of Kenya (Amendment) Bill, 2018	36

4.0	OTHER INITIATIVES SEEKING TO IMPLEMENT THE TWO-THIRDS GENDER PRINCIPLE	38
4.1	The court process	38
4.2	Post 2017 General Election	41
4.3	Development partners gender programme	43
4.4	Joe Mutambu initiative	44
4.5	The Moses Kuria ' <i>Punda amechoka punguza mzig'o</i> ' initiative	44
5.0	AN ANALYSIS OF STRATEGIES AND PROCESSES USED BY NGENC IN THE JOURNEY TOWARDS REALISATION OF THE TWO-THIRDS GENDER PRINCIPLE FORMULA	45
5.1	Court Processes	45
5.2	The Technical Working Group Process	46
5.3	Lessons Learnt from the Process and Strategy	47
6.0	COMPARATIVE OVERVIEW	49
6.1	Uganda	49
6.2	Rwanda	50
6.3	South Africa	51
6.4	Observation	52
7.0	LESSONS LEARNT AND WAY FORWARD	54
8.0	CONCLUSION	56
	Annexes	57
	Bibliography	58

Abbreviations

AMWIK	Association of Media Women in Kenya
ANC	African National Congress
AU	African Union
BPfA	Beijing Platform for Action
CAJ	Commission on Administrative of Justice
CDF	Constituency Development Fund
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CIC	Commission on Implementation of the Constitution
CKRC	Constitution of Kenya Review Commission
CLE	Council of Legal Education
CMD	Centre for Multi- Party Democracy
CMD-K	Centre for Multi-Party Democracy-Kenya
CORD	Coalition for Reforms and Democracy
COVAW	Coalition on Violence Against Women
CRAWN TRUST	Community Advocacy and Awareness Trust
CREAW	Centre for Rights Education and Awareness
CRPD	Convention on the Rights of PWDs
CSO	Civil Society Organisation
CSW	Commission on the Status of Women
EU	European Union
FIDA (K)	Federation of Women Lawyers Kenya
GAC	Green Amendment Campaign
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission
ICRG	International Centre for Rights and Governance
IRI	International Republican Institute
JLAC	Justice and Legal Affairs Committee
KEDIPA	Kenya Disability Parliamentary Association
KEWOPA	Kenya Women Parliamentary Association
KHRC	Kenya Human Rights Commission

KLRC	Kenya Law Reform Commission
MCA	Members of County Assembly
NA	National Assembly
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organisation
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
ORPP	Office of the Registrar of Political Parties
PCEA	Presbyterian Church of East Africa
PR	Proportional Representation
SCK	Supreme Court of Kenya
SDGs	Sustainable Development Goals
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNFWCW	United Nations Fourth World Conference on Women
UNGASS	United Nations General Assembly Special Session
UNIFEM	United Nations Development Fund for Women
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review
USAID	United States Agency for International Development
WEL	Women Empowerment Link

Foreword

I am happy to present to the nation an elaborate account of the journey towards the realisation of the not more than two-thirds gender principle. It is a journey punctuated with epic highs and lows, exasperation, hot tempers and near desperation that morphed into one of the the heavily debated and contentious issues post-2010 promulgation of the Constitution.

This report examines the cautious yet bold consultative framework in which the National Gender and Equality Commission while convening the Technical Working Group pursued in trying to broker a practical and politically sound formula for the realisation of the not more than two-thirds gender principle as enshrined in Article 27 of the Constitution of Kenya. The accounts range from both hard to soft lobbying tactics deployed to various influencers. It exposes the initial naivety that the Technical Working Group strode while seeking a framework within the shortest time possible.

While the Technical Working Group construed the principle as a straight forward constitutional imperative, it became clear from the onset that the matter was beyond simple and clear understanding. It became a simmering warfare of genders laced with patriarchy, a generous dose of political propaganda and competing needs with other Special Interest Groups (SIGs) like Persons with Disability (PWD) and youth. The Technical Working Group was treated to a first-hand experience of underhand dealings between progressive forces keen on the full implementation of the Constitution and devious tactics employed by anti-reform forces bent on maintaining the status quo. This report documents the process undertaken, a raft of proposals received – some too radical to even contemplate – yet in the spirit of public participation they all had to be considered, weighed and classified in the order of practicability.

While it was thought that beneficiaries of affirmative action would be champions in seeking to promote and entrench the principle, the Technical Working Group was treated to a sobering realisation that even good intentions have unintended consequences. It became clear that the genuine empowerment contemplated by affirmative action pro-

grammes and policies had been distorted and assigned a demeaning label that ultimately made the promotion of the principle more difficult.

Despite all the push and shove, the constitutional imperative of achieving the not more than two-thirds gender principle remains intact. Probably this is the defining realisation that notwithstanding the power games, patriarchy and all manner of negative stereotypes, the Constitution of Kenya provides a solid ground for entrenching the principles of equality and inclusion in all spheres of life including political representation as an irreducible minimum.

There are valuable lessons learnt in the entire process. We hope this report provides valuable insights to other actors at the local, regional and international levels as well as in comparable jurisdictions on the strategies to employ and the pitfalls to avoid. Indeed, the journey has just begun. While legislation might mechanically enforce the principle, the ideal will be a situation where all special interest groups have the opportunity to actively participate and be elected on account of pure merit from a well-informed citizenry that understands the dividends of inclusion and participation of special interest groups.



Dr. Joyce Mwikali Mutinda (PhD)

Chairperson

¹ Those serving at national and county level Assemblies 2013-2017.

Acknowledgement

This report summarises the critical milestones made by the National Gender and Equality Commission (NGEC) and its stakeholders between 2012 and 2017 in search of a plausible framework for the realisation of the not-more than two-thirds gender principle in Kenya. The activity received the highest attention and investment from the Commission and, therefore, we take this opportunity to sincerely acknowledge every partner and stakeholder who participated in the process.

The Commission wishes to thank all eleven-member institutions and nominees of the Technical Working Group formed by the Office of the Attorney General whose sole task was to advise the State on the most practicable, affordable and less invasive framework. These members dedicated their time and technical expertise to inform the process. We also wish to thank the chairs and members of various committees in the National Assembly and Senate including the Justice and Legal Affairs, Labour and Social Welfare, Joint Committee on National Cohesion and Equal Opportunity, Committee of Senate on Legal Affairs and Human Rights and the Constitution Implementation Oversight Committee who participated and contributed to this agenda and in multiple instances presented the matter for discussion within and without their committees.

The Commission appreciates the roles of the Leaders of Majority and Minority in the two houses of Parliament, Speakers of the National Assembly and Senate, Chair and members of the Kenya Women Parliament Association, members of various caucuses in Parliament, Council of Governors both at policy and secretariat level, County Assembly Speakers Forum and Members of County Assemblies for building momentous pressure on legislators to formulate a mechanism for the realisation of the not more than two-thirds gender principle at the national level¹.

The process benefited immensely from many non-state actors including faith and community based organisations, professional associations including the Law Society of Kenya (LSK), Association of Media Women in Kenya (AMWIK), Association of Women on Boards in Kenya, Kenya Private Sector Alliance (KEPSA) and the Media Council of Kenya (MCK). We also appreciate the Kenya Editors' Guild, and associations of various special interest groups including National Council for Persons with Disabilities, National Youth Council and National Council for Children's Services. The Commission fur-

² Included but not limited to Tora Bjarte, Millie Lwanga, Patricia Mbote, Linda Mulira, Noor Ghalgan Anwar and Kare Vollan.

³ By the date of publishing this report, the State had not presented a national framework for the implementation of the not more than three-thirds gender principle.

ther acknowledges the technical support received from selected eminent persons in Kenya, representatives of academia from Kenyan universities, commissions and independent offices as well as legal and gender experts² who supported in preparing and reviewing technical proposals on the framework and presentations to various audiences on the subject.

We sincerely thank the financial and technical support provided by the Kingdom of Norway, Ford Foundation and Electoral Institute for Sustainable Democracy in Africa (EISA), UN Women, UNDP and USAID through URAIA Kenya trust funds. We thank the Kenyan people especially workers, youth, persons with disabilities and indigenous peoples who routinely provided ideas on the design and operationalisation of the framework. Your consistent demand for a workable framework motivated the Commission and the Technical Working Group to work tirelessly.

At the Commission, I recognise the tremendous effort and time dedicated to finalisation of this report by the Board and Secretariat. In particular, I acknowledge the efforts of Mr. Sylvester Mbithi, the senior legal officer who provided the relevant materials from the Commission and also reviewed this report. I acknowledge the technical assistance from Hon Lady Justice Nancy Baraza who drafted this report. Special thanks to the outgoing Chairperson Winfred Lichuma for providing strategic leadership in full documentation of the process towards finding the mechanism to realise the two-thirds gender principle.

To all of you, mentioned or omitted in this report but contributed to the process of establishing the two-thirds gender principle, we say thank you for choosing to partner with the Commission³.

This report is printed with financial support from UN Women and the Government of Kenya.



Sora Katelo

Acting Commission Secretary/Chief Executive Officer



General Objective

The general objective of this report is to analyse and document the skills and strategies applied by NGECC and partners in the process of seeking a workable formula for the realisation of the not more than two-thirds gender rule representation in elective positions in Parliament. It particularly sought to find out whether or not the advocacy strategies used were effective, the challenges faced and lessons learned. The report is envisaged to form a case study for use at continental and international level to countries that may wish to implement such a principle. Locally, the report will be used to form the basis for negotiations towards implementation of the two-thirds principle.

Methodology

The report is based on data gathered and analysed following a multi-pronged approach which included desk research, key informant interviews and comparative studies of some African countries including Rwanda, Tanzania and South Africa which have effected affirmative action for women's political participation. Desk research included the study of key international and regional human rights treaties as well as national frameworks.

The study examined the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of PWDs 2015/2016, the Maputo Protocol and the Beijing Declaration and Platform for Action.

Within the national framework, the study focused on the Constitution of Kenya and more specifically on articles relevant to the promotion and implementation of the not more than two-thirds gender principle. It examined the various draft bills introduced in Parliament for the implementation of the not more than two-thirds gender principle as well as various court decisions touching on the issue. Key informant interviews targeted several Members of Parliament, members of Kenya Women Parliamentary Association (KEWOPA), religious leaders, journalists and representatives of key human rights organisations and national Commissions.

1.0 Background

According to the 2009 National Housing and Population Census, women constitute 51.4 percent of Kenya's population. As of 2016 women constituted 49.1 percent of registered voters in the country. This numerical strength is, however, not reflected in the representation of women in political leadership. The representation is, therefore, below Kenya's international and regional obligations and commitments to ensure that there is gender parity in politics.

Kenya is signatory to various international, regional and sub-regional instruments and commitments including the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Beijing Declaration and Platform for Action, the African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) and the Solemn Declaration on Gender Equality in Africa – all of which guarantee gender equality. In line with these obligations, the Constitution of Kenya 2010 espouses the rights of women in Article 27 as being equal in law to men, and are entitled to enjoy equal opportunities in the political, social and economic spheres.

Article 27 of the Constitution provides;

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly and indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, ability, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any other grounds specified or contemplated in clause (4).
6. To give full effect to the realisation of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination.
7. Any measures taken under clause (6) shall adequately provide for any benefits on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.



19.7%
Political representation of Kenyan women compared to Rwanda's 64 percent



The presence of women in positions of power has largely proven to be invaluable

Further, Article 81 provides the general principles of Kenya's electoral system. Specifically Article 81 (b) states that 'not more than two-thirds of the members of elective public bodies shall be of the same gender and in 81 (c) fair representation of persons with disabilities among other principles'.

Despite these affirmative action measures, women's participation in the 2013 General Election as candidates remained low. Out of the 290 single member constituencies in the National Assembly only 16 women (5.5%) were elected. In the Senate, no woman was elected out of the 47 available seats.

In 2017, political representation of Kenyan women stood at 19.7 percent compared to Rwanda (64%), South Africa (42%), Tanzania (36%) and Uganda (35%). In all these countries, 'gender quotas' have proven to be a critical and effective way of enhancing women's participation and representation in the political sphere. While the current number of women in Kenya's Parliament (86 out of 416) elected as well as nominated in both the National Assembly and Senate is the highest in history, the country still lags behind the global average of 22 percent⁴ and the desired 30 percent critical mass threshold needed to make significant change.

The poor performance of women in Kenya's political arena can be attributed to two major factors—Kenya's patriarchal culture and the electoral system. The latter has never been known to deliver gender equality in politics anywhere in the world. While the Constitution provides room for proportional representation by nomination through party lists as per Article 90, most parties are owned by men with little inclusion of women in the management structures.

Kenyan politics requires an enormous outlay of social capital, yet the processes of economic, cultural and political accumulation still favour men more than women. One may ask why it is necessary to increase the representation of women in Parliament. In answer to this question, Japhet Biegon in 2016 stated that "the presence of women in positions of power has largely proven to be invaluable. At the very least, women's presence has catalysed the broadening of priorities on the political agenda to include and give prominence to issues that were previously ignored. At best, the presence of women has brought about social transformation across a wide range of areas"⁵.

The Constitution of Kenya has provided a favourable framework for realising equal representation of women in political processes. However, there are multiple political, cultural and socio-economic factors that have impeded the translation of legal provisions into tangible or concrete gains for women. To date the affirmative provisions of the Constitution lack a legislative operational framework for implementation and Kenya is yet to close the gender gap in political representation.

It should be noted that Schedule Five of the Constitution of Kenya lists the mandatory legislations that Parliament must enact to facilitate its implementation and gives timelines within which these laws must be enacted. However, efforts to achieve a legislative framework for realisation of the not more than two-thirds gender principle

⁴ Biegon (ed) 2016, Gender Equality and Political Processes in Kenya, Challenges and Progress, page 6.

⁵ Ibid, page 1.

in the Kenyan Parliament remains elusive, or a hot potato, as leader of Majority Hon Aden Duale repeatedly called it in the 11th Parliament.

The problem with finding a legislative operational framework for attainment of the not more than two-thirds gender rule in Parliament has been occasioned by the fact that the Constitution does not provide an operational framework for attaining the principle in the National Assembly and Senate if the electorate does not elect enough women to give effect to the gender principle in Article 81 (b). This is unlike the situation in the counties wherein Article 177 (1) (b) of the Constitution ensures that the County Assemblies meet the gender rule.

It provides:

177 (1) (b) The number of special seat members necessary to ensure that no more than two-thirds of membership of the assembly are of the same gender,

(c) The number of members of marginalised groups including persons with disabilities and the youth prescribed by an Act of Parliament.

Achieving the not more than two-thirds gender principle has stirred active public debate as well as initiatives to ensure that it is complied with. These initiatives have included litigation such as *The Gender Representation Supreme Court Advisory Opinion*⁶ (on whether Article 27 (8) was immediately realisable), *FIDA Kenya & Others Vs Attorney General* and another⁷ (challenging the gender composition of the Supreme Court), *National Gender and Equality Commission (NGEC) Vs IEBC*⁸ (challenging the exclusion of women, youth and persons with disabilities from party lists under Article 90 of the Constitution), *CREAW Vs Attorney General & Another* (seeking publication of a Bill to give effect to Article 100)⁹ and recently *Katiba Institute Vs IEBC*¹⁰ (ruled that political parties are bound by the gender requirement in the Constitution).

The National Gender and Equality Commission (NGEC), a Commission established under Article 59 (4) and (5) of the Constitution and operationalised through the National Gender and Equality Commission Act 2011 and whose overall mandate is promotion of gender equality and freedom from discrimination as provided in Article 27 of the Constitution, has played an important and notable role in leading initiatives in an effort to achieve a legislative framework for the realisation of the two-thirds gender principle. The role played by NGEC together with other actors on this matter has been a long winding journey of five years that this report documents.

The aim of the report is firstly to tell the story of the journey seeking to find a workable formula of the not more than two-thirds gender rule representation in elective positions in Parliament. Secondly, the report will analyse the skills and strategies applied by NGEC and partners in this process, particularly in finding out if the advocacy strategies used were effective or not, the challenges faced and lessons learned. The

6 <http://kenyalaw.org/caselaw/cases/view/85286>

7 http://kenyalaw.org/Downloads_FreeCases/83092.pdf

8 <http://kenyalaw.org/caselaw/cases/view/87523>

9 <http://kenyalaw.org/caselaw/cases/view/111102/>

10 <http://www.katibainstitute.org/wp-content/uploads/2017/04/JUDGMENT.pdf>

2010

The new Constitution sought to be all-inclusive through the not more than two-thirds gender principle

report is based on data gathered and analysed following a multi-pronged approach which included desk research, key informant interviews and adoption of comparative studies. It is hoped that the report can be used in future as the basis for negotiations towards implementation of the not more than two-thirds principle in Kenya and for adaptation in countries with similar socio-political contexts that may need to implement the principle in elective politics.

1.1 Journey Towards Realisation of the Not More Than Two-Thirds Gender Principle in Elective Positions in Parliament: A Synopsis

The Commission on Implementation of the Constitution (CIC) was established 90 days after promulgation of the Constitution and its functions included monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the Constitution.

The Commission was also expected to regularly report on the progress in the implementation of the Constitution and on any impediments to the execution process. The Commission on Implementation of the Constitution (CIC) commenced its work and joined with Interim Independent Electoral Commission (IIEC) in the review of application of the relevant sections of the law in respect to the electoral process. The IIEC consulted widely on the best way to ensure that the not more than two-thirds gender principle was achieved during the first election in 2013 under the new Constitution.

The consultations aimed at translating the provisions to go into the then Elections Bill, 2011. Expert views were sourced from within and without the country. Kare Vollan, an expert in elections and minority representation from Norway, gave the following proposals to bridge the gap: Rotating constituencies earmarked for women; a ticket of candidates including both genders for each constituency (candidates to contest in pairs; woman and man) and a best runner-up alternative. The proposals¹¹ were discussed at length but never made it into the final Act.

The next attempt culminated in a draft Bill to amend the Constitution of Kenya 2010. The process was led by the then Minister for Justice, National Cohesion and Constitutional Affairs, the late Hon Mutula Kilonzo. On October 19, 2011, Kilonzo published the Constitution of Kenya (Amendment) Bill 2011, following extensive discussions and negotiations led by CIC and IIEC after it was formulated jointly with civil society organisations, Parliament and the Cabinet. The Bill, however, did not just address the implementation of the not more than two-thirds gender principle, but it also sought to address any doubts as to the date of the next General Election under the Constitution of Kenya 2010.

It provided in the Memorandum/Objects and Reasons section:

¹¹ Alternatives for Meeting Gender Requirements in the National Assembly in Kenya - Kåre Vollan, June 25, 2011 (updated August 5, 2014).

The Bill aims at giving full effect to Articles 27 (8) and 81 (b) which provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. The Bill further seeks to bring clarity and certainty to the term of the Tenth Parliament while also removing any doubts as to the date of the next General Election under the Constitution of Kenya 2010

The arguments put forward within the Hon Mutula Kilonzo Bill for this mechanism were that: The proposed amendment would not affect the other categories of members of Parliament under Article 97 and 98 of the Constitution and, therefore, not prejudice the rights of any person to stand for election or the right of one to elect a person of his or her choice; these special seat members would gradually reduce as the legislative and other measures contemplated in Article 27 (8) of the Constitution continue to be implemented.

In a nutshell, the proposal poised to borrow the words of Article 177 (1) (b) on the not more than two-thirds principle and write them into Articles 97 and 98 of the Constitution. Despite numerous consultations by the Ministry of Justice and Constitutional Affairs, the Bill was not put to first reading since consensus building failed. Members of the Tenth Parliament felt that it was too early to mutilate the new Constitution through amendments. This was the first blow to an attempt to find an implementable framework on the two-thirds gender rule.

In May 2012, NGEC became constituted with the appointment of the chairperson and commissioners. The team took up the process in the search for the formula to implement the not more than two-thirds gender rule in political representation as their first agenda item working jointly with the then Ministry of Gender and Ministry of Justice and Constitutional Affairs as well as with CIC and the Independent Election and Boundaries Commission (IEBC) that had been constituted.

Various stakeholder engagements were held by NGEC to build consensus from where Kilonzo had left the draft amendment Bill since it had lapsed. The Commission engaged the then new Minister for Justice, National Cohesion and Constitutional Affairs Eugene Wamalwa on the possibility of re-tabling the Kilonzo Bill. The minister was hesitant to have the Bill re-tabled since he indicated that there was no goodwill in the Tenth Parliament to pass a constitutional amendment motion that required a super majority of two-thirds of the members. Despite numerous consultations, the Bill was never re-tabled.

1.2 The Move to Seek Advisory Opinion from the Supreme Court

There was a general consensus from stakeholders that there would be a constitutional crisis in the event the resultant parliament following the 2013 General Election did not meet the not more than two-thirds gender principle.

Various stakeholders who included NGEC, the then Commission on the Implementation of the Constitution (CIC) and Commission on the Administration of Justice

(CAJ) requested the Attorney General to approach the Supreme Court for an advisory opinion on the matter in order to avert the impending crisis. The team agreed that the question for the advisory opinion would be the possibility of the Supreme Court granting structural orders to ensure implementation of Articles 97 and 98 respectively. This would ensure political parties complied with the principle as required.

However, contrary to the gentleman's agreement, on October 8, 2013 the Attorney General filed an advisory reference in the Supreme Court of Kenya requesting for direction on the interpretation of Articles 27 and 81 (b) of the Constitution with regards to the two-thirds gender principle. In summary, the Attorney General wanted to know whether the principle should be realised immediately or progressively.

He further argued that for provisions of the Constitution to be complied with, there was need to adopt other criteria and that this may necessitate an increase in the tax burden borne by Kenyans. He noted, therefore, that there was need for a corrective measure if the constitutional requirements were to be realised. It should be noted that although the Attorney General had sought the Advisory Opinion, he held the view that using nominations by parties to bridge the gap would result in unduly large legislative bodies¹². Much as NGEK had proposed to the Attorney General that he was in the best position to seek the Supreme Court's Advisory Opinion, the Commission was alarmed by the kind of questions he framed and thus sought to be enjoined as an interested party in the Advisory Opinion No.2 of 2012¹³.

Other public bodies such as CIC, IEBC and Commission on Administrative Justice (CAJ) were enjoined to the case as interested parties. The Centre for Rights Education and Awareness (CREAW), Katiba Institute, Centre for Multi-party Democracy (CMD), Kenya Human Rights Commission and International Centre for Rights and Governance (ICRG) as well as Mr Charles Kanjama were admitted as amici curiae (friends of the court).

The Supreme Court, by majority decision, ruled that the gender provision on the not more than two-thirds principle should be attained progressively using legislative and other means, including policy among other measures to be put in place.

Specifically, the Supreme Court's majority advisory decision noted:

1. The adjustment of Article 81 (b) of the Constitution into an enforceable right does not lie with the judicial branch of the Government but with the Legislative and Executive branches of the Government supported by other organs such as constitutional Commissions.
2. There is need to trigger the principle in 81 (b) into a right that is enforceable.
3. The Court found that the principle in 81 (1) could not be enforced in Articles 97 and 98 immediately and said it was amenable to progressive realisation.

¹² Japheth Biegon (ed) 2016, Gender Equality and Political Processes in Kenya, Challenges and Progress, page 58.

¹³ <http://kenyalaw.org/caselaw/cases/view/85286>

The Court used Article 100 on promotion of representation of marginalised groups to set the time frame of August 27, 2015 for the same to be in place. Article 100 of the Constitution provides;

Parliament shall enact legislation to promote the representation in Parliament of:

1. Women
2. Persons with disabilities
3. Youth
4. Ethnic and other minorities
5. Marginalised communities

In the Fifth Schedule, Article 100 legislation has a time frame of five years.

The then Chief Justice Willy Mutunga had a dissenting opinion. In his view, given the history of Kenya and the immediacy of the matter, interpretation of the articles required a purposive approach without relying on jurisprudence based on other jurisdictions. That the one-third principle was just the beginning because the aim was to have 50/50 representation between men and women and that equality should not be based on the traditional equality under the law but on societal equality¹⁴.

The Supreme Court in Advisory No.2 of 2012 ruled that legislation to facilitate implementation of the not more than two-thirds gender principle falls under the category of legislation that must be implemented within five years of promulgation of the Constitution; that is on or before the August 27, 2015. The Court directed that any legislation and legislative measures to give full effect to the two-thirds principle under Article 81 (b) of the Constitution and in relation to the National Assembly and Senate should be attained by the August 27, 2015 according to the terms of Article 100 on the promotion of representation of the marginalised group.

By September 2013, no action had been taken by the Attorney General to implement the Supreme Court's Advisory Opinion. The Commission was not satisfied with the advisory opinion. It commenced steps to have it implemented. In a letter dated September 19, 2013, the Chairperson of NGECC wrote to the Attorney General as follows:

...In light of NGECC functions and the Supreme Court decision in Advisory Opinion No.2 of 2012, which provided inter alia, that legislative measures be put in place for the realisation of the two-thirds gender principle in Parliament as per Article 81(b) by August 27, 2015, this is to enquire on the efforts put by your office geared towards actualisation of this decision. We look forward to working with your office."

The Commission's letter prompted the Attorney General to convene meetings that eventually led to the formation of the Technical Working Group (TWG) discussed hereafter¹⁵.

¹⁴ See the dissenting Advisory Opinion by Hon Willy Mutunga in Supreme Court Advisory Opinion No.2 of 2012

¹⁵ See letters appointing NGECC as convener of the TWG

2.0 Technical Working Group

In March 2014, the Attorney General formed a Technical Working Group chaired by the National Gender and Equality Commission (NGEC) and comprising a broad array of stakeholders among them NGEC as Convener and Secretariat; Ministry of Devolution and Planning, Attorney General's Office, Office of the Registrar of Political Parties; Independent Electoral and Boundaries Commission; Commission on Administrative Justice; Commission on the Implementation of the Constitution; Parliament (Committees of the National Assembly and Senate dealing with the implementation of the Constitution and Legal Affairs, respectively) and Kenya Women Parliamentary Association as well as FIDA-Kenya representing civil society organisations.

The Technical Working Group was tasked with “coordinating the process of developing enabling mechanisms for the attainment of the two-thirds gender rule within 90 days effective from February 11, 2014; identifying and facilitating key stakeholder engagements towards the process of developing this enabling mechanism; organising and coordinating public participation towards the development of this enabling mechanism; engaging such experts or institutions as may be necessary to facilitate this process; reviewing proposals towards the implementation of the Supreme Court's Advisory Opinion; mobilising resources towards the agenda of the Technical Working Group; and undertaking any other functions that may be necessary for the attainment of its objectives”.



The Technical Working Group at a press conference on the road towards the two-thirds gender rule framework.

Once the Technical Working Group drew its work plan and mapped the key stakeholders to be engaged in a participatory manner, it was evident that the Secretariat required a full time individual to be committed to follow up with the process of documenting the information. With the support of UN Women, Ms Millie Lwanga, a lawyer and gender expert was contracted to provide strategic expertise and technical



86%

*of Kenya's
farmers are
women*



49%

*of Kenya's
voting
population
are women*

support in drafting feasible frameworks towards the realisation of the not more than two-thirds gender principle within the time frame of 90 days given from November 2, 2014.

Her tasks included working closely with the Technical Working Group under the leadership of NGECC to review all the background information and selected materials, review and document relevant laws and policies governing the equality principle, preparing a chronological paper highlighting the road map, planning, coordinating and facilitating meetings and engagements, identifying all relevant stakeholders, experts to seek information from and drafting the proposed mechanisms to be submitted to the Attorney General as per the committee's decisions.

In September 2014, the Technical Working Group secured an accountable grant of KSh41 million from the Kingdom of Norway towards its work. The grant would facilitate the Commission to:

- Acquire technical expertise in political and electoral discourse,
- Hold meetings with the National Assembly and Senate, particularly committees critical in the legislative process to agree on a plausible framework.
- Hold meetings with private sector, faith based organisations and county governments for consensus building on the framework.
- Draw a national consultations strategy and campaign to advocate for the need to have a framework before August 2015.

The Norwegian government further extended its support to the Technical Working Group by nominating Mr Bjarte Tora to provide technical support in development of the formula and consultation of Norway. Tora's expertise transcended from developing options to discussing them with stakeholders.

His immense knowledge on the subject matter enabled the Commission, stakeholders from all fronts and Members of Parliament to have an understanding of the whole discourse of equality in political representation, the advantages and disadvantages of all the options developed as well as those proposed.

The Norwegian Agency for Development Cooperation (NORAD) detailed Ms Hilde Aspenes Sjobo, Programme Officer, Gender and Humanitarian Issues at the Royal Norwegian Embassy to support the project officers in the early stages of this process towards realisation of intermediate goals.

Using the resources from the Norwegian government, the Commission engaged a local agency, Impact Africa Limited, to develop a public relations programme and internal communications strategy as well as a national campaign on the not more than two-thirds gender rule. Down to Earth, a local agency was engaged in the creative and launch of the Technical Working Group's not more than two-thirds campaign branded Tubadili Tusetawi Pamoja literally translating to 'partnership for sustain-

able development¹⁶.

The Technical Working Group also used the grant to secure additional support for a computational expert¹⁷ and legal drafter¹⁸ to beef up its technical capacities in undertaking the assignment to link the product of the not more than two-thirds gender principle with anticipated legislation in Article 100 on fair representation of the youth, PWDs, minority and marginalised groups.

The Technical Working Group engaged additional experts on the subject including Prof Dulacha Galgalo Barako on matters of representation of minorities and marginalised groups; lawyer Elisha Ongoya on matters of constitutionalism; and committed disability person's organisations, youth groups and associations including the National Youth Council and Youth Agenda among others.

On the other hand, the then Ministry of Devolution responsible for Gender engaged Prof Patricia Kameri Mbote to provide technical expertise and support to the work of Technical Working Group. Her role included participation in the working sessions of the committee towards finding a workable framework. Prof Mbote analysed the Supreme Court ruling that informed the initial thinking and framing of the issues herein¹⁹.

The Technical Working Group drew their work plan including stakeholder engagements and a call for memoranda that was put in three newspapers with wide circulation – two English and one Kiswahili²⁰.

Other strategies used included radio and television talk shows as well as activations and engagements of identified experts who would analyse the matter and propose a way forward on the required framework.

The first Constitutional experts' consultative roundtable meeting was held on May 6, 2014 at Sarova Panafric Hotel in Nairobi. The experts who presented their papers included Jill Ghai and advocates Charles Kanjama, Jotham Arwa, Atsango Chesoni, Collins Odote and Sarah Muhoya. Information received from the first meeting informed the key issues that framed thematic items and questions for use in the work of the Technical Working Group.

The committee conducted extensive stakeholder consultations²¹ and did a synopsis of the entire proposal received from experts and through memorandums. On February 18, 2015, the Technical Working Group released its first report titled *The Status Report Towards Finding a Workable Formula*²². The report gave a summary of the situation, the problem and provided the process taken by the committee, offered

16 See Tubadili Tunitawi Pamoja Creative brief.

17 Linda Murila

18 Noor Ghalgan

19 See analysis of the Supreme Court ruling

20 <http://www.ngeckkenya.org/news/6069/open-call-to-the-public-for-proposals-on-the-attainment-of-two-thirds-gender-principle>

21 See chronology of meetings

22 <http://www.ngeckkenya.org/news/6080/formula-for-realizing-two-thirds-gender-rule-unveiled>.

long and mid-term as well as immediate measures that were to be undertaken by the State. These included proposals to amend existing laws such as the Elections Act, IEBC Act and Political Parties Act. The report discussed the merits and demerits of the nine options the Technical Working Group had received from Kenyans.

The nine options are:

- Lifting the provisions of Article 177(1) (b) and (c) into Articles 97 and 98 of the Constitution of Kenya.
- Increasing the County Woman Seats in the National Assembly
- Proportionate County Woman Seats in the National Assembly
- Tripling 47 County Woman Seats in the National Assembly
- Gender incentives
- Gender Quota for Party Strongholds
- Rotational Seats for Affirmative Action
- Voting for a Party Ticket (Twinning) Best Runner-Up
- Reconfiguration of Constituencies

Subsequently, in its report dated May 21, 2015, the Technical Working Group narrowed down to three viable proposals on the framework towards implementation of the not more than two-thirds gender principle. These three options were arrived at after multiple meetings with National Assembly Departmental Committee of Justice and Legal Affairs chaired by Hon Samuel Chepkonga and the Constitution Implementation Oversight Committee chaired by Hon Njoroge Baiya. The Technical Working Group also held meetings with other committees of both Houses including the Senate's Committee on Legal and Human Rights.

The Technical Working Group submitted one of the most viable and preferred formula which formed the basis of a proposed Constitutional Amendment Bill (TWG Bill)²³.

The Bill proposed lifting the provisions of Article 177 (b) and (c) to Articles 97 and 98 of the Constitution. This proposal would guarantee the following: Precise realisation of Article 81 (b) on the two-thirds gender rule in political representation after the 2017 General Election, increase number of members of marginalised groups including persons with disabilities and youth; would enact the law envisaged in Articles 177 (1) (c) and 100 of the Constitution of Kenya 2010 that calls on Parliament to enact such law promoting representation of marginalised groups who include women, persons with disabilities, youth, ethnic and other minorities as well as marginalised communities. The proposal was gender responsive and would be applicable if the tides were to shift necessitating inclusion of men.

²³ See TWG Bill

The Technical Working Group's preferred method of implementing the not more than two-thirds gender principle was the lifting of Article 177 of the Constitution to make it applicable to Parliament. Article 177 has enabled County Assemblies to comply with the two-thirds gender principle.

2.1 Stakeholders Engagement

The Technical Working Group conformed to the participation requirements of Article 10 of the Constitution. It engaged private citizens, experts and civil society organisations among other institutions working on promoting the equality principle. The committee held numerous consultative meetings with majority of the parliamentary committees in both the National Assembly and Senate. The engagement also included representatives of persons with disabilities, youth as well as marginalised and minority groups. In its work, the Technical Working Group was confronted with some allegations of exclusion.

The vulnerable groups not mentioned in Article 81 (b) expressed their desire to be included in the content of the proposed formula. They argued that the framework should be clear on the representation of all special interest groups including youth, PWDs, minority and marginalised communities as per the Constitution. Members of the Kenya Parliamentary Human Rights Caucus were also engaged. Later, the Caucus preferred working with a different formula through the Green Amendment proposal supported by the National Women Steering Committee and Action Aid.

The Technical Working Group targeted the leadership of political parties and held several consensus building meetings. In a meeting on May 29, 2015 in Mombasa, the political parties' leadership endorsed the proposal of lifting Article 177 (1) (b) and inserting it in Articles 97 and 98²⁴. A joint media statement was made calling for parliamentary support of the endorsement²⁵.

Further, this endorsement was preceded by numerous meetings organised by the Centre for Multiparty Democracy (CMD) in Nairobi, where the Technical Working Group through NGEK made presentations to officials of political parties on the content of the proposed formulae. In all meetings, the political parties seemed convinced that the proposed formulae were most plausible. However, they understood their contribution to fair political representations by ensuring the parties' structure – governance, operations, internal rules and regulations – embrace in full the principle of not more than two-thirds gender rule.

²⁴ Endorsement letter signed by leaders of political parties that attended.

²⁵ http://www.ngekenya.org/news/6086/political-parties-reject-chepkonga%E2%80%99s-bill,-urge-tabling-of-twg-proposal?fb_comment_id=907453879315953_908953019166039#fd14beaf8d6c

2.2 Meetings with the Departmental Committee on Justice and Legal Affairs chaired by Hon Samuel Chepkonga

The Technical Working Group was aware that the Legal Affairs Committee of the National Assembly had the final say on the viable proposal and engaged with them extensively. A total of eight sittings including side meetings with Chairman Hon Samuel Chepkonga and two retreats in Mombasa were held. Members of the committee had an opportunity to critically examine all the options that the Technical Working Group had received and they also added their suggestions for consideration. During the Mombasa retreat, the chairman of the Legal Affairs Committee was not convinced that the realisation of the two-thirds gender rule could be immediate. He veered off what had been agreed on in his concluding remarks and asked the Chairperson of NGEC to provide him with a proposal to have the two-thirds gender rule realised progressively.

This took the team by surprise and in her response, Chairperson Winfred Lichuma indicated to Hon Chepkonga that she would not be obliged to provide the proposal as it went against the mandate of NGEC and would not be good for the women of Kenya. Further, such a framework was retrogressive. However, Hon Chepkonga would not relent and he asked the Chairperson of the Kenya Law Reform Commission (KLRC) Mr Mbage Ng'ang'a who was present in the meeting to provide him with the draft. Indeed, Mr Ng'ang'a provided the draft that became the bone of contention between him and Ms Lichuma on behalf of the committee. The request by Hon Chepkonga was not based on any research known by the Technical Working Group and this became the second major blow to the search for the implementable framework on not more than two-thirds gender rule. The draft was later tabled by Hon Chepkonga on behalf of the Legal Committee of the National Assembly.

This was the beginning of the division on the understanding of the principle of the not more than two-thirds gender rule. The Kenya Law Reform Commission was outrightly not in support of the viable proposal by the Technical Working Group and this is evidenced in a follow up communication between the chairperson of NGEC and KLRC.

The Kenya Law Review Commission moved to draft a constitutional amendment, 'the Constitution of Kenya (Amendment) Bill, 2015' that sought to introduce in Article 81 (b) the word 'progressive'. The Bill was sponsored by Hon Chepkonga, the Chairman of the Justice and Legal Affairs Committee (JLAC) published on April 30, 2015. Hon Priscilla Nyokabi and Hon Fatuma Ibrahim protested this move alleging that the position and proposal were personal to the Chairman and not the view of the Committee.

2.3 Consultation with the Senate Committee on Legal Affairs and Human Rights

The Technical Working Group held two meetings with the committee and also had a two-day retreat in Mombasa. The Legal Committee made suggestions that enriched the viable proposal and Chairman Senator Amos Wako and members were convinced that a lot of lobbying was necessary to secure the majority vote on the proposed amendments in the two Houses. The Bill for the viable proposal by the Technical Working Group was introduced in the Senate by Senator Judy Sijeny through a Private Member's Bill. It contained the same formula in what later came to be known as the Duale 1 Bill save for additional negotiated clauses contained.

2.4 Process Leading to Publication of Bill to Give Effect to the Proposal by the Technical Working Group

The Technical Working Group submitted to the Attorney General Prof Githu Muigai on April 30, 2015 their proposal of the viable and preferred formula with expectation that it would go through the formal process of law making and be submitted to Parliament for debate. The Attorney General said he preferred a formula that did not amend the Constitution, noting his preference for a Bill that was least invasive and cost effective. It is clear that the Attorney General was not in support of the viable proposal by the Technical Working Group despite the fact that members explored all options available but unfortunately none was viable. The Technical Working Group proposed a long term consideration that would draft an Equality Bill making specific provisions to give effect to the equality principles as espoused in the Constitution.

There was silence on the process being undertaken by the Attorney General towards publication of the Bill. This prompted the Technical Working Group to adopt a lobbying strategy that would see its tabling in the National Assembly. The following are some of the strategies that were used.

2.4.1 *The Cost of Implementing the Not More than Two-Thirds Gender Principle*

During the consultations it was evident that groups opposed to the proposal of increasing women's membership related high cost in terms of numbers in the two Houses. This prompted civil society groups that included Action Aid, Association of Media Women in Kenya (AMWIK), African Woman and Child Feature Service (AWC), ABALOMA Foundation, FIDA (K), CRAWN TRUST, CREAM, COVAW, Kimbilio Trust, Forum UNGASS AIDS, Wangu Kanja Foundation, Women Empowerment Link and Forum for Young Women in Politics (FYWP) among others working with Institute of Economic Affairs to undertake an analysis on the cost implications of implementing the principle. The findings were that in the worst case scenario, it would cost a maximum of KSh57.8 annual additional cost per Kenyan to give effect to the rule²⁶. This was found to be affordable.

²⁶ <http://www.ieakenya.or.ke/publications/research-papers/implementing-the-constitutional-two-thirds-gender-principle-the-cost-of-representation>

2.4.2 Development of the Communication and Lobbying Strategy

In order to effectively pass key messages, the Technical Working Group engaged the services of Impact Africa Limited and developed the communication, public relations and lobbying strategy. In summary, the strategy identified a critical mass required to obtain desired influence to support the Technical Working Group's proposals. The strategy prescribed frequency and intensity of messages required to persuade Kenyans to support implementation of the principle. The lobbying strategy identified key threats to the processes. The public relations strategy set out a social media account through a Twitter handle and media appearances by the Commission to manage emerging issues on the subject.

2.4.3 Launch of the Tubadili Tusitawi Pamoja Campaign

One of the outcomes of the campaign strategy was dubbed Tubadili Tusitawi Pamoja meaning partnership for sustainable growth. The campaign was designed by Down to Earth Creative and approved by the Technical Working Group and the then Cabinet Secretary responsible for Gender, Ms Anne Waiguru. His Excellency Uhuru Kenyatta, President of the Republic of Kenya, launched the campaign on August 13, 2015 at the Kenyatta International Convention Centre. The rationale of the campaign was to emphasise that gender equality is critical for development and economic growth. It was also a tool to create public support of the inclusion of women, to affirm the women's ability and key role as catalysts of change and to promote a single pathway for women in leadership through partnerships with men for ultimate sustainable growth and development.

The campaign was designed in two phases. The first phase was to make use of key influencers in society to highlight the positive contributions of women in various sectors that are important to growth and development. The underlying message was to urge Parliament to pass the proposed constitutional amendment on the not more than two-thirds gender rule. The second was the strategic phase where key actors including private sector, religious leaders and other supportive organisations would add their voice to the legislative proposal in support of women's leadership and implementation of the not more than two-thirds gender rule. The phase would put pressure on the Government for the immediate implementation of the gender principle.

The design and launch of the campaign was tied to the new global commitment, Sustainable Development Goals (SDGs).

2.4.4 KEWOPA Intervention

Kenya Women Parliamentary Association (KEWOPA) members were part of the Technical Working Group from inception and actively participated in all the proceedings through their secretariat. On other occasions, the members attended meet-

ings in person. When it was clear that the Attorney General and the Legal Committees of the National Assembly and Senate were not willing to publish the necessary Bills to give effect to the rule, the Technical Working Group requested KEWOPA to consider publishing the Bill proposed as private member's Bill.

KEWOPA agreed and Hon Cecily Mbarire and Senator Judy Sijeny would simultaneously publish the Bills in the two Houses. Hon Sijeny published her Bill but although Hon Mbarire put her motion in the process, it was overtaken by events when the Leader of Majority was persuaded with the intervention of the President to publish the Bill on behalf of the Government.

KEWOPA leadership was tasked to reach out to the Presidency to give support and influence the publication of a government Bill in support of the two-thirds gender rule. The Technical Working Group had unsuccessfully made attempts to meet the President to give him a brief on the process. The chairperson of KEWOPA managed



Members of KEWOPA address the press in relation to discussions around the two-thirds gender principle.

to lead a team of female Members of Parliament to the President to plead the case. The Technical Working Group applauded KEWOPA members who were united on the gender agenda, their party affiliations notwithstanding. The President directed the Attorney General, who was in the meeting, to review the proposed Bill, make necessary adjustments and publish it immediately. This was the genesis of the Hon Duale Bill of July 2015, which was originally what Hon Mbarire prepared to publish as a Private Member's Bill.

2.4.5 Hon Samuel Chepkonga Bill

The Justice and Legal Affairs Committee chaired by Hon Samuel Chepkonga, despite having reviewed several proposals presented by the Technical Working Group, disregarded all of its processes and published in the National Assembly the Two-Thirds Gender Rule Laws (Amendment) Bill 2015 and the Constitution of Kenya (Amendment) Bill 2015 hereinafter referred to as the 'Chepkonga Bill'²⁷ of April 30, 2015.

The Bill proposed a constitutional amendment to Article 81 (b) by stating that the two-thirds gender requirement should be implemented progressively. Hon Chepkonga was quick to say that the deadline given by the Supreme Court Advisory was soon approaching – August 27, 2015 – and his move and that of his committee was to comply with the deadline. However, KEWOPA members in the Justice and Legal Affairs Committee disowned the draft saying that it was done by Hon Chepkonga with support of some male committee members and was not reflective of a consensus.

The Commission, through its chairperson protested the publishing of the Bill, arguing that by introducing the word 'progressive', the amendments clawed back the gains Kenyans had made in gender equality and inclusion in political leadership. Chairperson Lichuma added that the name of the enabling legislation – Two-Thirds Gender Rule Laws (Amendment) Bill 2015 – did not resonate with its contents and observed thus;

"The Gender Commission wishes to state that the Bill is retrogressive and offends Article 27 in its entirety and realisation of the two-thirds gender principle and calls for its withdrawal since it is misleading"²⁸.

The Commission justifiably read bad faith on the part of the House team led by Hon Chepkonga, arguing that "while the House team was within its mandate to table a Bill to Parliament, it went against the Technical Working Group's Bill of which the House was part of as a member. In the view of NGECC, the Bill by the Technical Working Group was supposed to go to the Attorney General, then Cabinet before being presented in Parliament. The House team as a member of the group should have stuck to that arrangement instead of pushing for another Bill²⁹. The Committee's Vice Chair Hon Priscilla Nyokabi and member. Hon Fatuma Ibrahim, publicly claimed



Hon Samuel Chepkonga addressing participants at the Mombasa Retreat to discuss ways of fronting the two-thirds gender rule amendment at a meeting organised by NGECC.

²⁷ Chepkonga Bill

²⁸ See The Standard on Sunday, May 10, 2015.

²⁹ See communication officer's message, Ibid

that chairman Samuel Chepkonga “sneaked the Bill” using his position³⁰.

Hon Chepkonga remained undeterred and proceeded to hold public hearings on his Bill in fulfilment of constitutional provisions of public participation. He assigned committee members to several sites in the country to hold public hearings and receive submissions for the Bill. Majority of the public, particularly civil society organisations, were angered by the introduction of a Bill proposing progressive realisation of the principle. In three meetings, the processes were chaotic and unmanageable. While the public evidently contributed to the motions, majority gave views to support the Technical Working Group/Duale Bill even though the discussion was on Chepkonga’s.



Former IEBC Chairperson Isaak Hassan (left), NGEN Chairperson Winfred Lichuma and Hon Samuel Chepkonga during a retreat in Mombasa to discuss realisation of the two-thirds gender principle for Parliament.

The Technical Working Group through NGEN communicated to the Legal Committee of the National Assembly indicating reasons why the proposal and Bill published by Hon Chepkonga were unacceptable. The chairperson and vice chairperson of NGEN as well as chairperson of KEWOPA accompanied by some female MPs who appeared before the Justice and Legal Affairs Committee sitting in Mombasa deliberating on comments received from the public to give views on the proposed Chepkonga Bill. The issues raised included:

1. By introducing the word ‘progressive’, the amendment claws back the gains Kenyans have made in achieving gender equality and inclusion in political leadership as it makes the timeline for achieving the not more than two-thirds gender principle as envisioned in the Constitution indefinite. This was not good for development of the country as it would leave behind a half of its population (women),
2. The not more than two-thirds gender principle is anchored in Article 27 of the Constitution within the Chapter on Bill of Rights. The proposed amendment negates the principle is retrogressive and must, therefore, be approved through a

³⁰ Ibid

referendum. Article 27 falls under the sections of the Constitution that require a referendum. This is not cured by amending Article 81 as is the case herein.

3. The amendment cannot be passed in isolation. It would bring conflict with Article 27 (8) which provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. The law proposed here cannot limit the principle established.
4. In the interest of justice and implementation of the Constitution, the Bill should be withdrawn.

At this meeting, Hon Chepkonga ordered the team ejected from the meeting.

Chepkonga's Bill went through the first and second readings but never proceeded to the third. Meanwhile, the proposals he made to give effect to Article 100 of the Constitution have not been debated either. To date, Article 100 remains unlegislated despite the five-year period given by the Constitution and the one-year extension given by Parliament having lapsed. The Technical Working Group has been on alert just in case there is a likelihood that the Chepkonga Bill would be put on vote without notice since it had gone through second reading.

Determined to ensure that the Chepkonga Bill did not sail through, NGENC wrote to the Speakers of both National Assembly and the Senate to express its members' dissatisfaction with the Bill³¹. The Speakers never responded to any of the letters.

2.4.6 The Constitution Amendment Bill Number 4 of 2015: The Technical Working Group Bill or the Duale 1 Bill

The Bill was adopted from the proposal by Technical Working Group earlier presented to Hon Cecily Mbarire with some variations. The Constitution Amendment (No. 4) Bill of 2015 sought to amend the Constitution to ensure that the membership of the National Assembly and Senate conform with Article 81 (b) that not more than two-thirds members of elective public bodies shall be of the same gender. The Bill sought to create special seats to ensure the realisation of the gender principle beginning with the 12th Parliament for a period of 20 years. By then it is hoped that a level playing field would have been created and, thereafter, both genders could compete on an equal footing. In support of the Bill, the Technical Working Group observed the following:

- It would ensure that at any one time, the August House would constitutionally keep to the two-thirds gender rule representation.
- It contained a gender-neutral provision and would apply in the event the tide changed to the disadvantage of men.
- It was a simple and direct formula that adhered to the principles on legislation on

³¹ See letters to Speakers of the National Assembly and Senate.

elections as outlined in Article 82 of the Constitution.

- It protected and guaranteed the gains already made in the Constitution: Reserving elective positions of 47 county women MPs and six women nomination seats.
- It provided room to encourage election of women in order to limit the extent of its application through proposed additional amendments to existing legislation.
- It was a topping-up mechanism that would only be activated if voters did not elect at least one-third of either gender. These additional members are nominated, either men or women, proportionately from party lists of qualifying political parties to meet the two-thirds gender threshold in accordance with Article 90 (2).



NGECC Chairperson Winfred Lichuma with Speaker of the National Assembly Hon Justin Muturi.

Surprisingly, the proposed Duale 1 Bill on first reading was seconded by chair of the Parliamentary Justice and Legal Affairs Committee Hon Samuel Chepkonga, who left the House gaping since members were not sure if he had changed his mind from what he had earlier tabled introducing the word 'progressive' to amend Article 81 (b) of the Constitution to have the gender principle achieved progressively.

The Duale Bill was published on July 24, 2015. Its first reading was on July 30, 2015. It was introduced for a second reading on March 22, 2016, and debate finalised on April 19, 2016.

There was reason to believe that the Bill would be passed as there had been extensive lobbying of male MPs by their female counterparts to marshal the requisite numbers on the day of the vote. In the initial division, the Bill got 195 votes out of the minimum 233 votes required to pass a Constitution Amendment Bill. During the second round, the Bill garnered 178 votes and the Speaker ruled the motion negative.

What is notable from the debate is that realisation of the not more than two-thirds gender principle was seen as a women's issue and indeed was handled as such. The debate of the Bill was characterised by bitter exchanges between male and female Members of Parliament, drawing the line between the men against it and women supporting it.

Affirmative action for women was not seen as a constitutional and human rights issue, and certainly not as a development issue good for the country. The debate was a rancorous war of words between women and male MPs. This is aptly captured in the observation by Hon James Nyikal, MP for Seme Constituency who cautioned as follows:

Thank you, Hon Deputy Speaker. I have sat here very patiently listening to the debate. I start by saying that the issue of gender has been discussed for many years and it is always emotive. I sat because I have had an opportunity to work on this as my main job for three years. I have seen the value in discussing gender issues with concern, calmly and without emotions. The fact that there should be equality between the genders is no longer an issue to be discussed against or for. It is clear that we really need that quality for harmony in society³².

Notably, male MPs are on record for rejecting the Duale 1 Bill on the basis that it gives room for ‘people to nominate their girlfriends’. The bid to push the Gender Bill was lost on account of male dominance in Parliament where they argued that it was retrogressive to democracy, and that, passing it was tantamount to giving women free seats³³.

There was also the narrative that affirmative action for women is elitist and would only benefit urban women at the expense of their rural counterparts, even when there were deliberate efforts by the Commission to involve grassroots’ representatives for their contribution in interpreting the issues. Yet others argued that women in Kenya are not discriminated against and, therefore, should compete for elections the same way that men do. For instance, Hon Irungu Kang’ata had this to say during the debate on Duale Bill:

We are living in a society where people need to work for what they get. We are living in a world where people need to be competitive. We are also living in a world where we should encourage our girls to realise that you do not get anything for free. You have to work for it. The only way to work for it is to fight it out there on the ground, get elected, come here and become a fully legitimised Member of Parliament.

Others like Hon Isaac Mwaura, a nominated member representing persons with disabilities, completely failed to appreciate the need for women’s affirmative action and argued that women are not minorities and hence they should competitively vie for political positions. On the other hand, the Leader of Minority Hon Jakoyo Midiwo ran into trouble by referring to women MPs who rarely contribute to debates in Parliament and those nominated to county assemblies as ‘idlers’ and ‘busybodies’ who squander public funds³⁴.

³² See Hansard Records.

³³ See Hon Kang’ata, MP For Kiharu; Hansard.

³⁴ See Hansard records

Male MPs who are progressive supported the Duale 1 Bill. For example, Hon James Lomenen Ekomwa said³⁵:

Thank you, Hon Deputy Speaker, for giving me this opportunity. I stand to support this Bill with strong reasons. What I am is because of a woman. The first reason why I support this Bill is because it is a dedication to our mothers because were it not for them, we could not be here. The President and his Deputy could not be here. All the men could not be here. What appreciation do you have for your mum who took care of you? She persevered and carried you for nine months and took care of you in your early years. What thanks will you give to her?

This Bill appreciates women. That is not enough. The way you see me – I am very smart – it is the work of a woman. If Kenya stays without women, how will it look like? I want to tell the men who are here that, if we support this Bill, we will have a beautiful Parliament, well decorated, clean and entertaining. I also support this Bill because, in all our homes, the people who have been very responsible and taking care of them are women. Even if you analyse critically, women leaders in the world are very responsible and passionate. For men, it is biblical that a man will survive through sweat. Even when it comes to the obligations that we have, I am sure women leaders take care of dependants and needy in the community more than men. I have proof of that.

Once women have been given the opportunity to lead this nation, I am very sure we will have responsible leaders. The needy in the community will be taken care of and we will have honest and responsible leaders. Let me confess today that I am a philosopher. I have learnt the philosophy of women; the feminism philosophy. I have discovered where discrimination against women came from. It is because of historical injustices of culture and what we call Eurocentrism. Even philosophers like Aristotle and Plato were all against women. They came up with ideas that oppressed them and never gave them opportunities. Maybe, they felt threatened. I want to support assertions by one of the philosophers called Heraclitus that: "You cannot step in the same river twice." Everything changes.

The historical dictums we have heard that women cannot perform are not true. Even when it comes to examinations, girl schools have been winning and getting 'As'. They have been performing well and we have mathematicians. Why do we doubt them? It is not written in the Bible that they cannot perform. We are all created in the image of God and we all bear the superscription of God. Why are we threatened?

I want to challenge the men here because this Bill is very good. By passing it, Kenyans will be very clever. They will say since women have been given these opportunities, they will elect more men. The more men elected, the more women will be nominated. It is an advantage and I do not know whether men know that. For example, if 290 men will be elected, automatically two-thirds of that figure will be nominated women. So those electing will have that consideration. Why do we worry? This is another question for us men.

³⁵ See Hansard records

3.0 Lobbying Strategies to Support the Duale Bill

A clear strategy was developed under the leadership of NGEK that would be used by the Technical Working Group in order to ensure that the draft Bill was passed in both houses. The strategies included but were not limited to: engagements with the various institutions of Parliament, the Presidency, civil society actors, media, persons with disabilities, private sector actors, county governments and assemblies, religious leaders, various development partners, UN agencies, constitutional commissions, international and regional committees, professional bodies and the public.

Drawing from the lobbying strategy, NGEK developed a powerful ten-point lobby message in which it called for support of Duale 1 Bill. The message was published in print media with the help of FIDA Kenya and put in the mailbox of every Member of Parliament. The Commission led members of the Technical Working Group who conducted over 10 key lobbying forums with various stakeholders at national and county levels aimed at influencing the National Assembly to pass the not more than two-thirds gender Bill. The Commission, through the support of the International Republican Institute (IRI), rolled out targeted SMS messaging to MPs and strategic influencers seeking support for the Bill. The ten-point message is captured below.

In their annual work plan 2015-2016, the Commission programme departments con-

The Constitution of Kenya (Amendment) Bill 2015: Ten Points to Note on the Not More than Two-Thirds Principle

1. The Constitution of Kenya provides for the twin principle of equality and non-discrimination stating that men and women are equal and have a right to equal treatment, opportunities in political, economic, cultural and social spheres. Discrimination is forbidden. Article 27
2. The State is expected to take legislative and other measures including affirmative action programmes and policies designed to redress past discrimination and implement the principle that not more than two-thirds of members of elective or appointive bodies shall be of the same gender. Article 27 (6) and (8)
3. The general principles for the electoral system shall include that not more than two-thirds of members of elective public bodies shall be of the same gender (81
- (b)). This principle has a mechanism for implementation in the County Assemblies and not in the National Assembly and Senate. (See Article 177 (1) (b) in comparison to Articles 97 and 98)
4. The mechanism provides that membership of the County Assembly is made of elected members and “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”. Article 177 (1) (b).
5. The Constitutional Amendment Bill 2015 seeks to provide for a similar mechanism in Article 177 (1) (b) into the National Assembly and Senate to ensure that the not more than two-thirds gender rule is always met in the two Houses in circumstances where any gender is not directly

elected in single member constituencies.

6. The amendment if passed will apply after the 2017 General Election. Members elected on such special seats or affirmative action seats may only serve for two terms including the 47 women elected from counties in Article 97 (b).
7. The Affirmative Action provisions do not exclude any person from contesting an election in the single member constituencies.
8. The consequential effect of the proposed amendment is that it triggers the amendment on the guidance for allocation of party seats in Article 90. It also calls for amendments of the Elections Act and Political Parties Act to require consideration of competitiveness for the special seats.
9. Affirmative action needs to be time-bound. The amendment introduces a sunset clause of 20 years to review the status and applies to all Houses including the County Assemblies.
10. The proposed constitutional amendment is most direct, simple and least invasive to the content of the Constitution. It will ensure that at any one time the august House is constitutionally constituted, is gender neutral and guarantees gains already made and encourages women and other special interest groups to vie and seek to be elected. In order to pass the constitutional amendment, there needs to be a super majority of 233 votes.

Ask your MP to support the Hon Aden Duale Bill that provides for the realisation of the not more than two-thirds gender principle.

Courtesy IRI and NGEN

18 counties

Those visited by the Department of the Elderly and Persons with Disability to present the proposed Bill

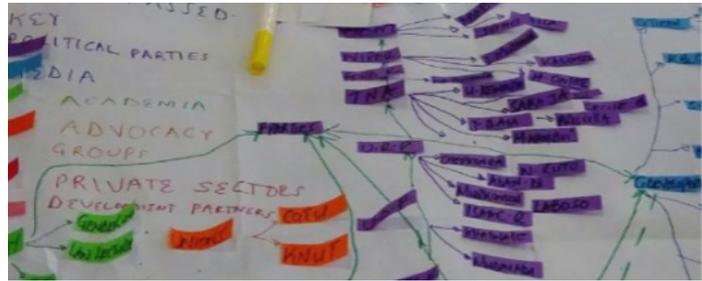
ducted several county-based interventions and coordinated public debates and discussions on the subject. The Department of the Elderly and Persons with Disability visited 18 counties to present the proposed Bill and variants of the same developed with the leadership of Kenya Disability Parliamentary Association (KEDIPA).

In total, the department reached 1,800 persons with disabilities with messages between January 2015 and February 2016 and held six sessions with KEDIPA.

3.1 Media Engagements

From the onset, the topic of the realisation of not more than two-thirds gender rule generated debate in both electronic and print media. Reporters reminded parliamentarians of their obligation. Several news anchors hosted debates on the subject. These included Yvonne Okwara of KTN, Citizen TV's Hussein Mohammed, Ann Kiguta and Uduak Amimo, Sibi Okumu of KISS TV and Debarl Aenea of NTV. Other mainstream TV stations such as K24 and KBC dedicated prime time shows to discuss the issue with resourceful panellists. Similar shows were held as general discussions on QTV and other urban and community FM radio stations. The Commission worked with the media and provided speakers for shows as need arose.

Brainstorming to develop a media strategy. NGENC organised several briefing meetings with reporters through the Association of Media Women in Kenya (AMWIK). Structured briefings were made to the media through formal press statements and releases.



Seeking to influence editors, NGENC met the chair of the Kenya Editors’ Guild Mr. Linus Kaikai on October 21, 2015 to seek partnership in support of the Duale 1 Bill that was pending before the National Assembly. The purpose was to organise a meeting with members of the Guild. The Technical Working Group subsequently held a meeting with the editors on the October 8, 2015 and shared information on the constitutional requirements and need to implement the two-thirds gender principle.

The editors agreed to partner with NGENC in support of enactment of the Bill, by writing and highlighting why it was important for Members of Parliament to pass the two-thirds Bill pending in the Houses. Indeed they lived to their promise since there was increased reporting on the importance of finding a framework for implementing the two-thirds gender rule³⁶.



Kenya Editors’ Guild Chairman Linus Kaikai makes a point at a breakfast meeting organised by NGENC to get media support for the two-thirds gender principle.

On November 18, 2015, the Commission met senior editors and shared information on the need to support full implementation of the Constitution with regard to the two-thirds gender principle. The senior editors pledged to support the advocacy and to disseminate information to the public through print and electronic media. They further agreed to host talk shows on the issue and liaise with NGENC which would provide experts.

The media further committed to help change the narrative that casts gender issues as purely women’s rather than societal issues. The positive effect of the media engagement was manifest in their reporting especially from late November 2015. On March 7, 2016, NGENC had Anne Kiguta, a senior female anchor to moderate a panel discussion in Nairobi during the celebration of the International Women’s Day. Engagements with the media to strengthen this partnership continued during the debates in Parliament. Throughout the lobbying period, the Technical Working Group members made appearances to debate the matter in the media. Other actors led by AMWIK held several meetings and consultations with editors and journalists. In all the meetings, NGENC was invit-

³⁶ See records of news headlines and daily topical issues.

ed to make presentations on the two-thirds gender issue. In 2015, AMWIK conducted a study on the frequency and intensity of coverage of gender equality issues in mainstream media³⁷. The report showed that NGECE was the leading agency in covering matters of gender equality in mainstream media. The report showed the Commission Chairperson Winfred Lichuma as the most vibrant in the country on the subject.

3.2 Engagement with Religious Leaders

National Gender and Equality Commission considered the religious community important partners in seeking support for the Bill. On November 6, 2015, officials of the Commission had a breakfast meeting with the Executive of the Nairobi Mothers' Union of the Anglican Church. In this meeting, the team shared information on the ongoing advocacy for enactment of the Constitution of Kenya (No.4) Amendment Bill of 2015 to implement the not more than two-thirds gender principle. The Commission found the Mother's Union team quite engaged on issues of gender inclusivity and they readily agreed to disseminate information to their members and to be partners in advocacy.

On August 26, 2015, NGECE Chairperson held discussions on the not more than two-thirds gender rule with Cardinal John Njue, head of the Catholic Church in Kenya. The purpose of the meeting was to explore support from religious leaders in making calls for political support and goodwill towards passage of the rule. His Eminence was in total support of the call and NGECE hoped the message was passed to Kenyans through the church. Subsequently, NGECE made follow up meetings with the Catholic Women's Association patron and the Justice and Peace team.

On December 8, 2015, NGECE met Archbishop Eliud Wabukala, the then head of the Anglican Church in Kenya. The meeting focused on the need for gender inclusiveness, notably a key theme in the denomination. It was agreed that the Constitution should be fully implemented and in particular the need to facilitate implementation of the two-thirds gender principle by enacting Constitution of Kenya (No.4) Amendment Bill of 2015. The Archbishop pledged to support the process.

The Commission continued to engage with the Archbishop by telephone. He was briefed on the status of the debate of the Bill in the National Assembly, and he agreed to issue a statement encouraging enactment of the Bill. At his request, the Commission prepared notes in point form to guide him. These were also shared for use by other religious leaders.

Further, NGECE continued to engage with the leadership of the Women's Guild of the Presbyterian Church of East Africa (PCEA) and shared with them via email the one-pager for advocacy on the implementation of the two-thirds gender principle.

³⁷ <http://amwik.org/wp-content/uploads/2015/08/Media-Monitoring-Report-Jan-July-2015.pdf>.

3.3 Engagements with Constitutional Commissions and Independent Office Holders, Civil Society Organisations, Professional Bodies and Private Sector



Hon Samuel Chepkonga (left) with former Chairperson of CAJ Otiende Amollo (centre) and KNCHR Chairperson Kagwiria Mbogori.

The Technical Working Group identified these groups as important key influencers towards passage of the not more than two-thirds gender rule and held structured meetings with their membership. Through the forum of chairpersons of constitutional commissions and independent offices, NGENC made presentations and called for the support of the chairs in passage of the Duale Bill.

The Commission engaged with the Kenya National Commission on Human Rights, the then Commission on Implementation of the Constitution, Commission on Administrative Justice, Commission on Revenue Allocation as well as the National Cohesion and Integration Commission leadership in calling on Kenyans to consider voting for women in the 2013 General Election.

The Chairperson of the Commission on Revenue Allocation Micah Cheserem made a public statement indicating that it was costly not to elect women since they would be added using nomination through political parties at the expense of tax-payers. Cheserem warned that the consequences for not meeting the one-third gender stipulation in the Constitution would be dire adding that Kenyans would be forced to pay KSh4 billion annually or KSh20 billion for five years to finance women nominated to the Senate as National and County Assemblies.

While his message seemed to support the women's agenda, on the other hand, it appeared to indicate to the country that the frame of the Constitution as it were in County Assemblies was a burden to the taxpayer. Needless to say, this was a backlash.

National Gender and Equality Commission held several meetings with the Law Society of Kenya in an attempt to involve the lawyers' body in the two-thirds gender discourse. The Technical Working Group hoped that LSK members would help in

giving legal guidance and if need be, provide *pro bono* litigation services in support of the two-thirds gender rule. The Commission Chairperson, in particular, made a presentation to the members of LSK in 15 Continuing Legal Education (CLE) sessions across the country between January 2015 and February 2017. There were mixed reactions from the lawyers. While some supported the proposed Bill, others indicated that affirmative action for women in political leadership was not necessary at the moment since Kenyan men and women had attained parity, especially in the legal circles. The Technical Working Group was disappointed that there was no concrete action from LSK despite the relentless engagement.

Numerous joint meetings were held to build consensus among CSOs who seemed sharply divided on the agenda. For example, while some CSOs supported the Duale Bill led by FIDA (K), others led by the National Women Steering Committee under the leadership of Daisy Amdany and the National Assembly Human Rights Caucus chaired by Hon Augustino Neto supported the Green Amendment Campaign (GAC).

The Green Amendment Campaign proposed a formula for the implementation of the two-thirds gender rule through reserved seats for women that guaranteed implementation of the two-thirds gender rule at the ballot in the National and County assemblies. In the Senate, the Bill proposed parity. The campaign had two formulas (Formula 136 or 94), one that retains the current number of constituencies at the national level, and the second one to reduce the constituencies to the previous 210. Both formulae provided for nomination slots to ensure five (5) percent representation of persons with disability. The Green Amendment Campaign collected over 700,000 signatures and hoped to galvanise another 800,000 signatures to push for a popular initiative through the county assemblies. This was never pursued after the motion was lost at the floor of the House raising questions as to whether it was a genuine move.

The National Gender and Equality Commission called on Hon Martha Karua to mediate the teams to support one process and speak with one voice. The entry of Karua into the discussions gave it impetus on two fronts. First, she held reconciliatory sessions between the Technical Working Group position and CSOs. Secondly, she became the entry point for NGEK and Technical Working Committee who held many engagements with the political parties' leadership, especially the Coalition for Reforms and Democracy (CORD) team. Karua facilitated NGEK to meet with CORD leadership. The leaders issued a joint statement in support of the two-thirds gender rule during a meeting held at Serena Hotel on June 17, 2015³⁸.

An initiative spearheaded by the Centre for Multi-Party Democracy-Kenya (CMD-K), known as the *Thuluthi Mbili za Mama Twazitaka Sasa*, was running side by side collecting signatures from Kenyans for a popular initiative if the parliamentary process failed. The Centre, under the leadership of Njeri Kabeberi, mobilised members and was influential in bringing women's leadership from the 47 counties to make a loud

³⁸ <http://www.ngeckenya.org/news/6089/hope-as-parliament-agrees-to-build-consensus-on-two-thirds-gender-rule>

and strong call for the support of Duale Bill. It was a plan B option in the event that Parliament failed to pass the framework proposed by the Technical Working Group. So far, it has collected over 300,000 signatures which are in its custody but the process was suspended to pursue the Duale Bill. It was a very expensive exercise that lacked support to enable completion. The Chief Executive Officer made an exit to pursue other interests and there was no support from the new leadership at CMD despite her having made assurances.

FIDA (K) was represented in the Technical Working Group by then Executive Director Christine Ochieng' (now a judge of the High Court), who actively participated in the process. In undertaking lobbying, FIDA organised campaign lobbying meetings across the country and more intensively in 20 counties. They organised women's leadership within communities to look for their MPs and lobby them to pass the not more than two-thirds gender rule. One week to the day the Duale Bill was to be voted for, having agreed with NGEK, FIDA (K) sent out the message captioned below:

Dear Hon MP, the Constitution Amendment Bill No.4 is coming up for voting on Wednesday April 27, 2016. Please note that voting for constitutional bills is public. We will be watching and counting on you to vote for the Bill. Thank you.

The message was part of the lobbying and communication strategy adopted to persuade Members of the National Assembly to pass the Bill. This message angered both male and female MPs who considered it a threat to them. Many used the message as an excuse to vote against the Bill.

In a dinner meeting supported by FIDA (K) and Women Empowerment Link (WEL) called by KEWOPA to lobby the male MPs, FIDA leadership was rebuked and accused of causing anxiety among male MPs. The blame did not end at FIDA. In one meeting Hon Cecily Mbarire and Hon Duale confronted Lichuma and indicated that NGEK and FIDA had failed to respect the MPs and contributed to the defeat of the Bill by sending out threatening messages.

In her response, the Chairperson indicated that she did not see anything wrong with the message as a lobbying tool. In any case, MPs would come looking for votes from the members of the public. The matter remained a bitter pill in the mouth of Hon Duale who constantly reminded Lichuma that the message contributed to the defeat of the motion. Lichuma did not buy into that argument but held that the country needs to address issues of patriarchy and culture to give women equity in law and by extension political leadership.



Hon Isaac Mwaura (centre) makes a point at a meeting to discuss the two-thirds gender principle. With him is NGECE vice Chair Simon Ndubai (left).

This was unfortunate considering the effort made by NGECE and the Technical Working Group members towards the process. However, in analysing the message, it was realised MPs took it out of context. KEWOPA had identified dinner meetings as instrumental in providing a conducive environment for female MPs to openly discuss the Bill with their male counterparts. The dinner meetings offered male MPs an opportunity to openly share their misgivings about the not more than two-thirds gender rule. The UN Women, FIDA, NGECE and WEL were at the forefront in supporting the meetings. They financed at least three dinner meetings on this matter. In addition, UN Women financed several consultative breakfast meetings held in relation to the subject.

The engagement with the National Women Steering Committee and Hon Neto through the expertise of Hon Karua and others, saw the teams join the lobbying process by the Technical Working Group towards the passage of the Duale Bill. Hon Ken Okoth, a member of the Green Amendment Campaign led support of the movement to the Technical Working Group proposal. He appeared in several discussion panels and media in support to the Technical Working Group proposal. At the time of the vote, the CSOs and NGECE spoke with one voice. However, the Bill was defeated on the floor of the House.

On November 25-26, 2015, NGECE partnered with the International Commission of Jurists (ICJ) and held a conference at Swahili Beach in Mombasa. The theme of the conference was Achieving Gender Equality in Political Processes, From Theory to Practice: Lessons from Africa. The Commission with support from the Norwegian government commissioned 10 articles and technical papers presented at the conference. There was robust discussion on the need to fully implement the Constitution and in particular the not more than two-thirds gender principle. The outcome of the conference was a report of the workshop proceedings published by NGECE and a book edited by Japheth Biegion³⁹.

On December 7, 2015, NGECE met the outgoing Commission on Implementation of the Constitution (CIC) at their offices and underscored the need for them to highlight the outstanding legislation and need to implement the not more than two-thirds gender prin-

³⁹ This book is quoted earlier

ciple in their final report. They agreed and issued a supportive press statement.

3.4 Engagement with Parliament

The objective of engaging Parliament was to lobby all members of the National Assembly and Senate, the two Speakers, Committee chairs and leaders of Majority and Minority. National Gender and Equality Commission engaged various groups among them, Coalition for Reforms and Democracy (CORD) parliamentary group which pledged to support the Technical Working Group Bill.

Respective party members of CORD – ODM, Wiper and Ford Kenya – also individually supported the Bill. The Commission further met the CORD Women Parliamentary Caucus and discussed in detail the various options open to them for lobbying fellow parliamentarians as well as political parties for support. They committed to be ambassadors of the Bill and as women, promised to go an extra mile to ensure its enactment.

Following NGENC meeting with CORD women parliamentarians, Hon Gladys Wanga on November 11, 2015, raised the issue of prioritising the Bill for debate on the floor of the National Assembly. The Coalition of Reforms and Democracy Women Caucus with the support of women parliamentarians from the ruling party presented a memorandum to Parliament, explaining the need for affirmative action law.

With technical support from KEWOPA, among others, the Commission reviewed the Hansard of the debate and division vote session of Duale 1 Bill. The Commission prepared a brief of critical issues raised, gaps noted in the discussions among members and a collection of concerns and questions raised on the floor.

A detailed paper guiding proposers of the motion was prepared, with each issue getting adequate responses. Anticipated questions were also enumerated and responses provided. The paper was shared with all female MPs for reference in raising points of order, framing arguments and thoughts during the debate session on the second voting of the Duale Bill.

3.5 Lobbying the President, Deputy President and Other Senior Politicians

In 2015, National Gender and Equality Commission (NGEC) lobbied the President, Deputy President, Opposition chiefs, Speakers of the National Assembly and Senate as well as KEWOPA. The message was that the matter of not more than two-thirds gender rule required concerted efforts across the political divide and it was important for them to rally their members in Parliament to pass the Duale Bill. Neither side had the numbers in both National Assembly and Senate to pass a constitutional amendment bill which requires at least two-thirds of the members to be actualised. The Commission sought political goodwill from these party chiefs noting that just mere rhetoric will not be indicative of support for the two-thirds agenda.

**KSh20
billion**

Is the cost for not meeting the one-third gender stipulation in the Constitution



President Uhuru Kenyatta (seated right) joins women parliamentarians and members of the Technical Working Group for a photo after the launch of the 'Tubadili Tusitawi' campaign.

These forums were helpful in articulating different entry points on the not more than two-thirds gender principle and some went beyond elective offices to look into the appointive as well as public offices while others advocated for the overall statutory reform to mainstream the principle.

The Kenya Human Rights Commission (KHRC) made proposals advocating for a comprehensive equality law envisaged under Article 100 of the Constitution⁴⁰. The advocacy targeted legislators to marshal their support for the Duale 1 Bill and KE-WOPA was very active on this front.

3.6 Lobbying County Governments

The Technical Working Group lobbied various arms of the county governments. The National Equality and Gender Commission engaged the 47 governors to garner their support. At the community level, workshops were led by FIDA. In 2015, the Technical Working Group held meetings with the Council of Governors in Naivasha and requested them to support the proposal to realise the two-thirds gender principle before the next General Election. The Council of Governors had attended the meeting for all nominated women Members of the County Assembly organised by civil society. The nominated MCAs were identified as ambassadors to bring the agenda forth in all committees of the County Assemblies. The Technical Working Group made presentations about the framework in devolution conferences held in 2014, 2015, 2016 and 2017. Presentations were also made to County Assemblies Annual Congress of 2014, 2015 and 2016 as well as in The Speakers' Forums held between 2014 and 2016.

In 2015, NGECE held a forum with all female deputy governors at the Windsor Golf Hotel and Country Club in Nairobi to discuss, among others, their role in advocat-

700,000

The number of signatures collected by the Green Amendment Campaign

⁴⁰ Synopsis of the Affirmative action Bill 2013

ing for the entrenchment of not more than two-thirds gender principle in county governance and 2017 General Election. From then on, the female deputy governors became a critical entry point for the Commission's advocacy and lobbying activities at county, regional and International levels.

3.7 Lobbying at Regional and International Levels

Through the periodic reporting mechanism at the regional and international levels, such as the Commission on the Status of Women (CSW), International Convention on Persons with Disabilities (ICRPD) and the African Commission on People's and Human Rights, NGECE ensured inclusion of progress reports on fair representation of women and special interest groups in the governance structure. This included documented progress made in the identification of a formula for the realisation of the not more than two-thirds gender principle.

3.8 The Sijeny Bill

The Sijeny Bill was supported by NGECE as an alternative measure at the Senate. Though the Bill was drafted at the same time with Hon Cecily Mbarire's Bill (Duale 1 Bill), the Sijeny Bill has held back after the Government published Duale 1 Bill. The Commission and by extension, the Technical Working Group considered this Bill as the Plan B measure for triggering if all other measures failed.

The Sijeny Bill, therefore, gained momentum in 2016 after Parliament extended the deadline of drafting Article 100 and two-thirds gender rule legislation by one year ending August 27, 2016. Even after the Attorney General had dissolved the Technical Working Group, the mandate of NGECE allowed it to continue engaging with the matter of the not more than two-thirds gender rule. The Commission, therefore, continued with activities of the two-thirds gender rule and pushing for fair representation of special interest groups beyond 2016.

The Bill proposed to amend Article 97 of the Constitution on the composition of the National Assembly and Article 98 on the composition of the Senate to ensure that not more than two-thirds of its members are of the same gender.

It proposed the creation of special members' seats necessary to ensure that not more than two-thirds of the membership of the National Assembly is of the same gender. The elections for the special seats would be undertaken in accordance with Article 90 of the Constitution. It stated that a person who has been elected for a party-list seat whether in Parliament or County Assembly would be eligible for election for a party list seat only twice. The Bill further provided for a sunset clause so that the affirmative action provisions on gender representation would be reviewed 20 years from the date of the next General Election. If passed, the Bill would take effect with the 2017 General Election.

The Commission did a lot of lobbying for this Bill which was ready for the second reading on February 10, 2016 but debate was deferred following a point of order raised by Senator Bonny Khalwale that the Bill concerned the sovereignty of the peo-

ple and was, therefore, a matter for referendum as provided in Article 255 of the Constitution. The Commission provided an advisory on the matter to Senator Sijeny, the sponsor of the Bill, for consideration by the Speaker.

The advisory was a brief of how to frame arguments while presenting the Bill as well as frequently asked questions and corresponding responses. A vote was scheduled to take place on August 18, 2016 but failed owing to a quorum hitch. Only 30 out of 67 senators were present in the House and as such, the vote was postponed to the following week, Wednesday August 24, 2016.

In another Senate Special Sitting and as fate would have it, there was no quorum and thus no vote. Moses Wetang'ula, Senator for Bungoma, intimated that Senator Sijeny "wanted to reserve herself a nomination as per the provision on two terms nomination"⁴¹.

On February 23, 2017, the Bill was finally put to the vote and defeated. Many women legislators were absent despite being aware of the voting time. The Bill needed support from at least 45 senators to move to the next stage, but it was only supported by 23 out of 67 who were present during voting time.

Senators Mutula Kilonzo Jr and Kennedy Mong'are pleaded with Speaker Ekwee Ethuro to defer the Bill as it could only be reintroduced in the House after six months, but he turned down the request. The senators opposed to the Bill said the Senate was a House of equity and could not be subjected to the nomination rule. Members were opposed to the clause that allowed one to be nominated more than once. They indicated that one should only benefit from the affirmative action once. In reaction to the loss, NGEN Chairperson gave her views captured in the Standard newspaper as follows.

Our politicians have decided that the gender agenda does not matter. That is why they have not sought to give a framework to implement the two-thirds gender rule. I tell parliamentarians that after the August 8, 2017 General Election, if the numbers are not achieved, we shall seek to dissolve Parliament as per the Constitution. I don't understand why we have reduced the two-thirds gender rule to be a woman issue. This is a national issue and there is a looming national crisis if we fail to realise it. Parliamentarians have refused to deal with the matter. I don't expect political parties to give women an opportunity in the polls because the same people who have frustrated the gender rule in Parliament own the parties. The argument that women should be as competitive as their male counterparts is neither here nor there. There is no political good will over the matter from the Presidency.

3.9 'The Compromise Bill' – Constitutional Amendment Bill No.6 of 2015

Towards the end of 2015, members of KEWOPA, without any reference to NGEN or other interested parties, introduced a new bill (the Compromise Bill to be known as 'Duale 2'). The Kenya Women Parliamentary Association had been tasked with per-

⁴¹ Moses Wetang'ula, see Hansard.

suading Hon Chepkonga to withdraw his ‘Progressive realisation’ Bill and instead support the Duale 1 Bill.

However, instead of getting the required support for the Duale 1 Bill, KEWOPA published the ‘Compromise Bill’ or the ‘Duale 2 Bill – Constitutional Amendment Bill No.6 of 2015’. In a meeting organised by NGECC at the Panafric Hotel in December 2015, KEWOPA leadership and a few of its members explained the origin of the Compromise Bill.

The women parliamentarians claimed that their male counterparts in the National Assembly were not upbeat on the Duale 1 Bill and, therefore, encouraged them to rethink through a framework that would reduce the number of women to be nominated should an election fail to raise the minimum numbers required to meet the threshold. Neither NGECC, the Technical Working Group nor civil society organisations supported this Bill. The Duale 2 Bill proposed a formula that would lead to one-third of the existing 290 seats in addition to the 47 county seats and the six nominated seats instead of providing a principle within the entire membership of either Houses – National Assembly and Senate.

In case of the National Assembly, one-third should be a factor of 349 members (total membership) less either one gender already elected or nominated in the House. The Compromise Bill would, therefore, negate the not more than two-thirds gender principle as envisioned in the Technical Working Group proposal and Constitution. Proponents of this Bill argued that women should not expect free seats but vie for them, just like men do.

The female MPs also seem to have warmed up to this narrative, with the 16 elected members arguing that women should vie for political seats just like they had done. The 47 women elected from the counties were also unhappy with their seat that did not have monetary reward like the Constituency Development Fund (CDF) despite it having been declared unconstitutional. This was the downfall of the joint women’s lobbying.

Based on these arguments, it is clear that the legislators had a total misunderstanding of the constitutional imperatives for affirmative action. This additional Bill brought in confusion and frustration. The Bill was hurriedly prepared and, therefore, had many technical omissions. The computations proposed in the Bill were wrongly conceived



Members of KEWOPA Hon Rachael Shebesh (left) with Hon Florence Kajuju.

and had it proceeded to the floor of the House for debate, it would have failed on technical soundness.

The National Gender and Equality Commission rejected the Compromise Bill and in a meeting with KEWOPA members and other stakeholders indicated to them that the Bill was contradicting a constitutional principle and stakeholders would not support it. This confusion was thankfully resolved in February 2016 when KEWOPA agreed to abandon the Compromise Bill and threw their support behind Duale 1 Bill. This came by after a number of consultations between NGECE, stakeholders and KEWOPA. However, the Bill remains alive in the House.

3.10 The Constitution of Kenya (Amendment) Bill, 2018

While various matters on two-thirds gender principle were pending in court, Hon. Aden Duale on February 12, 2018 published the Constitution of Kenya (Amendment) Bill 2018, which is similar to the Compromise Bill in terms of content. Upon review, NGECE was convinced that despite its earlier position on the Compromise Bill, its application would ensure both houses of Parliament would meet the two-thirds gender principle.

The Commission, therefore, resolved to support the Bill and urged Parliament to pass it. However, the Commission, upon a call for submission of memoranda, raised a few issues for reconsideration by Parliament. These issues included seeking amendment of Clause 2 which provided that a beneficiary of the affirmative action seat could be nominated for a maximum of two terms so that beneficiaries could only be nominated once.

The Commission argued that these positions being for affirmative action ought to empower as many women as possible after which they could join competitive politics. Other than the gender affirmative action provision, the Commission proposed that Article 97 (1) (c) which addresses other special interest groups be amended to address all marginalised groups in Article 100. The Commission proposed that instead of the affirmative action provisions lapsing after 20 years, Parliament should review them and have a mechanism which guarantees their existence for posterity.

On October 17, 2018, the Commission, with support from IDLO, organised a half-day parliamentary legislative dialogue on the two-thirds gender rule. The meeting brought together stakeholders that included women in leadership, chairpersons of Senate committees, members of Kenya Women Parliamentary Association (KEWOPA), leaders of both Majority and Minority in the National Assembly and in the Senate, distinguished members of the Bench and the Ministry of Public Service, Youth and Gender Affairs. These were the key implementers of the Constitution of Kenya Amendment Bill No.4 of 2018. The purpose of the meeting was to set the environment for the second reading of the Bill and to deliberate on the contents.

Following the issues and concerns raised by the various speakers in the meeting, it was agreed that the Commission's legal team joins forces with MPs Hon. Alice Wahome, Hon. Purity Ndirici and Hon. Millie Odhiambo as well as Senators Kipchumba Murkomen and James Orengo and Ms. Joyce Majiwa to give the Leader of

Minority Hon. John Mbadi a write-up for presentation before the House by Tuesday, October 23, 2018. It was also agreed that the State Department of Gender Affairs becomes part of the membership of the committee that was to do a clean-up of the Bill.

On November 19, 2018, the Commission held two meetings with various stakeholders. The objective of the meetings was to derive strategies for the successful lobbying of Members of Parliament to pass the Constitution of Kenya (Amendment) Bill 2018 which was due for second reading.

The first meeting had 81 members who comprised the Editors Guild, AMWIK, reporters from various media houses, Kenya Human Rights Commission and the KEWOPA leadership. The objective of the meeting was to urge journalists to provide an in-depth analysis and coverage of the Bill and to demystify certain aspects of the Bill that the public had raised concerns about, particularly the cost implications of implementing the principle. The journalists were taken through the contents of the Bill and informed about the cost implications of implementing it. In the afternoon of the same day, the Commission held talks with KEWOPA. The meeting had 71 participants who were once again taken through the Bill's contents and also informed about the cost implications of implementing it. The members, thereafter, came up with strategies of ensuring that the Bill was passed in parliament.

Debate and Voting

The Constitution of Kenya (Amendment) Bill 2018 came up for second reading on November 20, 2018. Leader of Majority Hon. Aden Duale had promised to call for a vote immediately thereafter but because of lack of quorum he requested the vote/division be deferred to the following week on November 28, 2018 to allow for more lobbying.

Sadly, however, when the date for voting came, there was again no quorum in the National Assembly. The House could not raise the minimum number of 233 members required to subject the Bill to a vote. Consequently, the Majority Leader moved a motion to further defer voting on the Bill to February 2019.

4.0 Other Initiatives Seeking to Implement the Two-Thirds Gender Principle

4.1 The Court Process

The National Gender and Equality Commission supported the litigation by civil society organisations seeking to compel Parliament to enact the necessary legislation. One of the matters was Nairobi Petition No.182 of 2015 filed by CREAM versus the Attorney General and CIC. On June 26, 2015, the High Court through Lady Justice Mumbi Ngugi delivered a ruling ordering the Attorney General, the Commission on Implementation of the Constitution and Parliament to draft and table the necessary legislation within 40 days of the ruling.

The result was the adoption of the Technical Working Group proposed Bill (the Duale Bill) by the Leader of Majority in the National Assembly who moved it for publication as a Government Bill. In the meantime, the timeline for finding mechanisms to achieve the two-thirds gender rule was extended by one more year from the date set by the Supreme Court to August 27, 2016.

Sylvester Mbithi, advocate for NGEK, addresses the media after a court ruling.



On July 25, 2015, the Constitution Amendment (No.4) Bill of 2015 was published and subsequently tabled before the National Assembly in line with the Technical Working Group's recommendation, and in compliance with the High Court ruling aforesaid. It was, however, clear that there would not be enough time to debate and enact the Bill before the August 27, 2015 constitutional deadline due to the 90-day period required for public participation. The National Assembly, therefore, successfully moved a motion to extend the timelines for this and other pending Schedule Five

legislations by one year, pushing the deadline to August 27, 2016. The Duale Bill was debated on March 22, 2016 at the National Assembly and subjected to a vote on two occasions – April 27, 2016 (195 votes) and May 5, 2016 (179 votes) but was defeated.

After the expiry of the deadline of the August 27, 2016, Centre for Rights Education and Awareness (CREAW) and Community Advocacy and Awareness Trust (CRAWN Trust) filed petition 371 of 2016 on September 5, 2016, under Article 261 for failure to enact a framework for implementation of the two-thirds gender principle. The Commission had been enjoined in the matter as an *amicus curiae* (friend of the court). The matter suffered some delays and did not take off for some time owing to delaying tactics employed by lawyers for Parliament through a myriad of interlocutory applications.

However, on March 29, 2017 the High Court through Justice John M. Mativo rendered its decision. The petitioners had moved to Court under Article 261 seeking orders against Parliament after it failed to enact the necessary legislation on implementation of the not more than two-thirds gender principle in line with the Supreme Court Advisory Opinion in Reference No.2 of 2012 which held that the framework ought to have been in place by August 27, 2015 as per the Fifth Schedule of the Constitution.

The court made declarations that the National Assembly and Senate had failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two-thirds of the members of the National Assembly and Senate shall be of the same gender and that such failure amounted to a breach of the rights of women to equality and freedom from discrimination as well as violation of the Constitution.

The court ordered Parliament to take steps to ensure that the required legislation is enacted within a period of 60 days from the date of the order and to report the progress to the Chief Justice. If Parliament failed to enact the said legislation within the said period of 60 days, the petitioners or any other person would be at liberty to petition the Chief Justice to advise the President to dissolve Parliament.

On April 4, 2017, the Commission issued an advisory to the Speaker of the National Assembly and Senate on the steps to be taken to ensure the court's decision was complied with within the set timelines. In particular, the Commission advised on the two (2) similar bills before the National Assembly and Senate that had been defeated several times in the respective houses. Those bills are (a) the Constitution of Kenya (Amendment) (No.4) Bill, 2015 (Duale Bill); and (b) the Constitution of Kenya (Amendment) Bill, 2015 (Sijeny Bill).

Both Bills had gone through public participation and the mandatory 90 days had lapsed since their first reading in line with Article 256 (1) (c). Clause 4 (a) of the Duale Bill and Clause 5 (a) of the Sijeny Bill have similar provisions word for word which are key provisions providing for the framework on the implementation of the principle. The Commission was of the view that because six months had lapsed in the case of the Duale Bill and that no division or vote had happened for the Sijeny Bill, it was possible under the standing orders to introduce them for another vote in the respective Houses.

The Commission further advised that Speakers of both Houses to establish a mediation committee in line with Article 113 of the Constitution that would develop a version of the bill that the Senate and National Assembly could pass and perhaps consider joint sittings to do so in view of the strict timelines. The Commission noted that the two-thirds gender principle was a matter that required a bi-partisan approach across the political divide.

The National Assembly and Senate have since appealed through the Court of Appeal under Civil Appeal No.148 of 2017 challenging Mativo’s Judgment and orders. The appeal is still pending determination.

4.1.1 Litigation on two-thirds

After the expiry of the August 27, 2015 deadline set by the Supreme Court Advisory Opinion, CREAM and CRAWN Trust filed Petition 371 of 2016 seeking orders against Parliament after it had failed to enact the necessary legislation on implementation of the two-thirds gender principle. NGEC was *amicus curiae*. On March 29, 2017 Justice Mativo made a declaration that the National Assembly and Senate had failed in their constitutional obligations to enact the said legislation and this failure was tantamount to the violation of the rights of women to equality and freedom from discrimination as well as a violation of the Constitution. The court ordered Parliament to enact the required legislation within 60 days from the date of the order. The National Assembly and Senate through Civil Appeal No.148 of 2017 challenged Justice Mativo’s decision. The appeal is pending determination.

After the August 8, 2017 elections, both Houses of Parliament still failed to reach the necessary quota to ensure the two-thirds gender principle is realised. Challenging the constitution of both Houses, two similar petitions were filed. Petition 397 of 2017 by CREAM and CRAWN Trust were co-petitioners against Parliament (NGEC is enjoined as *amicus curiae*) and Petition 401 of 2017 filed by FIDA-Kenya against Parliament and the IEBC (NGEC is an interested party). Both Petitions seek similar declaration and orders as follows:

Petition 397 of 2017	Petition 401 of 2017
A declaration that the composition of the National Assembly and Senate has failed to meet the constitutional threshold of the not more than two-thirds gender principle	A declaration that the 12th Parliament as proposed to be constituted would be unconstitutional, null and void
A declaration that the failure by Parliament to meet the not more than two-thirds gender principle contemplated under Articles 27 (8) and 81 (b) amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution	A declaration that the failure by Parliament to constitute in numbers at least a third of female representatives as contemplated under Articles 3 (2), 27 (6) and (8) and 81 (b) amounts to establishment of an unconstitutional Parliament and a breach of the fundamental rights of women in Kenya

An order in the nature of mandamus (judicial writ) directing Parliament that the first and only order of business is to pass the necessary legislation to implement the not-more-than two-thirds gender principle	An order of mandamus directed to the Respondents to remedy the continuing breach of the Constitution by taking steps to ensure that the proposed 12th Parliament passes on priority basis and within timelines as specified by this Honourable Court legislation and immediate measures to bring it to compliance with the Constitution and that will ensure that no more than two-thirds of members of the legislature are of the same gender
	An order of mandamus directed to the 4th Respondent [IEBC] that it presents to Parliament a list of nominees in numbers sufficient to bring the entire Parliament in conformity with law as provided under Articles 3 (2), 27 (6) and (8), and 81 (b) of the Constitution
	A declaration that Gazette Notice No.5735 on the submission of party lists by political parties published in the Kenya Gazette Volume CXIX No.76 is inconsistent with Articles 3 (2), 27 (8), and 81 (b) of the Constitution
	A declaration that Gazette Notices No.7846, 7847 and 7848 published in the Kenya Gazette Volume CXIX Number 118 detailing the list of elected leaders to Parliament during the August 8 General Election is inconsistent with Articles 3 (2), 27 (8), and 81 (b) of the Constitution
Any other or further orders that this court may deem fit to grant to meet the ends of justice	Any other or further orders that this court may deem fit to grant to meet the ends of justice
Costs of the Petition	Costs of the Petition

The two petitions were consolidated due to the similarities. The matters are still ongoing, with the next hearing slated for January 2019.

4.2 Post-2017 General Elections

Following the August 8, 2017 General Election, the elected Parliament in both National Assembly and Senate did not meet the two-thirds gender principle. Expectedly, two almost similar cases were filed at the High Court in Nairobi challenging the composition of Parliament. Petition 397 of 2017 filed by Centre for Rights Education and Awareness (CREAW) and Community Advocacy and Awareness Trust (Crawn Trust) as co-petitioners against Parliament and Petition 401 of 2017 filed by FIDA-K against both Houses of Parliament and IEBC. In both cases, NGEC is joined as *amicus curie* and interested parties respectively.

Petition 397 seeks (1) A declaration that the composition of the National Assembly and Senate has failed to meet the constitutional threshold of the not-more-than two-thirds gender principle, (2) A declaration that the failure by Parliament to meet the not more than two-thirds gender principle contemplated under Articles 27 (8) and 81 (b) amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution, (3) An order in the nature of *mandamus* (judicial writ) directing Parliament that the first and only order of business is to pass the necessary legislation to implement the not more than two-thirds gender principle, (4) Any other or further orders that this Court may deem fit to grant to meet the ends of justice, and (5) Costs of the Petition.

Similarly, petition 401 seeks (1) A declaration that the failure by Parliament to constitute in numbers at least a third of female representatives as contemplated under Articles 3 (2), 27 (6) and (8) and 81 (b) amounts to establishment of an unconstitutional Parliament and a breach of the fundamental rights of women in Kenya, (2) A declaration that the 12th Parliament as proposed to be constituted would be unconstitutional, null and void, (3) An order of *mandamus* directed to the 4th Respondent (IEBC) that it presents to Parliament a list of nominees in numbers sufficient to bring the entire Parliament in conformity with law as provided under Articles 3 (2), 27 (6) and (8), and 81 (b) of the Constitution, (4) A declaration that *Gazette* Notice No.5735 on the submission of party lists by political parties published in the *Kenya Gazette* Volume CXIX No.76 is inconsistent with Articles 3 (2), 27 (8), and 81 (b) of the Constitution, (5) A declaration that *Gazette* Notices No.7846, 7847 and 7848 published in the *Kenya Gazette* Volume CXIX Number 118 detailing the list of elected leaders to Parliament during the August 8 General Election is inconsistent with Articles 3 (2), 27 (8), and 81 (b) of the Constitution, (6) An order of *mandamus* directed to the respondents to remedy the continuing breach of the Constitution by taking steps to ensure that the proposed 12th Parliament passes on priority basis and within timelines as specified by this Honourable Court legislation and immediate measures to bring it to compliance with the Constitution and will ensure that no more than two-thirds of members of the legislature are of the same gender (7) Any other or further orders that this court may deem fit to grant to meet the ends of justice, and (8) Costs of the Petition.

Whereas petition 397 seeks to compel Parliament to pass the necessary legislation on two-thirds gender principle as its first order of business, petition 401 further seeks to compel IEBC to present a list of nominees necessary to ensure that 12th Parliament meets gender parity. A considerable time was expended in dealing with preliminary issues such as consolidation of the two petitions and stay of proceedings application. Generally, considering the seriousness of the orders sought, the Court has not been serious in dispensing with the matter on priority basis.

4.3 Development Partners Gender Programme

Kenya has a vibrant development partner's Gender Sector Coordination Group. In 2012, Kenya and the Ministry for Foreign Affairs of Finland developed a three year (2013-2016) €57.8 million (KSh6.82 billion) Strategy for Development Cooperation with focus on support for gender and women's empowerment, human rights and governance as well as forestry and natural resource management among others. In the area of governance and human rights, Finland is one of the most prominent donors together with Sweden, Norway, the Netherlands, World Bank, African Development Bank, European Union, USAID and Japan.

Finland served as the donor co-chair in forestry and gender issues during the period under review and prioritised the not more than two-thirds gender principle in all sector meetings and decisions. In 2014, the donor Gender Sector Coordinating Group through UN Women provided technical support to the National Gender and Equality Commission on the subject in addition to pushing for additional resources from development partners that supported governance programmes through EISA and URAIA.

The Gender Sector Working Group received monthly updates from UN Women on the progress the Commission was making on the identification of a framework towards realisation of the two-thirds gender principle. Between 2014 and 2016, UN Women engaged the Commission in ten donor roundtable meetings to discuss the agenda and highlight opportunities available for the county to identify a mechanism to attain the two-thirds gender principle before August 2017.

In 2015, UN supported Kenya in establishing a unified framework for development where all UN agencies and other organs would form synergies on the delivery of rapid development under Deliver-as-One (DAO). In the period 2014-2015, the UN provided KSh2.7 billion worth of development support for the most needy and marginalised in the country. The United Nations Assistance Development Framework (UNDAF) is a shift in development programming that allows the Government to take lead and the UN to coordinate its development activities as one entity. The priorities of the UNDAF are aligned to Kenya's development framework, the Vision 2030.

The framework which was launched by the President included an indicator on realisation of the two-thirds gender principle and a wider inclusion mandate at the nominative, elective and appointive positions. It is, therefore, clear that between 2014 and 2016, development partners supported the work of the Technical Working Group and the Commission on the equality agenda in line with Deliver-as-One Framework. The Framework was disseminated to the public through a multi-pronged multi-media approach enhancing public awareness. At the same time, the progress the Commission was making towards realisation of the two-thirds gender principle was documented and disseminated through the Deliver-as-One Framework.

4.4 Joe Mutambu Initiative

Hon Joe Mutambu published the Constitution of Kenya (Amendment) Bill, 2014 that proposed deletion of Article 81 (b) which provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. However, this would not take away the two-thirds gender principle as it is also provided for under Article 27 (8), a provision that falls under the Bill of Rights and which cannot be amended without a referendum as provided under Article 255 (1) (e). The principle would remain applicable at the National Assembly with or without Article 81 (b).

The Mutambu Bill also proposed:

1. Scrapping of the 47 seats reserved for women under Article 97 (1) (b).
2. Reduction of constituencies from 290 to 140 effectively reducing the number of Members of the National Assembly from 349 to 152.
3. Reduction of counties from 47 to 10 (by deleting the first schedule and inserting a new schedule). The proposed new counties would include Coast, Lower Eastern, Upper Eastern, Central, Nyanza, North Eastern, Nairobi City, Western, South Rift Valley and North Rift Valley.
4. Reduction of senators from 67 to 26 who will be elected thus: 20, a man and woman from the ten proposed counties, and six representing minority communities, youth and persons with disabilities.
5. Introducing a new category of two senators representing minority communities in Article 98 (1) (b).
6. Reduction of commissioners in independent commissions from a minimum of three and a maximum of nine to a minimum of one and a maximum of three (Article 250).

The initiative did not succeed for obvious reasons of attempting to remove affirmative action gains provided in the Constitution.

4.5 The Moses Kuria 'Punda amechoka punguza mzigo' Initiative

Hon Moses Kuria sponsored a referendum call dubbed *Punguza Mzigo, Punda Amechoka* literally meaning 'the donkey is tired, reduce the weight'. This symbolically indicates that Kenyans are tired of overrepresentation and the surging public sector wage bill. Collection of signatures for the initiative began on January 4, 2016. Hon Kuria argued that it made no sense for a poor country like Kenya to have 349 Members of the National Assembly and 2,526 MCAs. The initiative proposed reduction in the number of MPs, scrapping of the 47 women members from the counties arguing they added no value, scrapping of nominated Members of the National Assembly, scrapping the Senate which in his view has no work to do, and scrapping nominated MCAs. The initiative did not succeed and was overwhelmingly rejected.

5.0 An Analysis of Strategies and Processes Used by NGENC in the Journey Towards Realisation of The Two-Thirds Gender Principle Formula

The National Gender and Equality Commission (NGEC) team took up the process in the search for the formula to implement the not more than two-thirds gender rule in political representation as their first agenda item working jointly with the then ministry responsible for Gender and Ministry of Justice and Constitutional Affairs. This report reveals that NGENC used several strategies in the arduous journey to realise the not more than two-thirds gender rule. These included consultations with other key institutions to forge a way forward in seeking legislative formula for the realisation of the rule. Two processes stand out: Court and the Technical Working Group.

5.1 Court Processes

An important strategy used in the journey was court action. However, the court processes were characterised by intrigues and inertia to give a clear solution to a mechanism for realisation of the two-thirds gender rule. For instance, although the Attorney General had sought the Advisory Opinion of the Supreme Court, he surprisingly held the view that using nominations by parties to bridge the gap would result in unduly large legislative bodies⁴². He further argued that for the provisions of the Constitution to be complied with, there was need to adopt other criteria and that this may necessitate an increase in the tax burden borne by the citizens and hence the need for a corrective measure if the constitutional requirements were to be realised.

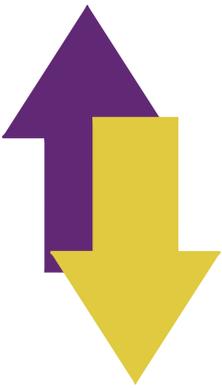
The Supreme Court, by majority decision in Advisory Opinion, ruled that the gender provision on the not more than two-thirds principle should be attained progressively using legislative and other means including policy, clearly failing to appreciate the need for affirmative action for women as rightly stated by the then Chief Justice Willy Mutunga in his dissenting opinion. The highest court on the land failed to seize the opportunity to give the country a clear direction on the realisation of the two-thirds gender principle. The painful journey was marked by confusion and lack of direction on the part of the Supreme Court.

The fear of women's affirmative action by the Attorney General echoed a general narrative that was being advanced against its implementation. Indeed, this narrative prompted civil society groups who included Action Aid, AMWIK, African Woman and Child (AWC), ABALOMA Foundation, FIDA-K, CRAWN TRUST, CREAM, COVAW, Kimbilio Trust, Forum UNGASS AIDS, Wangu Kanja Foundation, Women Empowerment Link and Forum for Young Women Politicians (FYWP), among others working with Institute of Economic Affairs to undertake analysis on the cost implications of implementing the principle. The finding was that in the worst-case scenario, it would cost a maximum of KSh57.8 annually per Kenyan to give effect to

⁴² Japheth Biegon (ed) 2016, Gender Equality and Political Processes in Kenya, Challenges and Progress, page 58.

195
votes

Those who
voted for
the Duale
Bill in April
2016



179
votes

How the
Bill scored
in May
2016

the rule, a sum that was found not to be prohibitive.

The Commission also affirmed the litigation by civil society organisations seeking to compel Parliament to enact the necessary legislation. One of those matters was Nairobi Petition No.182 of 2015 filed by CREAM versus the Attorney General and CIC. On June 26, 2015, the High Court through Lady Justice Mumbi Ngugi delivered a ruling ordering the Attorney General, the Commission on Implementation of the Constitution and Parliament to draft and table the necessary legislation within 40 days of the ruling. The result was the adoption of the Technical Working Group proposed Bill (the Duale 1 Bill) by the Leader of Majority in the National Assembly who moved it for publication as a Government Bill. The Commission had been enjoined as *amicus curiae* (friend of the court) in a petition 371 of 2016 instituted by Centre for Rights Education and Awareness (CREAW) and Community Advocacy and Awareness Trust (CRAWN Trust) under Article 261 for failure to enact a framework for implementation of the two-thirds gender principle. To date, the outcome of the petition has not resulted in the realisation of a framework for implementation of the two-thirds gender principle.

One important observation on the process is the sheer lack of interest by relevant bodies to obey court orders. Patriarchy seems to be so entrenched in all the relevant bodies that even disobeying orders of the courts is not frowned upon.

5.2 The Technical Working Group Process

A clear strategy was developed under the leadership of NGEAC that would be used by the Technical Working Group in order to ensure that the draft bill from this process was passed in both Houses. The strategies included but were not limited to: engagements with the various institutions of Parliament, the Presidency, civil society actors, media, persons with disabilities, private sector actors, county governments and assemblies, religious leaders, various development partners, UN agencies, constitutional commissions, international and regional committees, professional bodies and members of public.

National Gender and Equality Commission, as the Secretariat to the Technical Working Group and by virtue of its mandate held consultative and awareness creation workshops with Governors, constitutional experts and special groups and technocrats⁴³. Additionally, NGEAC made a 'Call' for proposals through the local dailies on September 24, 2014 and received 15 proposals from individuals and organisations alike⁴⁴. Funding to these processes was provided by United Nations Development Programme (UNDP), Norwegian Government and UN Women while the Attorney General's office provided the requisite technical support.

These sessions were helpful in articulating different entry points on the two-thirds gender principle and some went beyond elective offices to look into the appointive as well as public offices while others advocated for the overall statutory reform

⁴³ Milly Lwanga 2015-Towards realisation of the $\frac{2}{3}$ gender principle report on the summation of the consultative process on the proposed framework, page 4.

mainstream the principle. The Kenya Human Rights Commission (KHRC) proposals advocated for a comprehensive equality law envisaged under Article 100 of the Constitution⁴⁵. Refining and finalising of the plans proposed was done after various meetings with the Justice and Legal Affairs Committee between November 2014 and January 2015.

The advocacy targeted legislators to marshal their support for the bill and Kenya Women Parliamentary Association (KEWOPA) were very active on this front. The Commission engaged the Governors to garner their support. The Federation of Women Lawyers (FIDA) led workshops at the community level and other civil society organisations such as the National Women Steering Committee through the Green Amendment Campaign began a drive to obtain one million signatures as stipulated by the Constitution for any constitutional amendment. The Kenya Human Rights Commission led in the Equality Bill formulation and the Technical Working Group worked with the Ministry of Devolution to push this policy initiative. Experts like Kare Vollan and Ghottrel Ghai provided examples of gender quotas for consideration. Members of the Technical Working Group also engaged the media to highlight these issues.

5.3 Lessons Learnt from the Process and Strategies

The constitution of the Technical Working Group holistically captured the representation of relevant agencies drawn across different arms of the Government and civil society groups with distinctive mandates. There was also deliberate effort to capture public input through media outlets and call for memorandum across different social groups as well as the engagement of the devolved government structures through consultation with Governors. Noble as they maybe, there should have been more concerted efforts to bring on board community views through community-based social meetings on the process and strategy for realising the two-thirds principle to diffuse the elitist tag.

Multiple groupings and consultative forums provided rich avenues for feedback into the two-thirds gender principle journey. Most significantly, drawing from the experience of seconded international experts gave room for cross-comparison with other normative frameworks working in other jurisdictions.

Valuable and important propositions as well as feedback was provided through consultative forums and a call out for proposals. While a lot of the focus was on engendering Parliament, similar focus should have been directed to engendering local governance at the village level including within Neighbourhood Watch mechanisms (Nyumba Kumi initiative). Engendering decision-making organs should be a cumulative affair and process from the grassroots to the apex. Societal change is driven by every day experiences and exposure while facilitating women's inclusion in local mechanisms would have the effect of normalising equality

⁴⁵ Synopsis of the Affirmative Action Bill 2013

in leadership at all levels.

However, more initiatives on stakeholder engagement and training as well as civic education and outreach programmes, working closely with the media and civil society organisations to inform the citizens about the two-thirds gender principle would have helped put pressure on legislators. This would have fostered a sense of public accountability and especially of such a huge constituency base as women. While the proposals were comprehensive in content, the push for affirmative action should have been directed to the political parties and electoral legislation, training, sensitisation or such other forums that have been explored to sensitise the Justice and Legal Affairs Committee and legislators on the importance of engendering the political arena. A mechanism should have been developed for constituency teams made up of citizens to lobby their respective leaders at the grassroots level.

While the Constitution has given the country formal equality, the conservatism of the highest Court and Parliament has ensured that the legislative mechanism for realisation of the two-thirds gender rule has not materialised. Patriarchal attitudes coupled with ignorance about constitutional imperatives still rule in these institutions. However, looking back at the Constitution making process, gender had been one of the most divisive of the nine contentious issues.

It is imperative to look at the comparative analysis before proposing the way forward for Kenya.



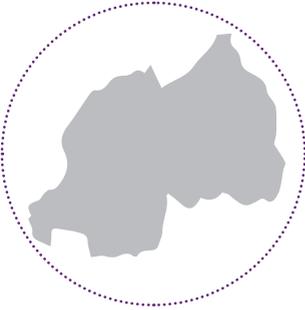
6.0 Comparative Overview

6.1 Uganda

The Ugandan Constitution has specific articles that take women's rights such as political leadership issues into account. Uganda emerged from the Guerrilla War in the 1980s where women fought alongside men in the National Resistance Army under the leadership of His Excellency Yoweri Museveni. To counter the previous regime that was seen as autocratic, Museveni introduced popular democracy in which the civil society organisations exercised power in a five-tier system of local councils.

For instance, Article 32 of the Ugandan Constitution provides for affirmative action to correct past injustices. Article 78 (b) provides that every district shall have one woman representative in Parliament and Article 108 (b) provides that the Government shall ensure that one-third of the local councils shall be women. These quotas have greatly enhanced women's participation in national politics in Uganda. The constitutional provisions include affirmative action to reserve seats for women in the national Parliament. It has both constitutional and legislative quotas at sub-national level for women's representation. In the Ugandan system, Parliamentary elections is on first-past-the-post (FPTP), in addition to this, the Constitution mandates that every district should elect a woman representative to Parliament. Female representation in Uganda is secured through the separate women's elections. In addition, at the local government level, there is a decentralised system of governance of a five-tier local council system ranging from the Local Council I at the village level to Local Council V at the district level. All these councils are required to have at least 30 percent women representation

Parallel to the Local Council system is the National Women Council. This system was introduced in 1993 mainly to mobilise women for social, political and cultural activities. A member of the Women Council sits in the Local Council to ensure women's needs and concerns are represented. In this case, there is a comprehensive systematic procedure that ensures women's political representation from the basic unit of governance i.e. Local Council 1 to the highest level at Parliament. The system also helps change perceptions on women's leadership and ability as they are infused in all levels. However, the full impact on socio-cultural perceptions are yet to be researched on. In addition, having a dedicated Women Council system helps to nurture female leadership and infuse decision making with women's concerns. It is, therefore, not a surprise that Uganda had the first woman Vice President in the East African region.



6.2 Rwanda

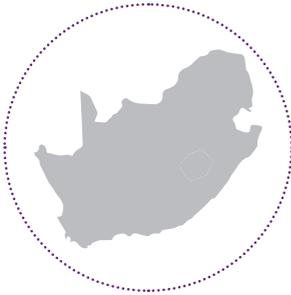
Rwanda is ranked top in the world for having 64 percent women's representation in politics and positions of power, surpassing the Nordic countries. Emerging from conflict, its leadership recognised women's critical role in development and the need to involve them in social, economic and political spheres of life. As part of reconstruction and reconciliation peace processes, law reforms were undertaken that saw the Constitution of Rwanda subjected to radical changes to reflect the people's wishes. There are three critical power structures in the Rwandan government, namely the Senate, Chamber of Deputies and the Women's Council that specifically ensure women are brought on board in all areas of decision-making.

The new constitution was formally adopted in 2003. Article 9 of this constitution embraces the principle of gender equality and explicitly outlines the Government's commitment to ensuring equal rights between Rwandese women and men without prejudice to the principles of equality and complementarity in national development. The Rwandan Constitution has a provision that reserves at least 30 percent seats in all decision-making organs. Article 54 mandates political parties to reflect in their recruitment the composition of their governing bodies and operations in the spirit of national unity and promotion of gender equality. Similarly Article 76 (2) specifically reserves 24 seats for women in the Chambers of Deputies.

The Senate is considered as the Upper House of Rwandan Parliament and is composed of 26 members who are either elected or appointed and serve for eight years. Of these, 30 percent must be women as stipulated in the Constitution. The Senate membership composition is a mixed one, as there are some members who are elected by provincial or sectoral councils, others are appointed by the President and other national organs.

The Chamber of Deputies is considered the Lower House of Rwandan Parliament. It is composed of 80 members, out of which 53 are directly elected through a proportional representation system. The rest of the seats are contested as follows 24 seats (30%) are reserved for women and are contested in women-only elections with no male contenders. The fact that 24 seats are reserved for women does not bar women from vying for election for competitive seats with men to boost their numbers in Parliament. Women leaders are elected by women from each province and the capital city of Kigali. There are two elected by the National Youth Council and one by the Federation of the Association of the Disabled. This requirement is also entrenched in Article 76 of the Rwandan Constitution providing more opportunities for quota systems in women's representation.

The Women Council was established under the Ministry of Gender and Women in Development. It is composed of 10 members. The Women's Council is made up of grassroots structures elected at the smallest administrative unit by women only, and then through indirect election at each successive administrative level such as sector, district and provincial. They operate parallel with the general local councils and their main concern is representation of women's concern. The members of the Women Council are mainly involved in capacity and skills training at the grassroots level and awareness raising on women's rights and gender issues. There is a seat reserved specifically for the head of Women Council in the General Local Council. This is aimed at ensuring official representation of women's needs and concerns in the Council and a bridge between the Women Council and the General Local Council. Through this system, Rwanda has been able to record notable progress in women's representation at all levels in decision-making. This has been powered by a strong political will and commitment at the top to promote gender equality through action.



6.3 South Africa

Since the end of the apartheid era, South Africa has increased women's representation in politics and positions of power. Both women and men played a critical role in South Africa's political struggle for liberation against apartheid. It has a system of proportional representation and party lists for the electoral process. During the making of the constitution of the new South Africa, between 1992 to 1994, women's organisations played an important role in ensuring women's issues were entrenched in the new laws to promote gender equality. The Constitution does not have a provision for quotas even though Article 9.2 provides that the Government shall take measures to ensure the achievement of equality.

The Municipal Structures Act of 1998 provides that as far as councillors selected by proportional representation from party lists is concerned, every party must seek to ensure that 50 percent of the candidates are women and that female and male candidates are evenly distributed throughout the list. The approach adopted by South Africa for drawing up party lists of candidates for the National Assembly and provincial legislatures ensures that at least every third person on the list is a woman securing at least the 30 percent of women's representation. In South Africa's first democratic election in 1994, the African National Congress (ANC) adopted a 30 percent quota for women in its Political Party List. This initiative saw an increase of women's representation from three to 27 percent in one election from 1994 to subsequent polls.

At the local level, ANC has adopted 50 percent quota for women party list. The increase in women's representation is attributable to ANC's commitment to a minimum 30 percent representation of women at all levels of decision-making. The provincial structure, which bridges the gap between traditional and modern governance, has benefited from ANC's policies. Each of the South African nine provinces is headed by a Premier (Governor), who is extremely powerful. In the 2009 elections, five women were elected Premiers surpassing of the four males for the

first time since independence. This was a major gender score for South Africa as women are now recognised and elected to head this previously male-dominated position.

6.4 Observation

In the three examples reviewed, we note that women actively participated in Constitution making and they were all coming from a period of strife. We note that political goodwill in the provision and support for gender measures is crucial. In all the cases, there are strong women councils in Uganda and Rwanda as well as the Women's Wing in ANC of South Africa. These entities have contributed greatly in ensuring the capacity building of women at the grassroots level and inclusion in decision-making. The issue of engendering decision-making is seen at all levels and not just Parliamentary but also at local governance as is the case in Uganda. These constitutions, as well as legislative and voluntary quotas, are very specific in terms of the numbers for women's political inclusion and they all have well spelt out mechanisms.

6.4.1 Ethiopia as an Emerging Case Study

Women make up about 51 percent of the Ethiopian population. In spite of these statistics, women have been having minimal political participation. Lack of commitment for increased women participation and absence of sufficient political knowledge about women representation have been some of the problems for poor participation of women in politics. The Ethiopian Constitution recognises women's equal rights with men in the political, social, economic and cultural spheres. It stipulates that women have the right to take part in the conduct of public affairs, directly and through freely elected representatives, the right to vote and be elected to any level of government offices and to be a member of any political organization, labor union, trade organization or employers or professional association of their choice.

In Ethiopia, women and girls like those in many developing countries, Kenya included, are strongly disadvantaged compared to boys and men who are born with male privilege that girls and women have never come close to achieving. This is mostly due to patriarchal societal systems and gender norms rooted in patriarchy which perpetuate gender inequality and discrimination. Girls are brought up with the notion that they are inferior to men and their place is in the home.

Through education this notion is being slowly dispelled but Kenya is way behind Ethiopia as far as embracing gender equality in leadership is concerned. For gender equality in leadership to be realized in Kenya, we have to go beyond enshrining principles of equality in the Constitution and deal with the structural dimensions of gender inequality which impede the race for equality by preventing women from entering the race in the first place, let alone win it.

We have to acknowledge the invisible brick walls, barriers, debris, and roadblocks a woman must pass through to enter the race. The Constitution amendment bill No.4 of 2018 on the implementation of the two thirds gender rule attempts to achieve gender parity in Kenya's representative leadership.

Historically women have been under represented in leadership but the situation has changed dramatically under the progressive, transformative, gender conscious leadership of the Prime Minister of Ethiopia Abiy Ahmed who appreciates that to achieve gender equality in leadership, it is imperative that women are appointed to top leadership positions.

Under his leadership, Ethiopia, the second most populated country in Africa, became the second State after Rwanda in the continent to have equal gender representation in the cabinet. Half of the current Ethiopian cabinet is comprised of women. Previously a few groups have always been in power but the new cabinet is also more ethnically diverse than ever, representing 80 different ethnicities. The need to empower girls and women cannot be over-emphasized. It naturally follows that empowering women and putting more women on senior leadership positions is crucial for the realization of sustainable development and prosperity in a nation.

7.0 Lessons Learnt and Way Forward

- Affirmative Action and equality for women cannot be achieved easily. A single most important drive for the action is undivided political goodwill from the ruling party, opposition and political elite. There are lessons to be drawn from countries such as Uganda, Rwanda and South Africa.
- Although the Constitution of Kenya provides a solid ground for entrenching the principles of equality and inclusion in all spheres of life including political representation, power games, patriarchy and negative stereotypes continue to inhibit decision-makers in key institutions. This stands in the way to realisation of women's political empowerment. In future, focus and resources should target deconstruction of these minds through sensitisation and education.
- Patriarchy knows no bounds as women themselves can be its agents. There is need to build and strengthen alliances with gender male champions, within and outside Parliament which is the formal political system. It is these kind of strategic alliances that enhance the capacity of any interest group to become influential in asserting and advancing a desired agenda in different contexts.
- There is clear need in the future to induct all incoming legislators on their responsibility as Members of Parliament to respect the Constitution on matters of gender in general and affirmative action in particular for them to understand the need for responsible articulation in decision-making. In this regard, there is need to engage more with academicians in these fields.
- Women and gender activists need to forge strategic alliances at all levels. For example, KEWOPA at the Parliamentary and community levels with FIDA on the legal side among other relevant institutions. The alliances need to transcend national and regional boundaries so that where necessary the Government can receive pressure or support from internal and external allies. It was felt that lessons were not learnt from previous efforts such as attempts towards the achievement of women-friendly Constitutional provisions.
- Patriarchy remains alive and insidious. Great care should be taken to ensure detailed understanding of implications of even the most benign actions. For instance, is 'lack of time' used as a strategy to delay or result in rushed through gender provisions? Is 'time' or 'lack of it' a variable in these delays or a coincidence? Was the silence in Article 177 on realisation of the two-thirds gender principle deliberate to deny women their rights?
- Do court decisions such as that of the Supreme Court Advisory of 2012 and the 2015 High Court determination the only impetus needed to push the Legislature into action? Has the focus of gender equality activists been manipulatively directed to look at the legal arena at the expense of overlooking the real culprits in the social and cultural systems that are fighting by all means necessary to protect the male bastions of power?

- To affect the attitudes of the citizens on defeminising the quest for gender equality, there is need to adopt more bottom-up and citizen-driven processes. Further to this, there is need to embrace more nuanced gender-specific mechanisms and bottom-up approaches keen on developing women's competence as electable candidates. Even the advanced theory of 'equality of results' from the original 'competitive equality' guaranteed by rights to vote and compete will only be achieved sustainably when the foundations of discrimination are solidly and continuously addressed rather than taking a final solace in the provisions of remedial measures in the form of quotas.

The Kenyan political system – the-first-past-the-post – has never been known anywhere in the world to deliver gender parity. Countries like Rwanda and South Africa have benefited from the proportional representation system. Kenya may wish in the long term to review its electoral system.

8.0 Conclusion

The journey undertaken by the National Gender and Equality Commission (NGEC) from 2012 to 2017 towards the achievement of a legal framework for the realisation of the not more than two-thirds gender principle has been long and complex, characterised by distortions, betrayals and power games.

As stated by NGEC Chairperson Dr. Joyce Mutinda in the foreword to this report, this has only led to a sobering realisation that attaining affirmative action for women is not easy and cannot be achieved by sheer commitment by its champions. Hope lies in the reality that the Constitution of Kenya provides a solid ground for entrenching the principles of equality and inclusion in all spheres of life including political representation as an irreducible minimum.

Although no framework has been put in place for the implementation of the not more than two-thirds gender principle, the journey started by NGEC has generated ready bills that Parliament can draw from and give the country a working document as ordered by Hon Justice Mativo on March 29, 2017. This decision required a framework for implementation of the principle within 60 days of the ruling and in line with the Supreme Court Advisory Opinion in Advisory Opinion No.2 of 2012.

In a visionary manner, NGEC advised that Speakers of both Houses of Parliament could establish a mediation committee of members in line with Article 113 of the Constitution to develop a version of the Bill that could pass and consider joint sittings to do so in view of the strict timelines. The 60 days have since elapsed without the framework being realised.

Of historical importance, however, is the fact that no effort was spared by NGEC during the period under review to press for a legal framework for the realisation of the principle. The Commission's hope is that in future, no effort should be spared to ensure that the women of Kenya reap the benefits of the Constitution to take their rightful position in political participation.

Annexes

- Annex 1 Supreme Court Advisory Opinion No.2 of 2012
- Annex 2 The Constitution of Kenya (Amendment) Bill, 2011 (Mutula Bill)
- Annex 3 Letter by NGEC to Attorney General to Convene Technical Working Group
- Annex 4 'Tubadili Tustawi Pamoja' creative brief
- Annex 5 Analysis of the Supreme Court Advisory Opinion No.2 of 2012
- Annex 6 The Viable and Preferred Formula and the Technical Working Group Bill
- Annex 7 Green Amendment Proposals
- Annex 8 Commitment by Leaders of Political Parties - refer to page 24
- Annex 9 The Constitution (Amendment) Bill, 2015 (Chepkonga Bill)
- Annex 10 The Constitution (Amendment) (No.4) Bill, 2015 (Duale Bill)
- Annex 11 Press Statements by NGEC: The not more than two-thirds gender principle
- Annex 12 Conference Papers: ICJ/NGEC conference
- Annex 13 The Constitution of Kenya (Amendment) Bill, 2015 (Sijeny Bill)
- Annex 14 NGEC Advisory on a Point of Order to Senator Sijeny
- Annex 15 The Constitution of Kenya (Amendment) (No.6) Bill, 2015 (Compromise Bill)
- Annex 16 NGEC Advisories to the President and Speakers of the National Assembly and Senate
- Annex 17 Constitutional of Kenya (Amendment) Bill 2014 (Mutambu Bill)

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