

## **An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya**

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### **Abstract**

*The resistance to women based affirmative action has remained the facilitating tool for perpetuation of discrimination against women notwithstanding the spirit and provisions of the Constitution of the Republic of Kenya (2010). The current globalization has made it almost mandatory for countries subscribing to international treaties to abide by gender equity and equality principles and Kenya cannot afford to be left behind the wave of development. This study argues that affirmative action can work and promote gender equity in political representation and ultimately improve development outcomes if there is full commitment to its objectives and measures. The study further makes the case for affirmative action on grounds of necessity, legal justification and its value for attainment of broad developmental goals. Through the methodology of review of laws and various documented literature, the concept of affirmative action has been understood, its milestone traced and a mechanism for implementing its policies proposed.*

**Key words:** Affirmative Action, Women, Gender, Leadership, Equity, National Assembly, politics

### **1. Introduction**

The Constitution of Kenya, 2010, Article 27 (8) provides for affirmative action where the State is required to take legislative and other measures to ensure that not more than two-thirds of the members of elective or appointive bodies are of the same gender. Article 81 further reiterates that the same rule should be applicable in elective public bodies. In Kenyan public institutions, and in particular the National Assembly, gender balance is skewed against women, thus the gender rule generally tries to bring in women into the lime light.

#### **1.1 The Concept of Affirmative Action**

Generally, affirmative action means a deliberate move to reforming or eliminating past and present discrimination using a set of public policies and initiatives designed to help on the basis of colour, creed, geographical location, race, origin and gender among others (WiLDAF, 2010). This definition is in line with Dessler (2005) who asserts that affirmative action involves steps that are taken for the purpose of eliminating the present effects of past discrimination. Affirmative action takes into account under-representation and insignificant occupation of positions by some minorities in the society. The underlying motive for affirmative action is the principle of equal opportunity, which holds that all persons have the right to equal access to self development. Lee (1999) defines affirmative action as the proactive policy of making special efforts in employment decisions, college entrance, and other areas of public behaviour as a way of compensating for past discrimination.

He gives the justification of affirmative action as being based on the thought that certain groups of people, even in the absence of current discrimination against any individual member of that group, are at a disadvantage because of the effects of past discrimination against some members of the group. Affirmative action is thus an attempt to 'level the playing field'.

Emphasis is placed on the fact that affirmative action is to benefit a disadvantaged group and is not limited to injured individuals of discrimination. Though those directly injured too may benefit, affirmative action policies are not put in place to redress their grievances. The solution they have is to seek redress from the courts.

## 1.2 The History of Affirmative Action

The affirmative concept was first introduced by President John F. Kennedy in the United States with his Executive Order number 10925 (Shirley, 2012). His aim was to redress the discrimination that still persisted in spite of civil rights laws and constitutional guarantees that had been put in place. The order instructed federal contractors to take affirmative action steps to ensure that applicants were treated equally without regard to race, colour, religion, *sex*, or national origin. The Civil Rights Act of 1964 extended Kennedy's order to non-governmental contractors, making nearly all employment discrimination illegal on the basis of *sex*, colour, religion or any other ground.

## 1.3 Affirmative Action in Kenya

In Kenya, affirmative action mainly takes a gender perspective. It is a concept that has come a long way. Most people are familiar with affirmative action in relation to university admission where grades for female university applicants are put much lower than those of the boys so as to encourage more girls to access education. In 1997, Hon. Phoebe Asiyo tabled a motion on affirmative action to increase women's participation in leadership and decision making in parliament and local authorities to at least 33%, a motion which was soundly defeated (Amnany, 2013). In 2000 Hon. Beth Mugo again tabled the same motion which was somewhat successful as it was referred to the Constitution Review Commission of Kenya (CRCK) which was reviewing the constitution at the Bomas of Kenya. The provision was incorporated under the Bomas Draft, which culminated into the Wako Draft that was defeated in the 2005 referendum. The Constitution of Kenya, 2010 has however, been gender conscious as it stipulates strategies of affirmative action to bring women into the limelight.

It has been the experience in Kenya that women are underrepresented. From the 1<sup>st</sup> general election held in Kenya to the most recent 2013 general election, men have been the majority in parliament. There was not a single female MP in the first legislature in 1963. Female representation has only improved slightly. There was 4.1% female representation in Parliament in 1997, 8.1% in 2002 and 9.8% in 2007. Even with the 2010 Constitution providing for the two-thirds gender rule, the 2013 general elections saw only 16 of the 290 women elected as members of parliament.

Women representation and participation in Kenya's parliament: 1<sup>st</sup> to 10<sup>th</sup> parliaments

Parliament	Time/ Duration	Total No. Of constituencies	Total No. Of Women Mps	No. Of Elected Women Mps	No. Of Women VS Number Of Men Nominated To Parliament	
					Women	Men
1 <sup>st</sup> Parliament	1963-1969	158	0	0	0	2
2 <sup>nd</sup> Parliament	1969-1974	158	2	1	1	10
3 <sup>rd</sup> Parliament	1974-1979	158	6	4	2	14
4 <sup>th</sup> Parliament	1979-1983	158	5	4	1	11
5 <sup>th</sup> Parliament	1983-1988	158	3	2	1	9
6 <sup>th</sup> Parliament	1988-1992	188	2	2	0	10
7 <sup>th</sup> Parliament	1992-1997	188	7	6	1	12
8 <sup>th</sup> Parliament	1997-2002	210	9	4	5	9
9 <sup>th</sup> Parliament	2002-2007	210	18	10	8	4
10 <sup>th</sup> parliament	2008-2012	210	22	16	6	6
Total			74	49	25	87

Source: Adopted partly from Kihoro (2007) in Nyokabi Kamau's study on women and political leadership in Kenya (2010)

Kenya is a signatory to many international instruments such as the Convention on all Forms of Discrimination against Women (CEDAW), the Beijing Declaration and Platform for Action, the Millennium Development Goals (MDG's), the UN Security Council Resolution 1325 (UNSR 1325) among many others. Being a signatory to all these instruments that advocate for women representation at all levels of decision making, it is saddening that Kenya has a low level of female representation in elective positions

#### **1.4 Statement of the Problem**

Since Kenya achieved its independence in 1963, eleven general elections have been held, the latest being the 2013 general election which was unique in the sense that it was the first one under the new 2010 constitution, which provided that no single gender should hold more than two-thirds of elective or appointive positions. The percentage of women parliamentarians remained less than 6% from 1963 to 2007. In the 2008 general elections the numbers slightly rose to 9.8% with 22 women parliamentarians. The 11<sup>th</sup> parliament which came in place in March, 2013, saw a lot of improvements as far as women representation is concerned. In this parliament, women make over 19% representations in parliament. This was made possible by a creation of 47 seats for women as well as policies requiring parties to nominate women into parliament. Even though the number of women representatives in parliament has increased, it still lies way below the expected 33.3% if the two-third gender rule is to be observed. The study thus sought to establish what affirmative action policies could be adopted to achieve the minimum representation in the National Assembly. The study recognizes that although the constitution suggests affirmative action as an obvious solution, it does not provide for the affirmative action mechanism to be employed. The study also seeks to understand the challenges that the implementation of the gender rule is facing.

#### **1.5 Objectives of the Study**

The overall objective of the study was to examine the extent to which implementation of the two- thirds gender rule could be achieved by affirmative action. Specific objectives included:

1. To determine affirmative action policies that can be put in place to give effect to the two-third gender principle and subsequently make recommendations
2. To examine the challenges which women face that impede them from achieving a minimum one-third representation in the National Assembly.

#### **1.6 Importance of the Study**

The fact that the two-thirds gender principle has been entrenched in the constitution which is the supreme law of the land is noteworthy. This study is important because it offers insight into the new law and the effect of its interpretation. This study is also important because it looks at affirmative action as a method of implementing the new provision. Even though affirmative action has been widely studied, the circumstances of each country are different. Kenya is unlikely to achieve 33% female representation without the help of affirmative action. Therefore, a study that looks into affirmative action in the Kenyan perspective to offer a method that might work for Kenya goes a long way in ensuring that the country get to implement the 33% requirement, which is also in line with Beijing platform requirement. This study can be used by policy makers in developing practical affirmative action policies and strategies. The study is also useful to the general public at large as it unravels the myths held about affirmative action by providing a comprehensive understanding of the concept.

## **2. Literature Review**

### **2.1 Affirmative Action Concept**

Affirmative action has attracted different views from different writers. For example, Weiss (1997) contends that affirmative action seeks to overcome discrimination, increase diversity and reduce poverty among groups that have historically been victimized by discrimination. Alexander (2006) on the other hand argues that affirmative action is to a large extent an aspect of transformational measures, as it aims at enriching the society's welfare by providing education, better housing, sanitary conditions, employment and other benefits. He further contends that true and just affirmative action is based on the premise that preference is shown to members of a designated group as long as they are as qualified/skilled or have the same know how as members of the non-designated group.

## 2.2 Affirmative Action for Women

Sowell (2004) laments that throughout history women have been discriminated in various ways. Nzomo (1987) traces the subordination of women to the evolution of the class society into an institutional one where the men were in control of the means of production. She further contends that those who control the economic domain invariably exercise similar control over the political arena, therefore political leadership and important decision making is dominated by men.

Okeyo (1989) proposes an economic rationale for focusing on women development in all sectors of life including leadership. He says that since women constitute a half or more of the population, they have a potential to contribute to development. Affirmative action in its true sense is not meant to be a permanent fixture, but is meant to redress a past injustice and once the injustice is cured, the system goes back to normal. This can be achieved by not only transformation as suggested by Alexander (2006) but by ensuring the beneficiaries of affirmative action outperform themselves when given the opportunity based on their disadvantage.

It is worth noting subordination and discrimination of women is universal and that there is no society where they are treated as equals with men (Schmidt 2006). Some issues affecting women like domestic violence or rape are global problems. Others like Female Genital Mutilation, child marriages and wife inheritance are found in specific cultural contexts. On the whole, not everyone thinks that all of these issues are problems that ought to be addressed. This is because they believe that some of these practices have only become oppressive in modern society. This argument is backed by Schmidt (2006) who argues that without modernisation and exposure, the whole community would still regard such problems as perfectly okay. The reality is that African women have become more conscious about discriminative behaviour and structures that oppress them and are articulating more openly their expectations to be treated as equal citizens endowed with absolute rights.

Stereotypes against women as well as their family responsibilities have had their share in demeaning women and shunning their enthusiasm to participate in public life (Kassilly & Onkware, 2010). According to Grignon (1990), “the men could not imagine being led by a woman.” On the other hand numerous studies have shown that women’s family obligations, including the availability of child care, interfere with their ability to take on political jobs. One’s strong spousal support is a prerequisite for women to seek public office thus there is a conflict between parental roles and marital roles and career opportunities for women (Martin & Glaine (1990).

## 2.3 Pre-colonial Status of Women

Before the white colonialists set foot in Kenya, the society was still patriarchal. African men made the decisions in the society and set the rules that the community was to live by. This was through the council of elders that existed in most societies (Kariuki 2011). Few women occupied public positions of power. The one common position was that of medicine-woman. Generally the place of women was largely in the house and looking after the welfare of her homestead. Men on the other hand were generally their own masters. They dictated what was permissible and what was not. Men were the warriors of the community, decision makers, and heads of families and in that capacity; they dictated what was expected of the family.

## 2.4 Arguments for Affirmative Action

Proponents of Affirmative action argue that it creates opportunities for women and other previously disadvantaged groups to showcase their talents, skills, and leadership qualities thereby compensating for their historical discrimination (McLean, 2002; Taylor, 2002; Whiteneck 2003). Without affirmative action, they would have remained untapped. Moreover, affirmative action provides role models (Patrick 2004) since successful women encourage and motivate other women to be confident in knowing that excellence can be achieved. Affirmative action promotes diversity and encourages public welfare for common good by increasing opportunities for previously disadvantaged groups, which in turn decreases the potential for conflict as the members of the society find themselves at the same level politically, economically and socially. Furthermore, proponents have held that affirmative action creates organizational harmony (Rossett and Bickham, 1994) is socially just and morally desirable (Carnevale and Stone, 1994), improves productivity (Gordon, 1992) and assists the understanding of greater customer needs (Rice,1994).

## **2.5 Arguments against Affirmative Action**

Opponents of affirmative action believe that it rewards people on the basis of their genetically determined trait (in this case they were born women). Affirmative action programmes that favour women undermine the democratic concept of equality of opportunity. They argue that women should be given a chance to compete for opportunities equally with men, without any favour. At the same time, Harris (2009) adds, affirmative action undermines the principle of compensatory justice. Compensatory justice requires that compensation be provided to the specific individuals who were wronged or harmed. It is unjust for a whole society to compensate a class of people for harm done to specific individuals amongst them.

Critics further claim that affirmative action lowers the self worth and self-esteem of women. This is because one does not know whether they have sailed through because of their abilities and expertise or because of the preferential treatment accorded. Moreover, treating people differently conflicts with corporate philosophies of equality and unitary goals and increases social hostility since men who see themselves as lacking an opportunity because it has been given to a woman become hostile and resentful to women in general (Gottfredson, 1992). Opponents also see preferential treatment as reinforcing the perception that women cannot make it on their own without the assistance. Moreover, it lowers the standards of performance and delivery because people who have less qualification are given the positions in contention. They allege that had the positions been occupied by the other qualified individuals, the performance would have been better. Others view affirmative action as just but a component of inclusivity and propose that a diverse workforce requires a shift from affirmative action to a market oriented debate (Dessler 2005).

## **2.6 Quotas and Affirmative Action**

The most used method of affirmative action is the use of quotas. Quotas in politics may be defined as an affirmative measure that establishes a fixed percentage or number for the nomination or representation of a specific group, in the case of this study women, most often in the form of a minimum percentage. Quotas can be legislated in law, as is the case in Kenya, where no single gender is expected to make up more than 66% parliament or other public bodies by the constitution. Secondly, it could be voluntary where internal requirements within the party are made to nominate a minimum number of women for elected office.

## **3. Methodology**

The study focused on the 11<sup>th</sup> Parliament of Kenya, the first one of its kind as it incorporates the structural reforms laid out in the 2010 Constitution with a membership of 349 representatives comprising of 290 elected members from the constituencies, 47 women elected from the counties and 12 nominated representatives. The study adopted a qualitative design and widely used secondary data which comprises of applied facts, assumptions and premises contained in documentary sources. Critical reading, thinking and assessment of documented literature provided relevant data which was synthesised and evaluated into categories to form key issues, patterns and themes. An analysis was done which provided information on logical relationships, which in turn informed conclusions regarding the subject in question.

## **4. Results and Discussions**

The study found out that although affirmative action for women has been clearly enshrined in the constitution through the two-thirds gender rule, a framework for implementation does not exist, giving leeway for gaps. The executive arm of government must have the will to pursue such affirmative action policies by presenting Public Bills to the National Assembly on such policies thereby legalizing it for ease of application and enforcement. Moreover, there exist gender stereotypes against women and women leadership, leading to a general mindset skewed against women leadership and thus affecting the will to implement affirmative action policies. Affirmative action for women is viewed as a weapon to destroy the already rooted male prominence in public life and decision making positions and is unlikely to be fully achieved without an expressed mechanism as well as a change of mindset by not only the policy makers but also the general public. Where a mindset change is achieved affirmative action for women would even be voluntarily achieved, and with expressed mechanisms for implementation, quotas would enable Kenya to reach the 33% mark. As evidenced in this study, affirmative action for women, though slowly being implemented has showing signs that with a little more deliberate effort, it can be achieved.

## **5. Recommendations**

The study recommends that the government should develop programs to ensure that political, economic and socio-cultural factors that impede women participation in public life should be addressed. Campaigns and sensitisations should be strengthened in support of affirmative action for women. Party policy on selection of candidates for the nomination in the party's strongholds should deliberately and as a matter of party policy and commitment target women. The political parties can also introduce voluntary quotas by establishing that a certain percentage of the nominees contesting for Member of Parliament seats are women, preferably over 30 percent. If all the parties do so, that would be a great stride for affirmative action for women.

Women need to be more purposeful about working on the personal factors that hinder them from taking their rightful place in society. They need to work on issues of self-esteem and confidence in relation to politics. There is need to recognize that even though academic achievement is extremely important for leaders to be effective, of equal importance is a better understanding of politics and issues of legislation. Women planning to join politics need to familiarize with the political dynamics in Kenya and especially how they can stand out in a male-dominated parliament. Women currently in leadership, given their small numbers, need to work extra hard to become role models for other aspiring women politicians so that the electorate can begin to appreciate their leadership. Women politicians need to appreciate that since they are a minority, they have a much bigger responsibility because everyone is watching how they perform. When women in public life become achievers, women are likely to find an equal competing ground with men without necessarily doing so through affirmative action.

## **6. Conclusion**

Affirmative action aims at remedying prior discriminatory practices or compensating past discriminatory practices or forestalling institution of any discriminatory agenda. If used well, it can ensure equality in the political leadership of Kenya and in the process ensure that the not two-thirds gender rule is implemented. At the same time, it can achieve in the easiest and best ways as well as shortest possible time rights denied over a period of time. The ultimate aim of affirmative action is towards justice, peace and development in any given society. With this in mind, affirmative action, particularly the use of quotas should be encouraged. Further, Kenyan women should embrace a common goal that will unite them in their diversity for the promotion of a gender agenda in the country's governance and democratization process.

## **7. Limitations**

The study investigated affirmative action in relation to representation in the Kenyan National Assembly. It appreciates that the two-thirds gender rule is not limited to only this institution but cuts across all other public institutions which may have different dimensions of its implementations.

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