

WOMEN'S GAINS IN THE NEW CONSTITUTION OF KENYA

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Introduction

Over the years, FIDA. Kenya has been on the forefront of the struggle for better protection of women's human and legal rights as enshrined in international and regional human rights instruments such as United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Beijing Platform for Action (1995) and the Protocol on the African Charter on Human and Peoples Rights on the Rights of Women in Africa (The Maputo Protocol). The Constitution of Kenya which has been in force since independence had legitimized the subordination of women by embracing legal pluralism which embodied customary and religious laws that are discriminatory to women. Worse still, courts have been reluctant to enforce the principles enshrined in these instruments on the basis that they have not been domesticated, in spite of the government's commitment in executing them. In spite of making 50 % of Kenya's population, women's needs have only barely been reflected in the overall national policy since they do not feature in key decision making positions that distribute power and resources nationally.

On 4th August 2010, Kenya went to the referendum poll on a proposed new constitution and a convincing 67% voted in its favour. The promulgation of the new Constitution of Kenya on 27th August 2010 was the culmination of a two decade struggle for a new constitutional dispensation, mainly due to poor governance, inequity in resource distribution, among a myriad of other social and economic problems facing the country.

This paper is an evaluation of the gains of women in the new Constitution of Kenya based on the principles laid in the key women's rights instruments, mainly CEDAW and the Maputo Protocol.

What are the Gains for Women?

The preamble of the constitution recognizes the key principles of gender equity, including social justice, parity and fair representation, which is critical for advancing women's rights and gender parity. The Constitution espouses the national values and principles of governance to include;

- patriotism,
- national unity,
- sharing and devolution of power,
- the rule of law ,
- democracy and
- participation of the people.

The principles further include

- human dignity,
- social justice,
- inclusiveness,
- equality,
- human rights,
- non discrimination,
- protection of the marginalized,
- good governance,

- integrity,
- transparency and accountability, and
- sustainable development¹.

The recognition by the constitution of the principles of equity and non discrimination as part of the value system and principles of social justice is instrumental in accelerating gender justice for women.

The following are some of the key gains for the women of Kenya;

1. Outlawing of retrogressive customary /religious laws.

The recognition and entrenchment of customary laws by the independence constitution has been one of the major setbacks for women in Kenya, since it legitimized the marginalization of women by allowing the application of customary laws, which by their very nature are discriminative against women, in matters of personal law. The new constitution reverses this by stating that “ *any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid*”²

2. Domestication of International instruments

FIDA Kenya has been at the forefront of the struggle for domestication of CEDAW and the Maputo protocol, among other instruments. Constitution provides that “The general rules of international law shall form part of the law of Kenya” and “ Any treaty or

¹ Constitution of Kenya, Article 10,

² Article 2 (4)

convention ratified by Kenya shall form part of the law of Kenya under the Constitution".³

3. Protection of Vulnerable Groups

The new constitution bestows a duty on all public officers to address the needs of vulnerable groups in society, including women, older citizens, persons with disabilities, children, youth, members of minority or marginalized groups.⁴

4. Representation in Public Office

Women representation in all decision making organs is a fundamental issue in advancing gender equality. For a long time, women in Kenya have championed good leadership and meritocracy in hiring processes, while decrying their minimal representation in public office and key decision making organs. Even though some attempts have been made at affirmative action for women representation, it has not amounted to much in terms of increasing the representation of representation in public and key decision making bodies. Corruption and violence, especially sexual harassment have hampered effective participation of women in public office.

The new Constitution changes this through the guiding principles of leadership and integrity which include selection on the basis of personal integrity, competence and suitability, or election in free and fair elections⁵. The values and principles under which the Public Service Commission is established affords adequate and equal opportunities

³ Article 2 (5) and (6)

⁴ Art. 21 (3)

⁵ Art 73 (2) (a)

for appointment, training and advancement at all levels of the public for men and women.⁶

The new Constitution provides a legal framework for women representation which did not exist in the old order. It makes specific provision for the representation of women both at the national government and devolved government (County) level, the legislature, the judiciary and also in political parties. It provides that not more than two thirds of the members of elective public bodies shall be of the same gender.⁷

Ten independent commissions are established by the constitution, with a clear requirement that the chairs and vice chairs shall not be of the same gender.

i. Political Parties

The constitution ensures that gender equality is maintained in political parties providing a basic requirement for political parties as amongst other All political parties are also required to respect and promote human rights and fundamental freedoms, and gender equality and equity.⁸

ii. The Legislature: National Assembly and Senate

The constitution provides that membership to the National Assembly should include forty –seven women, each elected by the registered voters of their counties, each county constituting a single member constituency.⁹ Membership to the senate which will have 47 elected members, among whom will be sixteen women members nominated by political parties according to their proportion of members of the senate. There will be

⁶ Art. 232

⁷ Art. 81 (b)

⁸ Article 91(f) & (h)

⁹ Art. 97

two further members representing the youth, one male one female. Persons with disability will also have a male and female representative in the Senate.

The county assemblies will also have special seats to ensure the one third principle is adhered to.¹⁰ Parliament is required to enact legislation to promote the representation in parliament of women, persons with disabilities, youth, ethnic and other minorities, and marginalized communities.¹¹

iii. Devolved Government

The new Constitution is also laudable for providing women a framework that will promote women participation in the devolved government. One of the principles of devolved government geared towards ensuring gender parity is that no more than two thirds of the members of representative bodies in each county government shall be of the same gender. The county assemblies created by the constitution are required to have no more than two thirds of the membership of the assembly being of the same gender. It is also a requirement that no more than two thirds of the members of any county assemblies or county executive committees shall be of the same gender¹², effectively assuring women of at least one third representation in the county assemblies and executive committees.

iv. The Judiciary

Women's participation in the judiciary is enhanced by the Constitution. The eleven member Judicial Service Commission (JSC) established under the new constitution requires that at least one female judge/magistrate, one female advocate, one woman

¹⁰ Art. 177(1) (b).

¹¹ Art. 100

¹² Art. 197

representing the public.¹³ The JSC which is expected to promote and facilitate the independence and accountability of the judiciary and the efficient and transparent administration of justice is specifically required to be guided by gender equality in the performance of its functions.

5. Property Rights

Currently, women hold title deeds for only 1% of land in Kenya. The new Constitution lays a solid foundation for the legal protection of women's equal property rights by eliminating discriminatory land ownership practices, hence bringing Kenya into compliance with its international human rights obligations, including the rights to non-discrimination and equality before the law and to do away with problematic provisions of the former constitution, which permitted discrimination on the basis of customary and personal laws that affect women's property rights. All forms of discrimination against women is prohibited and contrary to customary law, women can now inherit land. Their right to matrimonial property is also protected both during marriage and in the event of a breakdown in the marriage¹⁴.

6. Citizenship

Citizenship has been a contentious issue for women in Kenya. Under the old constitution, women could not pass citizenship to their foreign husbands or children born to non Kenyan men. Men on the other hand could pass citizenship to their foreign wives and children born by non Kenyan mothers. This discrimination is addressed under the new constitution which declares any person a Kenyan citizen whether born in or outside Kenya, as long as either of the parents is Kenyan,

¹³ Art . 171

¹⁴ Art 68(c)iii

7. Parental Responsibility

Historically, women and girls have had to deal with the burden of child care especially in situations where the child is born outside the institution of marriage. They are often left to take care of the children with no participation or involvement of the man involved. The Children Act 2001 also discriminates against children born out of wedlock in matters of parental responsibility. The legislation imposes conditions upon which a father of a child can be made to bear his parental responsibility over such a child, often to the detriment of the child and her/his mother. The new constitution provides for equal parental responsibility over children regardless of the circumstances under which the child is born.

8. Right to Health

Every year hundreds of women die as a result of pregnancy related complications in Kenya. The constitution seeks to address this by allowing termination of pregnancy when the life of a mother is in danger accord the right to health including reproductive health to women. The explicit prohibition of violence against every person is a huge gain for women who are constantly subjected to domestic and gender based violence.

Under the new Constitution, the National Gender and Development Commission has been merged with the Kenya National Commission on Human Rights. Even though this has been taken by some as a negative move, some have lauded it as a step in the right direction, considering the challenges of resourcing that have held back the Gender Commission. The Commission is expected to promote gender equality and equity and generally to coordinate and facilitate gender mainstreaming in national development.

Conclusion

The promulgation of the new constitution was an historic moment for the women of Kenya who have for years battled with discrimination, non representation and suppression at all levels. The gains for the women of Kenya in the new constitutional dispensation are enormous, both in process and content, considering the far we have come.

Most importantly, the increase in the representation of women both at policy and implementation level in all the three arms of government provide an excellent opportunity for ensuring that the gains are followed through and fully implemented.

The constitution provides women with the opportunity to challenge as unconstitutional any government decision that does not comply with the requirement to have at least one third representation of women in any body or decision making organ. This is just a beginning, and it calls for the vigilance of all women to hold the government accountable and to ensure it does not just pay lip service to the changes envisaged by the constitution.