



IEBC AND THE IMPLEMENTATION OF THE TWO-THIRDS GENDER PRINCIPLE IN KENYA

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The Two-Thirds Gender Principle is one of the important constitutional mechanisms designed to promote gender equality and inclusive political representation in Kenya. The principle requires that not more than two-thirds of the members of elective or appointive public bodies should be of the same gender. Its constitutional foundation is primarily found in Articles 27(8) and 81(b) of the Constitution of Kenya. Article 27(8) requires the State to take legislative and other measures to ensure that no more than two-thirds of members of elective or appointive bodies are of the same gender, while Article 81(b) specifically establishes the principle as one of the requirements governing Kenya's electoral system. The Independent Electoral and Boundaries Commission (IEBC), as the constitutional institution responsible for conducting and supervising elections and referenda, therefore plays an important role in promoting compliance with this constitutional requirement.

One of IEBC's major interventions is the regulation of political party nominations. Political parties provide the main route through which candidates participate in elections, meaning that decisions made during party nominations can significantly influence gender representation in elective institutions. IEBC oversees aspects of the nomination process to ensure that political parties comply with applicable constitutional and electoral requirements. The decision in *Katiba Institute v. IEBC* reinforced the importance of political parties taking proactive steps to promote compliance with the gender principle when nominating candidates for the National Assembly and Senate. The case also recognised that IEBC has responsibilities relating to constitutional compliance within the electoral nomination framework.

Closely related to its regulatory role is IEBC's examination of candidate nomination lists and party lists. Political parties are required to submit various lists to IEBC during the electoral process. The Commission checks whether these lists comply with applicable constitutional provisions, electoral laws and nomination requirements. Before the 2022 General Election, IEBC required political parties to revise certain National Assembly and Senate nomination lists that did not meet the Commission's requirements regarding the Two-Thirds Gender Principle. This illustrates the Commission's attempt to use its regulatory authority to promote greater gender balance at the candidate nomination stage.

IEBC may also require political parties to correct lists that fail to meet legal requirements. Under the party-list system, failure by a political party to amend and resubmit a defective list after being directed to do so may result in rejection of the list where the applicable law permits such action. In the preparations for the 2022 General Election, IEBC warned political parties that failure to comply with the gender requirement could lead to rejection of their nomination lists. However, implementation of the requirement relating to National Assembly and Senate candidate lists was subsequently affected by a High Court order suspending its application for the 2022 General Election. This demonstrates the legal complexity that continues to surround implementation of the Two-Thirds Gender Principle at the national parliamentary level.

Another important intervention involves gender alternation within applicable party lists. Party-list arrangements may require candidates to alternate between women and men according to their order of priority. This arrangement is commonly described as the "zebra system." For example, a list may follow the sequence female, male, female and male, or the reverse. Gender alternation is intended to prevent one gender from occupying most of the favourable positions on a party list and therefore supports more balanced representation in positions filled through proportional representation.

IEBC's role is particularly clear in relation to gender top-up seats in County Assemblies. Article 177 of the Constitution establishes special seats where necessary to ensure that no more than two-thirds of the members of a County Assembly are of the same gender. After an election, IEBC determines the number of special seats required to achieve the constitutionally required gender balance. It then uses the gender top-up lists submitted by qualifying political parties to allocate the necessary seats. This mechanism provides a direct constitutional method of correcting gender imbalance after the elective ward seats have been determined.

The allocation of these special seats is based on proportional representation. Article 90 of the Constitution provides for the allocation of party-list seats through proportional representation and places the conduct and supervision of such elections under IEBC. In practice, political parties receive a share of available special seats according to their electoral strength. Consequently, a political party that wins a larger number of elective County Assembly seats will ordinarily qualify for a correspondingly larger proportion of the gender top-up seats. This approach combines gender inclusion with recognition of the electoral support received by individual political parties.

IEBC also promotes the gender principle through engagement and sensitisation of political parties and other electoral stakeholders. The Commission conducts consultations, stakeholder forums and voter education initiatives aimed at improving understanding of electoral obligations and

inclusive participation. Engagement with institutions such as the Office of the Registrar of Political Parties also contributes to the review and strengthening of the legal framework governing political parties. Such initiatives are important because compliance with gender representation requirements depends not only on enforcement after nomination lists have been prepared but also on political parties understanding and integrating gender considerations into their internal nomination processes.

The Commission has further institutionalised inclusion through its Gender and Social Inclusion Policy. The policy is intended to strengthen the participation of women and other Special Interest Groups in electoral processes. It promotes principles including gender equality, non-discrimination, accessibility and meaningful participation. IEBC's inclusion initiatives extend beyond women to young people, persons with disabilities and other marginalised groups. Through inclusive voter education, stakeholder engagement and coordinating structures, the Commission seeks to reduce obstacles that may prevent Special Interest Groups from participating effectively in elections and political processes.

The development and issuance of guidelines to political parties constitute another important IEBC intervention. Political parties preparing party lists are expected to comply with procedures relating to candidate qualifications, nomination processes, priority and gender representation. Where lists contain defects or fail to satisfy applicable requirements, IEBC may direct parties to make corrections. Such guidelines help create consistency and transparency in the preparation, submission and consideration of party lists.

After the allocation of party-list seats has been completed, IEBC also performs an important formal role by declaring successful nominees and facilitating their publication in the Kenya Gazette in accordance with the electoral framework. Gazettement formally identifies the individuals who have obtained the relevant party-list seats. This process completes an important stage in translating party-list nominations and gender top-up calculations into actual representation within the affected elective bodies.

Beyond administering elections, IEBC contributes to discussions on electoral and legal reform. The Commission participates in stakeholder processes, working groups and consultations addressing ways of strengthening the implementation of the Two-Thirds Gender Principle. It may also submit proposals, views and recommendations concerning amendments to electoral and political party laws. These interventions are particularly significant because Kenya has continued to experience difficulty in establishing a comprehensive legislative mechanism for implementing the Two-Thirds Gender Principle within Parliament.

A distinction must therefore be made between County Assemblies and the National Assembly and Senate. At the County Assembly level, the Constitution provides an explicit gender top-up mechanism through Articles 90 and 177. Where elected membership fails to satisfy the gender principle, special seats can be allocated through party lists to correct the imbalance. At the national parliamentary level, however, implementation has been more complex. Although courts, IEBC, political parties and other institutions have taken steps to address gender representation, the question of a comprehensive legislative mechanism capable of fully operationalising the principle in the National Assembly and Senate has remained a significant constitutional and legislative issue.

In conclusion, IEBC plays a multifaceted role in promoting the Two-Thirds Gender Principle in Kenya. Its interventions include regulating political party nominations, examining nomination and party lists for compliance, requiring correction of defective lists, applying gender alternation where required, allocating County Assembly gender top-up seats and implementing proportional representation. The Commission also sensitises political parties, promotes the participation of women and other Special Interest Groups, develops electoral guidelines, implements gender and social inclusion policies, gazettes successful nominees and contributes to proposals for electoral reform. While the constitutional mechanism for achieving gender balance in County Assemblies is comparatively clear, implementation at the National Assembly and Senate levels remains more complex. Effective implementation of the constitutional principle therefore depends on continued cooperation among IEBC, Parliament, political parties, the courts and other institutions involved in Kenya's electoral and constitutional framework.