

AFFIRMATIVE ACTION IN KENYA: SETTING STANDARDS OR MISSING THE MARK? PERSPECTIVES ON GENDER EQUALTY IN KENYA.

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ABSTRACT

This article examines the concept of affirmative action, drawing on the specific experiences and practice in Kenya. The paper begins with an overview of the Kenyan landscape as far as gender equality is concerned, in different contexts including political representation, human rights, employment and economic empowerment. The second part of the paper looks into the push for gender equality and affirmative action in Kenya. Specifically, this section will describe and discuss the historical and reformative moves that have steered Kenya to its current position as far as affirmative action and gender equality are concerned. The study will then examine the challenges that have hindered full realization of affirmative action measures as well as the downsides that have presented themselves within the context of affirmative action and gender equality. The article concludes by drawing lessons on best practices, and making proposals that would be useful towards promoting affirmative action and gender equality in Kenya.

1. INTRODUCTION

Affirmative action in the simplest terms comprises of measures taken to redress past injustices premised on gender, racial or ethnic discrimination. Affirmative Action can be implemented through government-mandated policies and programs designed to bring change. Affirmative action can also encompass policies and procedures to end discriminatory practices in order to create equal opportunities. Affirmative action can also entail the use of policies and procedures in a way that accords preferential treatment to particular groups of society based on gender, race or ethnicity.¹

Gender equity on the one hand denotes the equivalence in life outcomes for both men and women, based on their different interests and needs. It calls for a redistribution of power and resources, and requires fairness and justness in addressing the needs of particular groups, ensuring that these needs are considered separately and acted upon ac-

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1 Gerface Ochieng. *Philosophical Analysis of Gender based Affirmative Action Policy in Kenya with Respect to Theory of Justice*. Kenyatta University, 2010, p. 1.

cordingly.² Gender equality on the other hand, speaks into the equal rights, responsibilities and opportunities of men and women alike, and fully engages both men and women in decision making, exercise of their human rights and in granting equal access and control of resources, employment and livelihood in general to both men and women.³

The role of gender in national development cannot be overlooked. The Constitution of Kenya is particular about gender equality and more so with regard to participation by men and women in Kenya's development agenda. The country has a progressive Constitution that not only safeguards the rights of women, but makes specific provision for affirmative action, enactment of legislation to promote women's representation in Parliament, affording adequate and equal opportunities for the appointment, training and advancement of men and women in public service as well as the responsibility of the State to address the needs of vulnerable groups within society including women.

What follows is a study into the concept of affirmative action and gender equality within the Republic of Kenya, beginning with a historical overview, a description of the journey towards securing affirmative action for women, the gains made through legal and institutional reforms and finally, the challenges and possible solutions that can remedy and further improve the state of affairs as far as affirmative action and gender equality in Kenya are concerned.

1.1. GENDER EQUALITY IN KENYA – A LOOK AT KENYA'S HISTORY

Women constitute and continue to form majority of the population in Kenya. However, despite this, Kenya was for a long time strongly patriarchal in nature. One may argue that Kenya is still largely patriarchal in nature. The status of women was therefore characterized by gross inequality compared to their male counterparts, and women were exposed to discrimination in almost all aspects of their life – politically, economically and socially. Traditional African societies in Kenya were largely founded on strong family ties, which embraced the clan system where ties were strong not only within nuclear family settings but within larger extended family and the community as a whole. Women and children were also largely treated as inferior and had a minimal role to play in leadership and administrative roles.

Kenya, like many other African States in the years after independence, had a legal system that embraced both customary law and written law. The legal system resulted in conflict between protecting human rights and perpetuating inequality and discrimination against women. Customary Law as a source of law in Kenya was entrenched in Section 3 of the Judicature Act, and was to guide courts in civil cases in which one or more parties

2 Kariuki Muigua. *Attaining Gender Equity for Inclusive Development in Kenya*. Journal of CMSD, Volume 2(2) 2018, p. 13.

3 Kariuki Muigua, *Ibid*, p. 14.

was subject to it or affected by it, so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law.⁴

Custom was particularly important because it defined social identity, relationships within family and society, access and rights to property and resources as well as dispute resolution in instances of conflicts.⁵ Customary law typically covered issues pertaining to marriage and divorce, division of matrimonial property, inheritance as well as aspects of personal law. Customary law was also exclusively applied to civil matters, and specifically those that related to native African communities. Customary law was therefore used as a tool by colonial administrations to contain and curtail African native communities. Most of these laws were also extremely oppressive to women and discriminated against them in several ways.⁶ In essence, customary law consisted of unwritten cultural norms and practices of native African communities dating back to the pre-colonial era.⁷

In these dispensations, women generally could not inherit property, pass citizenship to their children or to their foreign husbands, and were not guaranteed equal distribution of matrimonial property upon dissolution of marriage. In fact, the prevailing system of land access and ownership discriminated against women and served to perpetuate economic disadvantage and social inequality between men and women. In some communities, women were also at risk of being victims of wife inheritance which involved rituals of sexual cleansing and inheritance as property by the husband's male kinsmen. Harmful cultural practices including domestic violence, Female Genital Mutilation, early/child marriages (which were almost always entirely forced marriages) were also a common occurrence especially among the pastoral and nomadic communities in Kenya.

In addition to the oppressive discriminatory practices perpetuated by customary law, the policy and legislative frameworks in place in the nation were largely undemocratic and gender blind. The low levels of civic and gender awareness also contributed to the slow pace of changing the landscape as far as gender equality was concerned.⁸ Over the years however, Kenya has become a signatory to different international legal instruments that impose different obligations on States with regard to securing equality. These instruments are as follows;

- a. The Universal Declaration of Human Rights – UDHR
- b. The International Covenant on Civil and Political Rights – ICCPR
- c. The Convention on All Forms of Discrimination Against Women – CEDAW

4 Judicature Act – Section 3(3)(2).

5 Dr. Winifred Kamau. *Customary Law and Women's Rights in Kenya*. Equality Effect, p. 1.

6 Gail Presbey. *Women's Rights in Kenya Since Independence: The Complexities of Kenya's Legal System and the Opportunities of Civic Engagement*. The Journal of Social Encounters, Volume 6 Issue 1, Democracy and Political Change, 2022.

7 Dr. Winifred Kamau, *Op Cit*, p. 1.

8 Prof. Maria Nzomo. *Impacts of Women in Political Leadership in Kenya: Struggle for Participation in Governance through Affirmative Action*. Institute of Diplomacy & International Studies, University of Nairobi, p. 1.

- d. The African Charter on Human and People's Rights – ACHPR
- e. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. – Maputo Protocol

2. THE MOVE FOR GENDER EQUALITY IN KENYA

The agitation for affirmative action in Kenya became vibrant in the 1990s and gained gradual momentum at a time when global efforts were also working in concert towards securing women's rights across different levels. The *Nairobi Forward Looking Strategies for the Advancement of Women* emphasised on the need to integrate women wholly in the development process, bearing in mind the unique needs of different member states, particularly developing countries. Delegates also emphasized the need to promote women's participation in the professional, management and decision-making processes in their respective jurisdictions.

Efforts in the fight for affirmative action were concretised in 1996 when Hon. Charity Ngilu moved a motion for Parliament to implement the Beijing Platform for Action. Being male dominated at the time, Parliament shot down the motion. Further attempts by Hon. Phoebe Asiyo to move a bill for affirmative action in Parliament also met the same fate one year later.⁹ A similar affirmative action Bill was introduced by Hon. Beth Mugo three years later, except that this bill supported affirmative action as well as for other minority groups. The then President, Daniel Arap Moi was opposed to affirmative action for women specifically, arguing that everyone deserved equal opportunity despite their gender. The Bill met the same fate as its predecessors.¹⁰

Despite the continual shutting down of affirmative action in favour of women as presented in various draft Constitutions post-2000, spirited efforts by women's groups, civil societies, academia, women legislators and former women legislators saw lobbying efforts culminate in enactment of the 2010 Constitution that made clear provisions for the protection of women's rights, the recognition of women as constituting a vulnerable group, and the entrenchment of equality and non-discrimination not only as inherent rights but as part of the principles and national values of the State.

Over the years, the government has also identified twelve critical areas in which to advance gender equality. These areas range across the following; women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanisms for the advancement of woman; human rights of women; women and the media; women and environment and the girl-child.¹¹

⁹ *Ibid*, at p. 2.

¹⁰ *Ibid*.

¹¹ Ministry of Public Service, Youth and Gender. *Kenya's Report on Progress on Implementation of the Beijing Platform for Action – Review and Appraisal*. Beijing + 25 – Kenya's Report (revised July, 2019), p. 7.

2.1. THE STRUGGLE FOR FEMALE POLITICAL REPRESENTATION

Women, though forming the bulk of the population in most jurisdictions, tend to be under-represented. However, their numbers present numerous and varied political interests. The need to be equally represented in decision-making processes and forums is significant not only to ensure that women have a voice, but to ensure that their participation is impactful and relevant. According to AU statistics from 2017, women made up only one in four members of parliament in Africa. Even though this mirrors the global average, more than 50 % of African nations have less than 10 % of women in parliament.¹² Currently, East Africa is at the forefront as far as women's representation in parliament and cabinet are concerned. However, only South Africa and Botswana have succeeded in surpassing 30 % women representation in the public sector.¹³

Securing representation by women in legislation had been an uphill task in different jurisdictions the world over. Even where systems and structures have been put in place to secure women representation in legislative organs, their numbers still remain low. In African nations in particular, women remain either entirely unrepresented or grossly under-represented. Historically, women in Kenya had been side-lined from representative and decision-making process since independence. In the 13 general elections that have been held in Kenya since independence in 1963 the number of women holding parliamentary positions had remained low, with notable increase taking place only from 2002.

Political representation in this context relates both to listening to and expressing the will of the people in different legislative or law-making organs. There are different dimensions to the meaning of representation. Pitkin identified formal representation as referring to the institutional rules and procedures through which representatives are chosen.¹⁴ Representation also refers to activities centred on policy formulation, law-making, exercise of oversight roles, vetting of appointments, budget-making and contributing to development processes in one way or another.¹⁵

In Kenya, female representation in Parliament was extremely small compared to men. Women have historically only constituted a small percentage of the National Assembly, a situation which began to change only after the promulgation of a new Constitution in 2010. Further details of the gains of the 2010 Constitution with regard to Political Representation by women are set out in subsequent parts of this article.

12 The African Union. *AU Strategy for Gender, Equality & Women's Empowerment 2018–2028*, p. 48.

13 *Ibid.*

14 Leslie Bayer & William Mishler. *An Integrated Model of Women's Representation*. *The Journal of Politics*, Vol. 67 No. 2 (May, 2005), p. 407.

15 Katiba Institute. *Women Representatives in Kenya. Why There Are Not More of them, What their Role is, and How to Get More of Them?* Katiba Institute. 2020, p. 9.

3. ASSESSMENT OF THE GAINS OF AFFIRMATIVE ACTION

There are many wins to the affirmative action narrative and especially with regards to gender equality that are provided for in the 2010 Constitution. The Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.¹⁶ Further, in order to give full realisation to the right to equality and freedom from discrimination, the State is required to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.¹⁷ In addition, women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹⁸

The National Gender and Equality Commission Act¹⁹ is a central part of the country's legal and institutional framework set up to streamline gender issues in the country's national development agenda. The Act defines gender mainstreaming to mean ensuring that the concerns of men and women form an integral dimension of the design of all policies, laws and administrative procedures, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres in order to ensure that men and women benefit equally and that inequality is not perpetuated.²⁰

The National Policy on Gender and Development was formulated in 2019 as a step towards creating a just, fair and transformed society free from gender based discrimination on all spheres of life practices. The goal of the policy is to achieve gender equality and women's empowerment in national development so as to enhance participation of women and men, boys and girls, vulnerable and marginalized groups for the attainment of sustainable development, the policy sets out the legislative and administrative measures meant to address gaps in realization of gender equality and women's rights.

The National Assembly has also passed several laws from 2011, all aimed at creating an enabling legislative framework to implement different aspects of the Constitution with regards to affirmative action and the equality of men and women. These include;

- a. The Citizenship and Immigration Act of 2011
- b. The National Gender and Equality Commission Act of 2011
- c. The Prohibition of Female Genital Mutilation Act of 2011
- d. The Law of Succession Act of 2012 (Revised 2018)
- e. The Micro and Small Enterprises Act No. 55 of 2012
- f. The Matrimonial Property Act No. 49 of 2013

16 Article 27(1).

17 Article 27(6).

18 Article 27(3).

19 Act No. 15 of 2011, Laws of Kenya.

20 Section 2.

- g. The Marriage Act No. 4 of 2014
- h. The Protection Against Domestic Violence Act No. 21 of 2014

As part of its efforts in implementing gender equality and freedom from discrimination, the State also established the State Department of Gender to;

- a. Institutionalize gender mainstreaming in government departments and agencies
- b. Review and promote the review the gender policies and legislation
- c. Engage in research, analysis and dissemination of sex-disaggregated data to inform programming
- d. Coordinate programs geared towards reducing the prevalence of Sexual and Gender Based Violence
- e. Oversee the implementation of socio-economic empowerment among women and youth; and
- f. Set standards for capacity building of State actors to monitor compliance and report on progress at National and County levels.

3.1. POLITICS AND LEADERSHIP

One of the biggest wins for women post 2010 has been the statutory establishment of political positions that serves to guarantee women's voices being heard in decision-making at different levels of public administration. Specifically, the Constitution of Kenya, 2010 provides for;

- a. Election of 47 Women into the National Assembly as Women Representatives
- b. The right of every citizen – including special interest groups to form and participate in forming political parties and participate in their activities including recruitment of members, campaigning, contesting and holding office.
- c. The requirement for Parliament to enact legislation to promote the representation of women in Parliament
- d. The two-thirds gender rule where County Governments are required to ensure that no more than two thirds of the members of representative bodies in each county government shall be of the same gender.

As a result of these and other changes, the level of women representation and participation in politics and political processes in Kenya has seen a marked increase.

3.2. ECONOMIC EMPOWERMENT

Women have historically borne the brunt of Kenya's high poverty levels both in the past and at present. However, notable efforts geared towards the economic empowerment of women have been put in place by the Government of Kenya. Various strategies have been applied towards this end including gender mainstreaming, gender responsive budgeting, affirmative action and specialised funds dedicated to women and other vulnerable groups

(youth and persons with disabilities) have been set up. In addition, the government also introduced 30% procurement reservation wherein special interest groups (women, youth and persons with disabilities) access 30 % value of all public procurement tenders.

The specialised funds mentioned above are set out in further detail as follows;

- a. The Women Enterprise Fund to provide micro-finance and other financial support for women.
- b. The Youth Enterprise Development Fund to provide credit for young men and women to establish businesses.
- c. The Uwezo Fund which empowers women and vulnerable groups by giving seed money as start-up capital for businesses.
- d. The Social Protection Fund which gives credit and cash transfers to older citizens above the age of 65 years.
- e. Government Affirmative Action Fund administered through female Members of Parliament to run programs that empower women and vulnerable groups (persons with disabilities, youth, children and the elderly).

The State Department for Gender currently has in place a 5-years strategy (2020–2025) for the economic empowerment of women. The strategy's guiding principles include recognition of human rights; respect for rule of law and constitutional rights; respect for national values including non-discrimination and equality; equality and equity; enhancing equitable socio-economic development; economic empowerment; fair labour practices; participation and representation; non-discrimination; historic and sustainable approach to economic development as well as joint coordination, partnerships and collaboration.

3.3. OTHER PRIORITY AREAS

The National Policy on Gender and Development outlines key priority areas in which the government seeks to strengthen through institutional arrangements and other actions, with the aim that gender equality play a key role in the country's development agenda. Specifically, the key priority areas are;

- a. Strengthening legal, policy and administrative frameworks for gender equality and women's empowerment at all levels;
- b. Poverty eradication by eliminating discriminatory laws, policies and practices and empowering men and women to have access to and control over economic opportunities and resources;
- c. Eliminating discrimination in access to employment, promotion and training to enhance income security for men and women;
- d. Enhancing and sustaining measures to eliminate gender disparities in access to education;
- e. Promoting new attitudes, values and behaviours, including promoting a culture of respect for men and women;

- f. Facilitating access to health care
- g. Implementing measures to overcome barriers that inhibit women's access to and control of resources of production;
- h. Integrating and mainstreaming gender perspectives in peace and security processes
- i. Ensuring equitable and meaningful participation and representation of women and men in governance and decision-making positions in public and private sectors;
- j. Having measures in place to ensure that gender is considered when dealing with other forms of inequality;
- k. Elimination of sexual and gender based violence;
- l. Enhancing respect and promotion of children's rights for both boys and girls
- m. Strengthening institutional mechanisms for the advancement of gender equality and empowerment of women generally.

4. AFFIRMATIVE ACTION – CHALLENGES AND DOWNSIDES IN KENYA

Even though there have been targeted and spirited efforts to introduce gender-sensitive approaches in national development, the approaches have not entirely succeeded in addressing underlying norms and customs that define gender relations and power dynamics in the society.²¹ The following have been the major challenges and setbacks as far as actualising and implementing constitutional requirements on affirmative action and gender equality;

- a. Lack of political goodwill to comply with constitutional requirements, most notably the two-thirds gender rule;
- b. Imbalance in implementation of affirmative action which has resulted in the boy-child being side-lined from benefits and efforts to empower girl-children;
- c. Conflict of marriage law systems resulting in continued discrimination against women especially in areas of personal law (marriage, divorce and succession);
- d. Failure to include or perceive men as change agents particularly with regard to reforming harmful cultural norms in favour of women;
- e. Lack of capacity at the institutional level

5. CONCLUSION AND WAY FORWARD

While there have been many gains for Kenyan women, there is still room for much more to be done in order to ensure that the gains of affirmative action continue to bear impactful fruit. More specifically, it is recommended that the following measures be taken;

- a. Implementation of not more than two thirds gender rule at all levels. This requires political good will and deliberate efforts in order to ensure that there is compliance at all levels of institutional leadership.

21 Kariuki Muigua. *Attaining Gender Equity for Inclusive Development in Kenya*. Journal of CMSD, Volume 2(2) 2018.

- b. Having men on the negotiation table, and as part of the decision making process. It has been proven to be more meaningful when stakeholders who stand to be affected by decisions are included and involved in the decision making process. Not only do they own the process, but they also act as change agents to further the discourse and positive outcomes around affirmative action. Having men on the decision making table will also help to deconstruct harmful and negative social structures built on the foundations of oppressive patriarchal models.
- c. Dealing with negative cultural practices from a cultural perspective. A good example of this would be the exercise of alternative rites of passage in lieu of FGM as well as educating the community on dangers associated with these practices. Whereas the law is a strategic and impactful tool through which to engineer social change, it remains true that culture too does play a significant role in establishing social norms and practices. As such, there should be deliberate efforts to make use of this as a channel through which to slowly but steadily introduce a different paradigm that preserves the essence of culture, while doing away with those aspects of practice that are actually harmful.

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