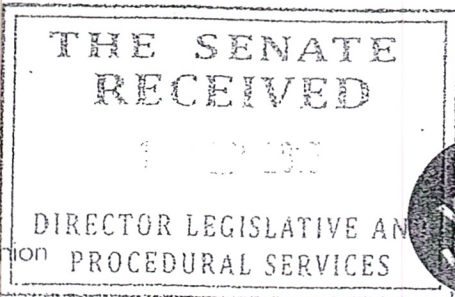




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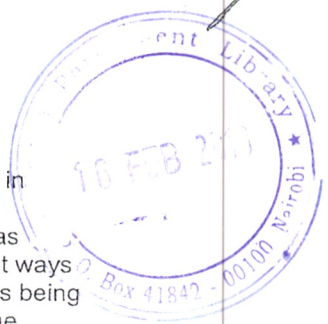


DLPS
The speaker has directed
that he go to an
opinion to move a
motion on the
recommendation,
M Daniel
11/9/15

Chama
Please draft an
appropriate motion
Sen. Ogunj
more
14/09/15

A framework to implement the Kenyan constitutional provision of the two-thirds gender rule

Conclusions and recommendations of the IPU's advisory delegation to Kenya

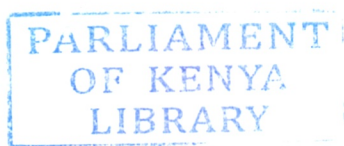


The IPU was requested by the Speaker of the Senate of Kenya to form a delegation of experts in women's participation in Nairobi in order to provide guidance and advice on the way forward in implementing the Kenyan Constitutional provision on the two-thirds gender rule (Art. 81b). It was requested that the mission take place in conjunction with ongoing debates in Kenya on the best ways and means to put the Constitution into effect. Parliament has played a key role in these debates being the main institution tasked by the Constitution with crafting a framework of implementation of the gender quota rule by 27 August 2015.

The IPU delegation was in Nairobi from 12 to 16 July 2015. It held extensive consultations with the Speakers of both Houses of the Kenyan Parliament, men and women parliamentarians, representatives of the government, political parties, constitutional bodies as well as civil society organizations.

The IPU delegation was composed of:

- Ms. Betty Amongi, Member of Parliament of Uganda, President of the Caucus of Ugandan Women Parliamentarians and member of IPU Coordinating Committee of Women Parliamentarians;
- Prof. Drude Dahlerup, Professor of political science specialized in women's participation in politics and IPU consultant;
- Ms. Zeina Hilal, IPU Programme Officer in charge of women's participation; and
- Ms. Mariana Duarte, IPU Programme Officer.



Context

The IPU is the international organization of national parliaments of which the Parliament of Kenya is an active Member. The Organization provides support to parliaments in areas such as law and policy-making, as well as representation. IPU support is based on human rights standards, gender equality and the democratic principles of representation, openness, accessibility, transparency and efficiency.

Gender equality in politics is enshrined in the IPU's Universal Declaration on Democracy, adopted by its Member Parliaments in 1997. It makes a direct link between women's participation in public affairs and democracy. The parliamentary momentum was renewed by the signing of the IPU's Call for Action titled "I am an MP, my power for women's power", most recently launched by the IPU during its celebration of the 30th anniversary of its Meeting of Women Parliamentarians. Other international commitments made by Kenya, such as the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the Beijing Declaration and Platform for Action, and the Millennium Development Goals (MDGs), call on the country to take all necessary measures to secure equality of men and women in political life. At the

regional level, both the East African Community Protocol on Good Governance and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) call on all Member States, including Kenya, to guarantee equality in political representation to both genders.

Kenya currently stands 70th in IPU's global ranking in terms of women's participation in lower or single houses of national parliaments, far below many neighbouring countries such as: Rwanda, which ranks 1st with 64 per cent of women parliamentarians; Tanzania, which comes in 21st in the ranking with 36 per cent of women parliamentarians; and Uganda, which ranks 23rd with 35 per cent of women parliamentarians.

Convinced of the importance of women's participation and eager to implement its regional and international commitments while further improving its own development path, Kenya has taken a strong stand by adopting a renowned gender-sensitive Constitution that embodies gender equality principles and guarantees that no more than 2/3 of its parliamentary membership be made up of one gender. In other words, the Kenyan Constitution calls for a minimum of 33% of parliamentary seats to be filled by women.

The Constitution provides a clear and concrete objective and calls on parliament to operationalize it through legislation. After the 2013 elections, which did not bring the minimum one third of women, a Supreme Court ruling issued in 2012 requested parliament to put in place a framework for the implementation of the provisions of the two-thirds gender rule by 27 August 2015.

Ahead of this deadline, in recent weeks several proposals have been submitted from MPs Chepkonga, Neto, Mbarire and Sijeny, as well as from the Technical Working Group (TWG) on the implementation of the two-thirds gender rule. As of 15 July 2015, one proposal was tabled in the form of a Private Member's Bill and another bill, including the proposals made by women parliamentarians and the TWG, was expected to be submitted to parliament as a Government Bill. The latter is perceived by parliament's leadership, the executive, women MPs and women's associations, as the most acceptable proposal. It is generally agreed, and supported by the IPU delegation, that in order to respect the two-thirds gender rule, more detailed explanations of the electoral process are needed, and will thus require a minor constitutional amendment.

Key conclusions and recommendations

Following the extensive consultations carried out in Nairobi, the advisory delegation is of the view that among the different proposals made and bills tabled, the most suitable ones are the proposed Constitution of Kenya (Amendment) Bill, 2015 and the Election Laws (Amendment) Bill, 2015. These are in line with the TWG's conclusions and, together with the key considerations outlined below, should be taken into account.

Guaranteeing equality of opportunities: The leitmotiv that should guide all decisions

- The need to put in place measures to enhance women's participation stems from a large number of structural barriers blocking women's participation, from long-term direct and indirect discrimination against women or other groups and persisting *de jure* and *de facto* inequalities in the political arena. Temporary special measures to enhance women's and other groups' participation in politics aim to correct existing imbalances and eliminate inequalities. Such measures have proven worldwide to be efficient in raising women and other groups' representation and in paving the way for the underrepresented sectors - which often account for large portions of society - to contribute to decision-making, enhance inclusiveness and openness, and ultimately craft more responsive legislation and policies. As stated in the Beijing Platform for Action, a modern democracy requires the equal participation of women and men.
- The national legal and social framework also encompasses inclusivity of other under-represented groups such as youth, people with disabilities, ethnic minorities, marginalized communities and others. In more general terms, diversity in parliament is a reflection of diversity in society.

- The requirement of a maximum of two thirds representation of either sex in parliament is not exclusively a women's agenda. It is a national agenda for both men and women from rural and urban areas. This agenda is supported by both the President and the Vice-President of the Republic of Kenya as well as by the Speakers of both Houses of the Parliament, men and women parliamentarians, national constitutional bodies and civil society organizations, and international and regional institutions and organizations. This, along with the principle of gender equality, has been enshrined in the Constitution. It is a national agenda and one of the landmark achievements of the 2010 Constitution.
- The leadership in parliament - both men and women parliamentarians - and all other stakeholders should communicate on the two-thirds rule through the lens of a national agenda agreed to by all parties through the Constitution.

Implementing a fast track approach: Devising concrete, transparent and effective measures

- The commitments to gender equality and inclusivity in politics need to become a reality. A bold first step was taken in Kenya through the adoption of a Constitution that enhances the participation of underrepresented groups in parliament and other elected offices, and sets a two-thirds limit for the total number of male and female MPs.
- The participation rights conferred by the Constitution must be implemented forthwith as rights enjoyment must be immediate. Hence the need to operationalize the constitutional provisions in what is called globally a "fast-track" model through the use of affirmative action measures already enshrined as a principle in the Constitution.
- As stated above, temporary special measures have proved to be effective in correcting imbalances in political participation. However, such measures have proved to be most effective when applied with commitment and political will. They are most effective when they are ambitious, precise, adapted to the political and electoral system in place, reinforced by an effective sanctions system for non-compliance, enforced by a competent and able electoral commission and backed up with accompanying measures such as special funds, capacity building and sensitization campaigns.
- Political parties are the key gate-keepers for women's participation and this is a reality in all parts of the world. In Kenya, political parties can become the agents of inclusiveness or the detractors of the Constitution. In order for them to be the promoters of gender equality, political parties need to open up more genuinely and more seriously to women and other underrepresented groups. Women and other groups need to be part of the democratic process.

Galvanizing support

- The constitutional amendment needs a two-thirds majority to be passed in Parliament. In order for this majority to be secured, knowledge-building and advocacy will have to be carried out and not only by women parliamentarians, gender machineries or women's associations. Men parliamentarians, political party whips and parliamentary groups have a key role to play to build consensus as well as to sensitize the electorate. The commitment made by the President of Kenya in signing up to the UN Women "He for She" campaign should be a benchmark for male MPs as well.
- The bill will go through public scrutiny for a period of 90 days after it is tabled in parliament.
- During this period, the IPU was encouraged to support the Kenyan Parliament in organizing an open parliamentary debate on women's participation. Such a debate could take place in parliament and bring together a maximum number of stakeholders. It would aim to: (1) enhance knowledge of the ways and means to enhance women's participation; and (2) provide a platform for sharing experiences and shaping advocacy strategies.
- In addition, a CPA meeting beginning on 6 August can also be used to galvanize support and raise awareness of members of parliament.
- A strong communications campaign at the national level could be a powerful tool to attract women's and other groups' candidatures, including by using social media.
- A civic education campaign on political rights and violence-free politics could also be of great value to build voters' support for women candidates and for candidates of other underrepresented groups.

Supporting women candidates

- Parties can be required to earmark a certain percentage of their public funds to train women candidates and a set amount of their funds to train candidates from other underrepresented groups targeted by the Constitution.
- The competent authorities may decide to provide free or additional air time on TV and radio, on State or private media, for parties that nominate a certain percentage of women candidates and candidates from other underrepresented groups targeted by the Constitution.
- If private funding is permitted, the law should ensure a cap on amounts granted to election campaigns so as to guarantee a level playing field.
- Capacity-building initiatives for women candidates need to be put in place.

The electoral commission: A key player

- The electoral commission needs the prerogatives, independence, capacities and resources to perform its duties in an effective and timely manner. It should be composed of at least one third of women members. It should have clear gender equality objectives and a mandate to oversee the implementation of measures to enhance women's participation. Timely publication by the electoral commission of sex-disaggregated electoral statistics, both on nominated and elected candidates, is vital for enhancing public interest in the representation of women and other underrepresented groups.
- It also needs to be entrusted with the power and means to protect all candidates, and women candidates in particular, from electoral violence (before, during and after elections), including verbal and physical abuse, recrimination and harassment.
- The electoral commission may, as is the case in several countries today, by law be given the authority to reject party lists that do not comply with the rules governing the gender composition of their lists (see below under Sanctions).

Addressing Violence against women (VAW)

- While violence seems to be addressed in several pieces of legislation related to elections, the challenge is the enforcement of the relevant provisions by all means so as to prevent and punish acts of violence and offer protection.
- One option that may be explored is the deployment of bodyguards to protect women candidates so that they are not discouraged to pursue their candidature if they are under threat.
- Political parties themselves have a key role to play in curbing violence by including principles of non-violence in their manifestos and holding to account all members and candidates who may be engaged in acts of violence or harassment.

Recommended legislative actions

Following the many informative and fruitful discussions between the delegation and key Kenyan stakeholders on the two-thirds gender principle, and based on the experience of several countries that make use of affirmative action measures, the delegation recommends that the implementation of the two-thirds gender principle enshrined in the Constitution be based on the premises set out below.

Securing the legitimacy of politicians on special seats

Affirmative action measures to enhance women's political participation are used in many countries and are also foreseen in the Kenyan Constitution. However, it is of key importance that all women parliamentarians elected on various types of quotas or nominated seats have a power base of their own in a constituency and in a party. It is also of primary importance that all women parliamentarians be given the necessary conditions and equal powers (including in terms of voting rights in the Senate) to enable them to perform their mandate in the national parliament and regional assemblies. Furthermore, the selection/election of candidates for reserved seats for women and other underrepresented groups should be based on open and transparent procedures. The selection should be carried out through a formal process that allows for competition in the nomination to such seats. One option might be to link the nomination to the respective party nominated lists (i.e. run-ups) to the

result obtained by most successful, yet not elected women candidates for constituency seats. This model will be unique to Kenya seen in a global perspective.

Increasing the number of women elected to the constituency seats

Women's underrepresentation primarily stems from the fact that too few women are nominated and elected for the constituency seats (i.e. the 290 constituency seats of the National Assembly in Kenya). Consequently in order to ensure the fulfilment of the principle of at least one third of women members enshrined in the Constitution, it is urgent to also introduce measures which eventually will result in the nomination of a sufficient number of women in winnable seats. Based on the understanding that political parties are the main "gatekeepers" of elected positions, it is important that political parties become more inclusive in terms of women and other underrepresented groups.

Hence, it is recommended that the electoral law (Elections Act) oblige political parties to nominate 30, 40 or 50 per cent of women among their candidates for the primaries and the general elections. More specifically in the short term, within a county, at least one third of the party candidates running for constituency seats should be women. In the 2013 election, only 6 per cent of the candidates for the constituency seats were women.

Such measures could be considered to be applied to the percentage of women elected on various party tickets in parliament. This will thus guarantee that at least one third of the seats will be filled by women.

The adjustment principle: Establishing the necessary connection between the number of women elected and the number of women in nominated or reserved seats (top-up)

Following the proposed new adjustment principle, an increase in the proportion of women elected to constituency seats for the National Assembly will necessarily result in a decrease in the proportion of women nominated in each election (the top-up nominated seats, distributed among the political parties according to their share of the directly elected seats). Thus, the top-up principle of the Senate and the County Assembly elections should, as suggested, be introduced also to the election of the National Assembly after a constitutional amendment. This principle will demonstrate the success in the advancement and sustainability of women's participation. Hence, as mentioned in the previous paragraph, it is crucial to craft measures that will ensure an increase in the number of women elected to open seats.

For those selected for nominated, top-up seats, it is important to limit the reserved seat to a maximum of two consecutive mandates as a way of encouraging women to run for office in the constituency seats and for the parties to select among these women with parliamentary experience.

Another option would be to double the number of reserved seats by reserving two seats per county for women. This option will not secure the minimum one third of seats for women. With this formula, far fewer top-up seats from party lists will be needed. The advantage of this model is that it provides a fairly predictable final number of seats in the National Assembly.

However, with or without increasing the 47 seats, the principle of nominated seats (top-up) which is applied in county assemblies' elections and in the Senate's elections - and now also suggested for the National Assembly - can provide the necessary link between the reserved seats and the increase in the number of women elected to the constituency seats. Consequently, the proposed "topping up", (e.g. nomination of a sufficient number of women from party lists to meet the one-third requirement of the Constitution) makes this connection, since the number of nominated seats will decrease as the number of women elected to constituency seats hopefully increases.

It goes without saying that the creation of new seats will come at a cost. However, it is a known fact that democracy is costly. In fact, according to calculations made by the National Gender and Equality Commission, parliament is among the least expensive branches of government in Kenya. It accounts for only 1.5 per cent of national spending and with the costs of additional seats, would not surpass 2 per cent.

Sanctions for non-compliance

Experiences from Kenya and many other countries show that financial penalties or financial incentives may work in order to ensure compliance with regulations. However, larger parties are very often less likely to be affected by such economic measures.

It has generally been shown that the rejection of party lists that do not comply with the gender quotas specified by the electoral authorities is by far the most effective sanction. In some countries, a party is given one to three days to correct/adjust its lists. This system works so well that in only a few cases have such rules led to the actual rejection of party lists, since the gender quota rule gives the political parties sufficient incentives to select more women candidates in the first place, thereby becoming more inclusive in their recruitment policy. In single member districts (FPTP), the obligation and the sanctions in cases of non-compliance could be placed on the party at the regional or county level.

A long-term perspective

In the longer term, it would be advisable for Kenya to consider changing its electoral system. Proportional representation systems or mixed systems with affirmative action measures have proved to be more conducive to greater participation of women and other underrepresented groups.

Follow-up actions

The IPU stands ready to pursue its support to the Parliament of Kenya through the provision of additional advice on the issue of women's participation, as may be needed, as well as through the organization of a parliamentary debate on women's participation. The IPU would also be ready to support the Parliament of Kenya in carrying out a gender assessment of its functioning, structures, operations, methods, and work, in order to devise a comprehensive plan of action that would advance gender equality in the institution of parliament. Such an exercise could help open up parliament to the interests and needs of both men and women, hence transforming the institution into a gender-sensitive one.

In addition, support to women parliamentarians in their work will be envisaged. Activities aimed at enhancing parliament's capacity to oversee and establish measures to promote gender equality in society at large should be part and parcel of the IPU's follow-up collaboration with the Kenyan Parliament.