

**AN ANALYSIS OF AFFIRMATIVE ACTION: IMPLEMENTING THE  
TWO-THIRDS GENDER RULE IN KENYA**

**A Dissertation Submitted in Partial Fulfilment of the Requirements  
for the Award of the Degree of Bachelor of Laws (LL.B) of the  
University of Nairobi**

**By**

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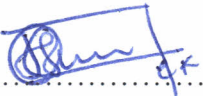
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## DECLARATION

I **EMELDA KINYA KAIMENYI** do hereby declare that this is my original work and it has not been submitted for a degree in any other university. All sources of information have been duly acknowledged.

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## **SUPERVISOR**

This dissertation has been submitted for examination with my approval as a University Supervisor.

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## **ACKNOWLEDGMENT**

I would like to thank my supervisor Mrs. Joy Asiema, for her valuable guidance while writing this dissertation.

Special thanks to my parents, Mr. and Mrs. Kaimenyi for their unfailing love and support.

To my friends who encouraged me through it all- Njeri, Makena, Kui, Lilo, Shei, Mailu and the rest, thank you.

Finally and most importantly, my heartfelt gratitude to God who is able to do exceeding abundantly above all that we ask or think, according to the power that works in us.

## **DEDICATION**

I dedicate this work to all the elected women in political leadership positions in Kenya. May you excel in representing your electorate.

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## **LIST OF CASES**

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[2011] eKLR

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Senate, Supreme Court Advisory Opinion [2012] eKLR

Matadeen and Another v Pointu and Others [1998] 3 LRC 542

## ACRONYMS

**FGM-** Female Genital Mutilation

**GBV-** Gender Based Violence

**MDG-** Millennium Development Goals

**MFI**s- Micro-Finance institutions

**PR-** Proportional Representation

**SACCO-** Savings and Credit Co-operative

**RPF-** Rwandan Patriotic Front

## CHAPTER ONE

### AN ANALYSIS OF AFFIRMATIVE ACTION: IMPLEMENTING THE TWO-THIRDS GENDER RULE IN KENYA

#### **1.1 Background**

The Constitution of Kenya, 2010 provides for the two-thirds gender rule. The principle is clearly stated in Article 27 (8) that the State shall take legislative and other measures to implement the principle *that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender*. Article 81 further reiterates that not more than two-thirds of the members of elective public bodies shall be of the same gender;

To actualize this, the constitution provides that the state should take measures including affirmative action and other legislative measures to ensure that the two-thirds rule is met.

The affirmative concept was first introduced by President John F. Kennedy in the United States with his Executive Order number 10925<sup>1</sup>. 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 to ensure that applicants are treated equally without regard to race, colour, religion, sex, or national origin.**”<sup>2</sup> 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. In America, he introduced the concept to deal mainly with racism.

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<sup>1</sup>Wilcher, Shirley, ‘History of Affirmative action’ <Americans for Fair Chance.  
<http://www.inmotionmagazine.com/aahist.html>> accessed 2nd January, 2012

<sup>2</sup> *ibid*

The concept has since been picked up around the world. In Indonesia they adopted a quota system where 30% of the female candidates nominated by the political parties for elections were to be women<sup>3</sup>. This was after heavy lobbying by civil rights groups and women groups to increase the representation of women which was at 8% at that time<sup>4</sup>.

In South Africa, the concept of affirmative action came up to deal with the effects of the apartheid system where the majority black population was racially segregated. They lagged behind in virtually everything<sup>5</sup>. Affirmative action was introduced in the form of an act in 1998<sup>6</sup>. They adopted the concept from United States with one notable difference. Affirmative action in South Africa was to benefit the majority black population as opposed to America where it benefited minority groups<sup>7</sup>.

In Kenya, affirmative action 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 apply.

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 33.3%. The motion was soundly defeated<sup>8</sup>. In 2000 Hon. Beth Mugo again tabled the same

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<sup>3</sup>Hana Satriyo, 'Can Affirmative Action Increase Women's Ability to Get Elected in Indonesia?' <<http://asiafoundation.org/in-asia/2011/06/01/can-affirmative-action-increase-womens-ability-to-get-elected-in-indonesia>> accessed on 11th January 2013

<sup>4</sup> ibid

<sup>5</sup>)A South African survey revealed that in 1991 there were only 30 black engineers vs. 17,840 white engineers, 31 black pharmacists compared with 2,021 whites. In 1994 only 60 blacks were chartered accountants and there were fewer than 20 black architects. The blacks held only 3% of managerial positions in a country where blacks represented more than 80% of the population

<sup>6</sup> Employment Equity Act, 55 of 1998

<sup>7</sup>Tabitha Wangare, 'Affirmative Action; A Kenyan Case' (Master's Thesis, Moi University 2009)

<sup>8</sup>Daisy Amnany, 'proposal to secure affirmative action as provided for in the constitution of Kenya 2010' <[www.ke.boell.org](http://www.ke.boell.org)>accessed 13<sup>th</sup> January 2013

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. This draft was rejected by one side of the NARC government (National Rainbow Alliance) and this led to its review<sup>9</sup>. The final draft was the Wako Draft which was put for referendum in 2005 but failed to go through.

The constitution of Kenya, 2010 has been gender conscious and it has tried to even out the field for women by clearly stating their rights<sup>10</sup>. In this case, the constitution went further to provide mechanisms for the actualization of these rights by directing the state to use affirmative action as one method.<sup>11</sup>

It has been the experience in Kenya that women are underrepresented. From the 1<sup>st</sup> general election held in Kenya to the just concluded 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.<sup>12</sup> In 2013, only 16 of the 290 women elected as members of parliament were women.

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<sup>9</sup> Ibid

<sup>10</sup> Constitution of Kenya, art 27 (3): *Women and men* have the right to equal treatment, including the right to equal opportunities in *political, economic, cultural and social* spheres.

<sup>11</sup> Constitution of Kenya, 2010 Article 27 (8)

<sup>12</sup> In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate, Advisory opinion no 2 of 2012,

**The Table Below Shows an Analysis of Women Representation Since 1963**

	Parliament	Time/ Duration	Total No. Of Women Mps	No. Of Elected Women Mps	No. Of Women VS Number Of Men Nominated To Parliament	
					Women	Men
1	1 <sup>st</sup> Parliament	1963-1969	0	0	0	2
2	2 <sup>nd</sup> Parliament	1969-1974	2	1	1	10
2	3 <sup>rd</sup> Parliament	1974-1979	6	4	2	14
4	4 <sup>th</sup> Parliament	1979-1983	5	4	1	11
5	5 <sup>th</sup> Parliament	1983-1988	3	2	1	9
6	6 <sup>th</sup> Parliament	1988-1992	2	2	0	10
7	7 <sup>th</sup> Parliament	1992-1997	7	6	1	12
8	8 <sup>th</sup> Parliament	1997-2002	9	4	5	9
9	9 <sup>th</sup> Parliament	2002-2007	18	10	8	4

The table illustrates the small number of women who have made it to parliament since independence. Only 33 women have been elected and 19 nominated in the 9 elections that have been held up to 2007. In 2013, the number of women elected increased to 63 due to the creation of women representatives in the 47 counties plus the elected 16 women members of parliament.

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 seats.

## **1.2 Statement of the Problem**

The Supreme Court took up the two-thirds issue and ruled that the constitutional provision is to apply progressively and not in the just concluded March 4<sup>th</sup> general elections<sup>13</sup>. A floodgate of possibilities on how this progressive implementation is to be carried out during the next five years was then opened.

What steps can be taken in the next 5 years to ensure women make up at least 33% of elective bodies come 2017? The constitution suggests affirmative action as one solution. What is not provided for is the affirmative action mechanism to be employed. The most common method of applying affirmative action is the use of quotas. Quotas can be in various forms, each producing different results and reactions from the public.

## **1.3 Objectives of the Study**

### **1.3.1 Overall Objective**

The overall objective is to examine the extent to which implementation of the two-thirds gender rule can be achieved by affirmative action.

### **1.3.2 Specific Objectives**

1. To examine the challenges that women face that impede them from achieving a minimum one-third representation in the National Assembly.
2. To carry out an analysis of the concept of affirmative action.
3. To determine affirmative action policies that can be put in place in the next five years to give effect to the two-thirds gender principle and subsequently make recommendations.

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<sup>13</sup>in The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate, Advisory opinion no 2 of 2012

4. To carry out a comparative study on how other jurisdictions have achieved more than one-third female representation in their National Assemblies.

## **1.4 Research Questions**

1. What challenges make it difficult for women to realize a minimum one-third representation in the National Assembly?
2. What affirmative action policies can be adopted to implement the minimum one-third gender rule?
3. How have other jurisdictions used affirmative action to implement the two-thirds gender rule?
4. What recommendations can be drawn from to help Kenya achieve a minimum one-third representation in the National Assembly through Affirmative action?

## **1.5 Hypothesis**

1. There exist numerous challenges that make it hard for woman to achieve the two-thirds gender rule.
2. Women representation can adequately be increased to more than one-third through affirmative action policies

## **1.6 Justification for the Study**

This is the first time in Kenya that the provision for a mandatory one-third minimum representation has been expressly stated in any law. The fact that it 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<sup>14</sup>. 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 we get to implement the 33% Beijing platform requirement.

This study can be used by policy makers in coming up with affirmative action policies and strategies that will work for the country.

The study can be useful to the general public at large as it unravels the myths held about affirmative action by providing a comprehensive understanding of the concept.

## **1.7 Scope of the Study**

The not more than two-thirds gender rule relates to both appointive and elective positions. This study concentrates on *elective positions*.

Kenyan political representation includes the National Assembly and County Assembly. For purposes of this study, I shall be carrying out an analysis of women representation in the *National Assembly* and how it can be improved by affirmative action.

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<sup>14</sup> In 1995, the United Nations' Beijing Platform for Action on Equality, Development and Peace, to which Kenya is a signatory, recommended a minimum of 30% female representation in decision-making positions. So far, 37 countries across the globe have reached the Beijing Platform's 30% marker for female representation in parliament. Of those countries, only three achieved the feat without affirmative action initiatives.

## 1.8 Literature Review

*Lee RA*<sup>15</sup> 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 they 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.

In '*We Want Jobs: A History of Affirmative Action*', **Robert Weiss**<sup>16</sup> contends that affirmative action has three main objectives

1. To overcome discrimination
2. Increase diversity
3. Reduce poverty among groups that have historically been victimized by discrimination.

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<sup>15</sup> Lee R A, 'The evolution of affirmative Action' (1999) 28 PPM 394

<sup>16</sup> Robert J. Weiss, 'We Want Jobs; A History of Affirmative Action'[1997] RP 100

The basis of affirmative action is on redressing discrimination, be it past or present. As much as various instruments have been put in place to end discrimination be it in the work place or elsewhere, a firmer method had to be developed.

### *Affirmative action and transformation*

**Neville Alexander** contends that Affirmative action is to a large extent an aspect of transformational measures<sup>17</sup>. Transformation measures in this case refers to measures put in place to enrich the society's welfare by providing education, better housing, sanitary conditions, employment and other benefits. In essence trying to better the society.

Affirmative action comprises of policies designed to ensure that those qualified individuals from designated groups (in these case women) are represented equitably on all levels. These designated groups are the members of society that have lagged behind because of historical injustices suffered by them over the years.

This concept is likened to famous statement by the 36<sup>th</sup> president of the United States, Lyndon Baines Johnson who said:

*You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire, and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory,*

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<sup>17</sup> Neville Alexander, 'Affirmative Action and the Perpetuation of Racial Identities in Post-apartheid South Africa'(South Africa 2006 May)

*but equality as a fact and as a result*<sup>18</sup>.

Alexander Neville further contends that true and just affirmative action is based on the premise that preference/favour 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. It should not be as a favour. Thus the basis of affirmative action should be transformation.

**Thomas Sowell**<sup>19</sup> argues that the historically discriminated and the rest of the population risk slackening their efforts in light of extended affirmative action. The former because working to their fullest capacity is unnecessary, and the latter because working to their fullest capacity can prove to be futile. It is deemed unnecessary because affirmative action ensures that (blacks, women and other historically discriminated groups) have a sort of direct advantage.

He gives the case example of when Jamaica gained its independence from British rule. Many whites living there no longer bothered to compete for public office because they *'felt that the day of the black man had come and questioned why they had to make the effort if the coveted job or the national honour would go to the blacks, despite their qualifications'*.<sup>20</sup> While affirmative action policies are often thought of as a transfer of benefits from one group to another therefore the benefit to the country is retained, there can also be net losses of benefits when both groups do less than their best.

I disagree with Thomas Sowell, everything that is done in life has a risk. What we should do is weigh the risks against the advantages that can be gotten, and by that reason determine if it is worth it.

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<sup>18</sup>[http://www.pbs.org/wgbh/amex/eyesontheprize/sources/ps\\_bakke.html](http://www.pbs.org/wgbh/amex/eyesontheprize/sources/ps_bakke.html) >accessed on 13th january, 2013

<sup>19</sup> Thomas Sowell, *Affirmative Action Around The World; An Empirical Study* (1<sup>st</sup>edn, Yale University Press 2004)

<sup>20</sup> Keith Windschuttle, 'The Fabrication of Aboriginal History: The New Criterion'(History Extension Conference, Sydney, May 2010)

**Maria Nzomo**<sup>21</sup> in her article on *women, democracy and development in women* proposes that democracy in a class society is an ideological weapon that serves the interest of the dominant class<sup>22</sup>. She looks at the historical development of society and concludes that all class societies have in one way or another fallen short in their practice of democracy; that whatever the democratic arrangements existing at one time, they first serve the interest of the dominant class. This is against the majoritarian principle of democracy.

She likens the Greek slave society to the modern capitalist one. Just like democracy in the Greek ancient society served the ruling oligarchy, democracy in capitalists' society today serves the bourgeois who are the owners of the means of production<sup>23</sup>.

She 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<sup>24</sup>. In the Mauritius case of *Matadeen and Another v Pointu and Others* the issue of equality before the law and affirmative action was addressed and in a majority decision the court rendered itself as hereunder; 'Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently'<sup>25</sup>.

**Oki Ooko-Ombaka**<sup>26</sup> contends that when matters that deal with women issues are brought before parliament, the legislators exhibit remarkable chauvinism. Chauvinism in two senses; male

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<sup>21</sup> Maria Nzomo, *Women, Democracy and Development In Africa*[1987] DoG111

<sup>22</sup> Ibid 112

<sup>23</sup> Ibid 112

<sup>24</sup> Ibid 121

<sup>25</sup> *Matadeen and Another v Pointu and Others* [1998] 3 LRC 542

<sup>26</sup> Oki Ooko-Ombaka, 'The Kenya Legal System and Woman Question, (1989) Public Law Institute 31

chauvinism and cultural chauvinism. They use African culture as an excuse to shoot down progressive initiatives.

He also proposes 3 methods to resolve the woman question in the country. He suggests that a sensitive judge can use his discretion to favour a feminist issue. Secondly, a sensitive attorney can canvass feminist concerns in his/her arguments and submissions thereby opening room for adjudication. Thirdly, he contends that the judicial process holds the promise of public interest litigation on various relevant issues which can easily articulate women's concerns.

*Achola Pala Okeyo*<sup>27</sup> 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 a lot. The failure to invest in women development by developing countries is a waste of a vital resource.

He contends that in many of African countries (Kenya included), women form the backbone of rural agriculture as opposed middle level industrialised women who sit and wait for their husbands as typical housewives do. Rural women are therefore producers and it would be wise to invest in their development to avoid hunger, poverty and famine.

My study is different as it aims to show that affirmative action principles can help level out the playing field to the extent that after a few years, it would be possible to do away with the actual laws. Affirmative action in its true sense is not meant to be a permanent fixture in law. It 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 Neville Alexander suggests, but by ensuring the beneficiaries of affirmative action outperform themselves when given the opportunity based on their disadvantage.

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<sup>27</sup> Achola Okeo, 'On Theory and Method: Issues in The Study of Women in Africa' Public Law Institute 3

### **1.9 Chapter Breakdown.**

The study will contain four chapters. Chapter One contains the Background, Statement of the Problem, Research Objectives, Research Questions, Research Hypothesis, Literature Review, Justification for the Study, Scope of the Study and the Chapter Breakdown. Chapter Two will focus on the plight of women. Chapter three will be an analysis of quotas in affirmative action and their use in Rwanda and Uganda. Chapter Four will contain the Recommendations and Conclusion.

## CHAPTER TWO

### THE PLIGHT OF WOMEN IN KENYA

#### **2.1 Introduction**

The constitution<sup>28</sup> states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The third and fifth Millennium Development Goals underscore the need for gender parity especially in education and access to social, economic and political opportunities, by 2015.

The constitution may have provided for equality, but the facts on the ground are very different. Men seem to be doing better than women. On average, they have better jobs, are richer, hold more executive positions at work, own more properties and even make up most of parliament<sup>29</sup>.

One of the major reasons put forward to explain the huge difference is the subordination and discrimination women everywhere undergo. There is no society where they are treated as equals with men.<sup>30</sup> It is preposterous that the status of women is determined by her XX chromosomes and not by the value of what she has to offer as a person.

Women subordination takes place within a world of ideas, attitudes, cultures and philosophies which rationalise gender inequality. Women advancement is a world-wide phenomena and it is necessary to distinguish the universal aspect of the movement and the traditional/ historical /cultural aspect of this movement. While the effect of gender subordination is the same everywhere, the historical origins and manifestation is diverse and different.

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<sup>28</sup> Constitution of Kenya, 2010 article 27 (3).

<sup>29</sup> Eldah Onsomu, 'Profile Of Women's Socio- Economic Status In Kenya' (2008) IEA 15

<sup>30</sup> Gregor Schmidt, 'Violation of Women Rights Seen from a Kenyan Perspective' (2006)

<[http://www.comboni.de/literatur/schmidt\\_gregor\\_violence\\_against\\_women.pdf](http://www.comboni.de/literatur/schmidt_gregor_violence_against_women.pdf)> accessed on 14 march 2012

Some issues affecting women like domestic violence or rape are global problems. Others like FGM, 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. They argue that without modernisation and exposure, the whole community would still regard FGM or even child marriages as perfectly okay<sup>31</sup>. 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 inalienable rights.

### **2.1.1 Pre-colonial status**

In Kenya, before the white colonialists set foot on our land, the society was still patriarchal. Women subrogation is not a concept that was introduced by the colonialists. 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<sup>32</sup>.

Traditional education was largely practical where one learnt by doing and observing. The girl was taught good manners, learnt such tasks as cooking, tending to children, fetching water, collecting firewood, doing garden work, cultivating, sowing, weeding, harvesting and other household duties. This traditional education derived its legitimacy from the customs of the community. Education today has become the means of preparing the youth for private and public roles in modern Kenya.

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<sup>31</sup> *ibid*

<sup>32</sup> Claris Kariuki, 'Women's Participation in Kenyan Society' (2011) CIPE 2

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. In most tribes there existed a council of elders which was composed solely of men. They dictated what was permissible and what was not. Men were the warriors of the community and the decision makers. Men were also the heads of families and in that capacity, they dictated what was expected of the family.

### **2.1.2 Post Colonial Status**

Women participated actively in national independent movements but did not adequately benefit to a level that they had envisioned during their struggle for independence. When a whole society is under stress, example under slavery or apartheid or in the case of Kenya; colonialism, all forces of resisting the stress are unleashed including women's activism.

Little change was experienced immediately after independence, which is not to say there has not been an improvement in the last 50 years. One major development was the enactment of The Constitution of Kenya, 2010 which has a lot of gains for women.

### **2.2 Factors That Curtail Women Empowerment**

Various reasons have been put forward to explain why women in Kenya have lagged behind in development. This is even in light of good constitutional provisions that are aimed at protecting the rights of women. But as Madan J asked, what is the use of having a Constitution if it is not honoured and respected by the people<sup>33</sup>?

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<sup>33</sup> Githunguri v Republic KLR [1986] 1

When women are not able to enhance their economic status, social position and are pulled behind by discriminative culture, then it becomes almost impossible for them to discover their political potential.

Some of the reasons include:

### **2.2.1 Educational Constraints**

Education in today's world has a bearing in the success of most individuals. At the very least, literacy is required in the carrying out of business transactions and most white collar jobs.

Women have lagged behind in education when compared to men. In 1967, 80% of women did not have any formal education as compared to 66% of men.<sup>34</sup> In 2000 the literacy levels among women was 76%<sup>35</sup>

**Goal 3** of the Millennium Development Goals is the achievement of universal primary education and for girls and boys to have equal access to all levels of education.<sup>36</sup> This shows the importance placed on education in achieving targets set by world countries. The World Declaration on Education for All and the Framework for Action recognizes the necessity to give to present and coming generations an expanded vision of and a renewed commitment to basic education. The Declaration reaffirms that education is a fundamental right for all people, women and men, of all ages. Primary education must be universal, basic learning needs of all children must be satisfied. The culture and needs and opportunities of the community should be taken into account. The Declaration firmly asserts the objective of universal basic education

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<sup>34</sup> Republic of Kenya, Central Bureau of Statistics, Ministry Of Finance And Planning, Women In Kenya. (Nairobi: govt printer, 1987)21

<sup>35</sup> <http://www.tulane.edu/~internut/Countries/Kenya/kenyaxx.html> accessed on 15 march 2013

<sup>36</sup> 4United Nations Millennium Declaration, 8th September, 2000

Koffi Anan in reiterating the importance of educating the girl child said:

*We know from study after study that there is no tool for development that is more effective than the education of women and girls<sup>37</sup>.*

Various reasons have been put forward to explain the difference between the number of educated men and women. The number of girls enrolled in schools<sup>38</sup> in urban areas is higher than that of girls in rural areas. This has been attributed to the fact that the urban population is a lot more enlightened. In comparison the rural population is deemed to be less liberated due to cultural constraints.

In rural areas, parents are of the belief that education is harmful to women as it destroys their morals and traditional values. Educated women are seen as having turned their backs on African customs and also being 'big headed'. Being big headed is seen as a bad trait especially in a marriage. This is because the wife is meant to obey and respect the husband.

Parents also prefer taking the boys to schools as opposed to girls for various reasons. **First**, it is an investment that they will personally benefit from<sup>39</sup>. This is because the boys will remain in their homestead and be part of their family even after marriage. The girl however, will marry and be assimilated into the husband's family. This means that the husband's family will be the ones to benefit from any skill she had bothered to acquire before marriage. **Secondly**, boys are naturally expected to do better and succeed more due to the cultural bias that exists. Parents would rather take their boy child to school because he is more likely, in their opinion, to succeed. This attitude also affects the girls because as humans, we do as best as is expected of us.

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<sup>37</sup> This was on 15<sup>th</sup> January 2004 at the International Women's Health Coalition Third Annual Gala

<sup>38</sup> This is in reference to public primary schools and public secondary schools

<sup>39</sup> Centre for Rights Reform and Democracy, *Status of Women and Girls* (MoH 2007 )

Where the girls are taken to school, their performance is not as good as that of the boys. This is attributed to the fact that there is a greater demand on their time. They are expected to cook, fetch water, collect firewood and generally do other household chores. This takes up a lot of the time that they could have dedicated to their studies. Boys on the other hand are hardly required to do anything at home and can therefore concentrate on their studies.

A lot of girls are at home 4 to 7 days every month because they lack sanitary towels. This is prevalent especially in the poorer rural areas of Kenya<sup>40</sup> where sanitary towels are a luxury that cannot be afforded. The time these girls miss is invaluable and hard to recover. This is because when they are at home, lessons for the rest of the students continue as usual.

### **2.2.2 Cultural Factors**

Kenya is a country that is rich in different cultures and traditions drawn from its 42 tribes. This diversity is especially obvious in rural areas where culture has yet to be eroded by westernisation. Social, cultural and traditional practices and unfounded norms deny women various opportunities to effectively participate in production systems. Cultural norms form a major challenge in Kenya. Most Kenyan cultures still regard the place of a woman as being in the kitchen and raising children as part of the reproductive role.

This kind of socialization makes it hard for many men to fathom the idea that they can share the same political platform with a woman. Consequently, women are locked out of political representation. This locks them out of participation in decision making forums. By joining politics, women in such cultures are still considered as breaking the rules that govern gender roles.

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<sup>40</sup> This include areas like North Eastern province and Rift Valley

A lot of cultural practices and values are beneficial to the cohesion of the society. African culture is based on respect and good morals, togetherness and helping each other when need be. When a community member died everyone pooled in to help and after harvest the old people in community were given a share of the produce.

Some cultural practices and values however, are detrimental to the society and discriminative against women.

Some of these practices include:

***(a) Early marriages***

This is the practice of marrying off girls who are still in their early years. This practice is prevalent especially in pastoralist's communities<sup>41</sup> where girls are married anytime after undergoing their rite of passage into woman hood. The girls are as young as 9 years in some cases.

Early marriage is a big challenge because the girl has to drop out of school to become a wife. There are slim chances of her continuing with her education because the society expects her to adapt into her new role as a home keeper and mother. In these marriages because the girl is still very young, immature and impressionable, she does not yet fully understand the implication of quitting school. Neither does she comprehend the effect it will have on her future.

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<sup>41</sup> Examples include the Maasai, Samburu and Somali.

In Samburu culture, there is the practice of ‘*beading*’<sup>42</sup>. The moran with or without the permission of the parents, presents a girl with a set of beads to engage her for marriage. The girl at this point has just passed through her rite of passage. During the engagement, the man can have sexual intercourse with the girl anytime he pleases and is not bound to marry her. The man is under no obligation to marry the girl he has beaded even if she falls pregnant. In fact, the child is branded an outcast if the man fails to marry the girl. The resulting child is killed or left to die in the bushes.

This practice is clearly discriminative. The moran has no responsibility under the engagement. The girl has everything to lose and very little to gain. The constant worry of pregnancy and the subsequent threat of segregation by the community is hardly the environment needed by women to help develop and improve their lives and circumstances.

Masaai morans in 2011 stormed into Enkare Nairowua Girls’ School in Narok South demanding that the administration give them wives because their ‘manyataas’ were empty<sup>43</sup>. They disrupted classes and caused the girls to flee. The morans felt that it was their right as morans in the Masaai community to demand for the girls. This shows a high level of male chauvinism and cultural chauvinism.

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13 David McKenzie, ‘Activist battles Samburu rape ‘beading’ *Lifestyle Magazine* (Nairobi 2 June 2011 ) <<http://www.capitalfm.co.ke/lifestyle/2011/06/02/activist-battles-samburu-rape-beading/>> accessed on 15 March 2013

<sup>43</sup> Julius Sigei, ‘Panic As Masaai Morans Raid School For Wives’ *Daily Nation* (11 November 2011) 18

***(b) Levirate Union, Sororate Union, and Wife Inheritance***

*Levirate union* is the practice where the widow cohabits conjugally with the brother or other male relative of her deceased husband<sup>44</sup>.

*Sororate union* is where the deceased wife is replaced by her sister who henceforth becomes wife of the widower<sup>45</sup>. This is if the deceased wife dies without a child or without a male child.

Wife inheritance connotes a situation where the widow with no child with the deceased husband at the time of death, is inherited by a relative of the deceased husband, commonly being the deceased husbands brother<sup>46</sup>.

These three set of practices are demeaning to women as they objectify her and add up her responsibilities even after the death of her husband. The practices were valid in the past when traditional society looked after everyone and ensured that in one way or another, everyone was well taken care of. In today's world where women aim to be on equal footing with men, practices like these set them back. This is because they force the women to be with partners whom they have not chosen and might not be compatible with.

Also, wife inheritance has been proved to be one of the leading causes of HIV transmissions in the communities that practice it<sup>47</sup>.

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<sup>44</sup> Oki Ooko-Ombako, 'The Kenya Legal System and Woman Question, (1989) Public Law Institute 31

<sup>45</sup> *ibid*

<sup>46</sup> *ibid*

<sup>47</sup> Kawango Agot et al, 'Widow Inheritance and HIV Prevalence in Bondo District, Kenya: Baseline Results from a Prospective Cohort Study' (2010) 11 PLoS ONE |

### ***(c) Female Genital Mutilation***

FGM comprises of all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons<sup>48</sup>. It has no health benefits and harms girls and women in many ways. In 2003 a study showed that 32% of Kenyan women were circumcised.<sup>49</sup> This procedure is illegal under the Children Act<sup>50</sup>. Girls are circumcised from the age of 9 years. It is a rite of passage and once circumcised, the girls are regarded as matured into 'women' and have to perform womanly functions. They get married at an early age, bear many children, till the land and do other burdensome activities.

Some of the communities that practices FGM include the Somali, Abagusii, Kuria, Maasai and Samburu, Taita, Kalenjin, Embu and Meru and to a lesser extent the Kikuyu and Kamba.

It is worth noting that there has been lobbying for an **alternative rite of passage** for girls. Kenya has made great strides through such programmes. In Kikuyu, the programme is known as '*Ntanira na Mugambo*' meaning '*circumcision through words*'. It is a week long programme where girls of circumcision age are secluded and through seminars, talks and workshops, given advice from a wide range of experts in various fields.

### **2.2.3 Violence against Women/ Gender Based Violence**

Violence against women according to The Declaration on the Elimination of Violence against Women<sup>51</sup> means *any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*

<sup>48</sup> World Health Organisation, 'Eliminating Female Genital Mutilation: An Interagency Statement' [ 2008] WHO 1

<sup>49</sup> Mabel Isolio, 'Protection Against Female Genital Mutilation: A Review Of The Implementation Of The Children's Act' [2009] FIDA 3

<sup>50</sup> Children's Act 2001, s 14 and 119 (1)(h)

<sup>51</sup> The Declaration on the Elimination of Violence against Women, article 2

The result of violence against women is degradation, humiliation, health issues and belittling of women<sup>52</sup>. It installs fear and insecurity among women and prevents them from leading an independent and fruitful life. Apart from the physical injury, abused women are also subject to depression and personality disorders like anxiety and somatic disorders<sup>53</sup>. The battered women become vulnerable and dependant and lose self esteem. Fatal outcomes include suicide and homicide. The overall effect is that their potential becomes unrealized and their energies are stifled as violence prevents women from participating fully in the life of the family and also in the community. The net effect is that GBV robs Kenya of potential women leaders.

Most of the cultural norms in the communities where GBV is rampant not only encourage male violence against women but also serve to entrap women in violent relationship by teaching them that violence is normal and deserved.

Wife beating is a common occurrence in many Kenyan homes. It largely goes unnoticed because the women hardly report it unless it gets out of hand. This is because of a common norm that family affairs should be kept private and that outsiders should not intervene. This isolates women from potential sources of support.

In 1979 Mr Wabugue, a Luhya member of parliament stated that a wife should be beaten as it was a pleasure to her and a way of expressing love in Luhya customs<sup>54</sup>. This was during a debate on the Marriage and Divorce Bill<sup>55</sup>. He proceeded to say that:

*'If you beat your wife, probably after doing something wrong, it would only be by accident if you broke her ribs'*<sup>56</sup>

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<sup>52</sup> Patricia Mbote, 'Violence Against Women in Kenya: An Analysis of Law Policy and Institutions' (2000) <<http://www.ielrc.org/content/w0001.pdf>> accessed on 14 March 2012

<sup>53</sup> *ibid*

<sup>54</sup> Phoebe Asiyo, "Legal Process and Gender Issues' (1989) Public Law Institute 45

<sup>55</sup> The bill was first introduced into parliament in June 1976, but withdrawn a month later. It was reintroduced 3 years later but failed to go through.

That was over thirty years ago but the belief is still held by some men and even some women. Some women believe that if a man really loves you then he will beat you. This kind of thinking encourages women subordination which in turn negates development in the society.

#### **2.2.4 Limited Economic Empowerment and Access to Credit**

Although close to 50% of women currently have access to credit, most of these are from informal savings mechanisms 'chamas' and micro-finance institutions<sup>57</sup>.

The main institutions offering credit specifically to women are:

- Kenya Women Finance Trust,
- Kenya Rural Entrepreneurship Programme,
- United Women's Savings and Credit Co-operatives Society
- National Association of Self-Employed Women of Kenya.

However, most of these institutions are located in urban areas and do not assist women to vertically expand beyond micro-level. Most business women lack training in financial management and entrepreneurship skills. Most women also lack opportunities to fully benefit from international trade since most of their businesses are small and informal. They also lack adequate network systems as very few business associations in Kenya effectively target women<sup>58</sup>.

The frequent requirement for land as collateral means that many women are unable to take the step up from MFIs and SACCOs to formal collateral-based lending<sup>59</sup>. This is because men are

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<sup>56</sup> Phoebe Asiyo, "Legal Process and Gender Issues' (1989) Public Law Institute 45

<sup>57</sup> Eldah Onsomu, 'Profile Of Women's Socio- Economic Status In Kenya' (2008) IEA

<sup>58</sup> *ibid*

<sup>59</sup> Amanda Ellis et al, 'Gender and Economic Growth in Kenya; Unleashing the Power of Women' (2007) World Bank Report 1

the majority of land owners in Kenya. Banks are unwilling to deal with women as they feel that she does not have the final say in the transaction. This means that businesses owned by women are founded on less capital investment than male-owned firms are.

Businesses owned by women are less likely to grow. Male-headed firms are estimated to grow on average by 11 percent a year, compared with 7 percent for female-headed firms<sup>60</sup>.

When women lack economic empowerment, then they are unlikely to step up as political leaders. This is because campaigning for office requires money.

### **2.3 Other Stereotypes against Women**

There exist various other stereotypes against women that are discriminative in nature. These stereotypes seek to diminish the value of women in society and in the long run may hinder her development.

Some of the stereotypes include:

#### **2.3.1 Failure of Marriages**

If a marriage fails, then the society frowns upon the woman as being the cause of the failure. The society perceives the woman as having been unable to keep the man well, this is without taking into consideration, the uniqueness of every marriage. This social stigma that comes with divorce scares many women into staying in abusive marriages and marriages where they are demeaned. This in turn means that these women will lag behind in development. Development requires social stability, harmony, encouragement from the opposite gender and peace, which are lacking in those marriages.

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<sup>60</sup> Amanda Ellis et al, 'Gender and Economic Growth in Kenya; Unleashing the Power of Women' (2007) World Bank Report 1

### **2.3.2 Lack of Children in a Marriage**

If a marriage is without children, then the society automatically assumes that it is the woman who is barren. The man in most societies is likely to get another wife who will be more valued than the first one if she succeeds in bearing children. This social stigma of barrenness, where the worth of a woman is determined by her ability to bear children, has resulted in discrimination against the women that cannot. This discrimination in turn leads to low self worth and makes it harder for the woman to prosper socially, economically or politically.

### **2.3.3 Lack of Recognition**

Women lack recognition for their efforts in many families. Their output is largely ignored. If the children do well in school, then they are considered to be bright and hardworking like their father, if they do not do well or misbehave, they are considered to be stupid and misbehaved like their mother.

## **2.4 Conclusion**

Women face many challenges in their quest for development. They are held back by culture, lack of economic empowerment, little education and discrimination among other factors. All these challenges ultimately make women feel like they are inadequate and not capable of running for any political office. They destroy their self esteem and self worth.

If women can be freed from all these constraints, then the chances of more women standing up for themselves and for others politically would increase. As they say, you can legislate equality all you want, but you cannot make people think it and live it particularly if they had

been conditioned through inherited traditions and their own life experiences to the concept of inequality<sup>61</sup>.

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<sup>61</sup> Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR

## CHAPTER THREE

### QUOTAS IN AFFIRMATIVE ACTION: LESSONS FROM RWANDA AND UGANDA

#### **3.1 Introduction**

Affirmative action is a policy in which an individual's colour, race, sex, religion or national origin is taken into account in order to increase the opportunities provided to an underrepresented part of society<sup>62</sup>. Affirmative action is designed to increase the number of people from certain underrepresented groups within businesses, institutions and other areas of society in which they have historically had low representation. It is often considered a means of countering historical discrimination against a particular group.

From the discussion in chapter two, it is clear that women have been discriminated upon in the past and continue to suffer through various prejudices. Affirmative action steps in not only as a redress for that past discrimination but also to provide women with an opportunity to showcase their expertise in various fields, something they might have been unable to do.

#### **3.2. Affirmative Action Understood**

Affirmative action programs are not meant to last forever. On the other hand, such programs should not be cut off before they have served their purpose. Affirmative action programs are designed to compensate victims of past oppression, to offset the current effects of present oppression, and to create diversity.

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<sup>62</sup> <http://www.investopedia.com/terms/a/affirmative-action.asp>

Once the victims are put in a place where they originally would have been if not for the past oppression, once the impact of present-day discrimination is eliminated, and once a work force is created that reflects the society at large, then affirmative action will no longer be needed<sup>63</sup>. The beneficiaries of affirmative action in politics should not just be random women citizens. Clear guidelines should be put in place specifying the minimum qualifications required for the posts in question. The underling factor is that affirmative action is not token based but rather a way of ensuring diversity of the *qualified*. A person who benefits from affirmative action should be able to perform as well the next person.

### 3.2.1 Arguments for Affirmative Action

Victims of past discrimination are entitled to preferential treatment as reparation for the harms that have been previously committed against them<sup>64</sup>.

Affirmative action creates opportunities for women and other previously disadvantaged groups to showcase their talents, skills, and leadership qualities. Without affirmative action, they would have remained untapped.

An argument in defense of affirmative action is the critical need for role models<sup>65</sup>. Successful women will encourage and motivate other of women to be confident in knowing that excellence can be achieved. Moreover, role models will strongly influence younger girls to strive for excellence that others "of our kind" have already achieved.

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<sup>63</sup> Michael Higginbotham, 'Affirmative Action In The United States And South Africa: Lessons From The Other Side'(2000)TICLJ 187

<sup>64</sup> <http://www.investopedia.com/terms/a/affirmative-action.asp>

<sup>65</sup> Gabriel Patrick Wasson 'Affirmative Action: Equality or Reverse Discrimination?' (Senior Honors Thesis, Liberty University 2004)

A leading argument in support of affirmative action policy within society is the need for diversity. Those in support of attaining diversity maintain the importance of every person coming to appreciate other's culture and outlook on life. Affirmative action promotes diversity of viewpoints within one environment thereby creating a lively and differentiated outcome.

The social justification for affirmative action lies in the need to promote public welfare or common good<sup>66</sup>. By increasing opportunities for previously disadvantaged groups, inequality can be reduced<sup>67</sup>. This in turn decreases the potential for conflict as the members of the society find themselves at the same level politically, economically and socially.

Affirmative action breaks stereotypes. When women are given an opportunity to prove themselves, they are able to break away from the stereotype that exists against them by performing well.

### **3.2.2 Arguments against Affirmative Action**

Opponents of affirmative action believe that it rewards people on the basis of their genetically determined traits and in our case because 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.

Some critics argue that affirmative action undermines the principle of compensatory justice. Compensatory justice requires that compensation be provided to the specific individuals who

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<sup>66</sup> Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR

<sup>67</sup> *ibid*

were wronged or harmed. They believe that it is unjust for a whole society to compensate a class of people for harm done to specific individuals amongst them.

Men who have not and are currently not involved in the discrimination of women are penalized through no fault of their own. Critics say that these men are not responsible for the social evil sought to be remedied through affirmative action.

They further claim that personal injury must be demonstrated. Only individuals that have been personally wronged or injured and have consequently been unable to overcome the effects of that injury should be compensated. Preferential treatment is not given just by being a member of a certain historically discriminated group.

Critics further claim that affirmative action increases social stereotypes and reduces social cohesion. This is because showing preference to one sex over the other increases hostility. Men who see themselves as lacking an opportunity because it has been given to a woman become hostile and resentful to women in general.

Opponents also see preferential treatment as reinforcing the perception that women cannot make it on their own without the assistance. This in turn fuels the discrimination that affirmative action seeks to cure in the first place. This is because the society sees that women are weaker and need the help of affirmative action to succeed.

Affirmative action is also seen as lowering the self worth and self-esteem of women. This is because one doesn't know whether they have sailed through because of their abilities and expertise or because of the preferential treatment accorded.

It is also argued that affirmative action lowers the standards of performance and delivery because people who have fewer qualifications 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. However, true affirmative action originates from the premise that preference is given to members of a historically discriminated group only if they are as qualified or skilled as those from the historically non-discriminated group.

### **3.3 Use of Quotas in Elective Posts**

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 this case women – most often in the form of a minimum percentage.

Quotas can be legislated in law, as is the case in Kenya, where women are required to make up at least a third of parliament by the constitution. Secondly, it could be by voluntary as in the case of a voluntary party quota. Here, a political party can make internal requirements within the party to nominate a minimum number of women for elected office.

The first step in the electoral selection process is to find aspirants to be considered for nomination. In this step, gender quotas are designed as a requirement that a certain percentage of women or of either sex be represented among the pool of candidates under discussion. These kinds of quotas are often dubbed aspirant or primary quotas.

In the second step in the selection process, political parties nominate and place candidates on their party lists for public election. A common form of quota rule is that a certain minimum percentage of female candidates must be placed on the parties' lists, for example, 20, 30, 40 or

even 50 per cent; but it can also be formulated in a gender-neutral way. This is primarily used in countries with Proportional Representation electoral systems (example Rwanda).

In the third step, which targets those elected, quotas take the form of reserved seats. Regulated in the constitution or electoral law, a certain number or percentage of seats is reserved for women members in the country's legislature. Increasingly today, reserved seats are subject to election, usually elected by a special electorate or by an additional vote, as in the cases of Rwanda and Uganda.

### **3.3.1 Arguments against Quotas**

Quotas are in conflict with the principle of local autonomy, since the prerogative of party organizations to decide their own candidate selection processes is restricted<sup>68</sup>. Many people believe that women do not want to hold office- if they did, their numbers in politics would increase.

Political representation is about the representation of ideas and interests, not about gender or the representation of social groups<sup>69</sup>. Therefore, women should not be up in arms requesting for representation as women.

Quotas for women will be followed by demands for quotas for other groups. Opponents argue that other marginalized communities will start demanding that quotas be established for them also<sup>70</sup>. Examples would be the youth, disabled or the poor.

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<sup>68</sup> Drude Dahlerup 'Electoral Gender Quota Systems and Their Implementation In Europe' (2008) EP 1

<sup>69</sup> *ibid*

<sup>70</sup> *ibid*

Political representation is a question of merit – let the best candidate for the job win. If it is a woman or a man, so be it. Quotas go against the principle of equal opportunity for all and the principle of equal treatment, since one group is given priority.

Quotas are discriminatory, since one group of candidates will be favoured at the expense of better-qualified candidates who are set aside<sup>71</sup>. Thus, quotas represent reverse discrimination, where better-qualified men will lose out in order to achieve a quota for women.

Many women do not want to be elected just because they are women. Quotas contribute to a suspicion that women have been promoted thanks to their sex rather than their talent.

### **3.3.2 Arguments for Quotas**

Quotas are a quick method for increasing the number in parliament. Introducing quotas accelerates the process and leads to major leaps in the number of women elected.

Political assemblies should reflect the major social groups in society. Since women constitute half of the population, they should have half of the positions in public decision-making bodies. Political representation is about rights and justice. Women have the right as citizens to equal representation.

Quotas for women do not discriminate against individual men. Rather, quota rules limit the tendency of political parties to nominate mostly men and compel them to seek out active and competent female candidates. For the voters, the opportunities are expanded, since it now becomes possible to vote for parties with women candidates.

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<sup>71</sup> Ibid

Women are just as qualified as men, but their qualifications are downgraded and minimised in a male-dominated political system<sup>72</sup>. Women's experience is needed in political life. Political assemblies should take advantage of all the resources and of all the pools of competence in society.

### 3.4 Affirmative Action in Rwanda

Rwandese women were granted the right to stand for election in 1961 when they gained their independence from Belgium<sup>73</sup>. The first female parliamentarian began serving in 1965. However, before its civil war in the early 1990s and the genocide in 1994, Rwandan women never held more than 18% of seats in the country's parliament<sup>74</sup>.

It would be difficult to overestimate the impact of the *genocide* on Rwanda's subsequent development or on its political climate. A tenth of the population was killed, millions were displaced, the infrastructure and civil service were destroyed and the social fabric of the nation was ruptured. The dramatic gains for women in parliament can be traced in part to the significant changes in gender roles during and immediately after the genocide.

In the immediate aftermath, the population was 70 percent female (women and girls)<sup>75</sup>. Given this gender imbalance, women immediately assumed roles they previously did not have. They became the heads of households, community leaders and financial providers and met the needs of devastated families and communities<sup>76</sup>. They were the ones who picked up the pieces of a

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<sup>72</sup> *ibid*

<sup>73</sup> Elizabeth Powley, 'Rwanda: The Impact of Women Legislators on Policy Outcomes Affecting Children and Families' (2006) UNICEF

<sup>74</sup> *ibid*

<sup>75</sup> *ibid*

<sup>76</sup> Elizabeth Powley, 'Rwanda: The Impact of Women Legislators on Policy Outcomes Affecting Children and Families' (2006) UNICEF

literally destroyed society and began to rebuild it. They buried the dead, found homes for nearly 500,000 orphans and built shelters for themselves<sup>77</sup>.

The genocide forced women to think of themselves differently and in many cases develop skills they would not otherwise have acquired. This is the background against which their majority women representation in Rwanda must be looked at.

### 3.4.1 Women's Representation in Rwanda's Parliament

The Chamber of Deputies of Rwanda (parliament) has 80 members including<sup>78</sup> :

- 53 elected in universal suffrage through a secret ballot;
- Twenty four (24) women are elected by specific councils in accordance with the administrative entities;
- 2 members elected by the National Youth Council;
- 1 member elected by the federation of the Association of the Disabled.

Members are elected through **proportional representation (PR)**. An electoral system based on proportional representation means that political parties compete for support in constituencies and that the division of seats is determined by the actual support that a party receives. In Rwanda, there exists the **list proportional representation** where a party submits names of candidates in order of priority<sup>79</sup>.

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<sup>77</sup> Jane Lampman, 'Women lead in effort to rebuild Rwanda' (2001) Christian Science Monitor

<sup>78</sup> <http://www.rwandaparliament.gov.rw/parliament/ourscham.aspx> accessed on 5th April

<sup>79</sup> KAWERA Marie Sylvie, Proportional Representation electoral system and conflict management in divided societies. The case of Rwanda and Kenya (Masters Thesis University Of Pretoria) LIM 2009

The rationale underpinning all PR systems is the conscious translation of a party's share of the votes into a corresponding proportion of seats in the legislature. Particularly, List PR encourages parties to present inclusive and socially diverse lists of candidates. In essence, parties are able to use the lists to promote the advancement of women politicians and allow voters the space to elect women candidates

In September 2008, Rwanda held elections for the National Assembly. The Rwandan Patriotic Front (RPF) won the majority of the seats. Rwandese women took the majority (56.2%) of the total seats, and the Assembly elected the first female speaker of Parliament in October 2008<sup>80</sup>.

The constitution of Rwanda in article 76 provides for 30% women representation in parliament. This is an affirmative action strategy that provides for 24 women representatives from the various provinces. Two women are elected from each province and from the city of Kigali by an electoral college with a women only ballot.

The 24 seats that are reserved for women are contested in women-only elections, that is, only women can stand for election and only women can vote. This has the effect of ensuring that at any given time, parliament has the constitutional minimum of 30%.

The 53 members of parliament are chosen through List proportional representation (PR). Parties are supposed to ensure that the individuals on their list are as diverse as possible in terms of gender, race and ethnicity and that there are women also at the top. In the 2008 elections the

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<sup>80</sup>Ted Dagne, 'Rwanda: Background and Current Developments' (2011) CSR 1

leading RFP party had a woman at the top of the list and of the 42 seats it won, 17 went to women<sup>81</sup>.

In 2008 out of the 53 members chosen from the party list 21 were women and together with the 24 women in the quota system, they made up 56% of parliament, which is 45 of the 80 members.

### **3.5 Affirmative Action in Uganda**

Uganda is a landlocked country in East Africa. It occupies 241,551 sq.km<sup>82</sup>. It is bordered to the south by Tanzania and in the west by the Democratic Republic of Congo, Kenya to the east and South Sudan to the north<sup>83</sup>.

Affirmative action was introduced in Uganda through quotas. Reserved seats for women made their debut on the Ugandan political scene in 1986. In what appeared to be a testing of the waters, the National Resistant Movement first experimented with one mandatory seat for women on the executive councils of local councils (LCs). The 1995 constitution made further provisions as to quotas as discussed below.

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<sup>81</sup> Irene Zirimwabagabo, Rwandan Women Secure 56% of Parliamentary Seats in Historic Election Result <[http://www.unifem.org/news\\_events/story\\_detail882c.html](http://www.unifem.org/news_events/story_detail882c.html)> accessed on 8th April 8, 2013

<sup>82</sup>

Alice Merab Kagoda, 'Assessing The Effectiveness Of Affirmative Action On women's Leadership And Participation In Education Sector In Uganda' UNESCO 2011

<sup>83</sup> *ibid*

### 3.5.1 Women Representation in the Ugandan Parliament

Parliament in Uganda is composed of<sup>84</sup>

a) *Directly elected members*, either men or women, elected through universal adult suffrage and by secret ballot each representing a constituency (238 constituencies)

b) *Special Interest Groups* including:

Women: One woman from each District of Uganda. (112 districts)

The Army: Ten (10) representatives, with at least 2 females, elected by the Uganda People's Defence Forces (UPDF)

The Youth: Five (5) youth, with at least 2 female youths, elected by the National Youth Council forming an electoral collage

The Workers: Five (5) representatives, with at least 2 female workers elected by the National Organization of Trade Unions (NOTU) delegate's conference

Persons With Disabilities: Five (5) representatives, with at least 2 female Persons with Disabilities (PWDs) elected by the National Union of Disabled persons of Uganda forming an electoral collage

It is noteworthy that affirmative action provisions have been made about the minimum women representation requirement for the special interest groups, be they workers, youth or persons with disabilities.

As part of the process of increasing women's presence in formal politics, Uganda implemented a unique quota system which entails the creation of special 'add on' seats for women at national

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<sup>84</sup> Constitution of Uganda, 1995, sec 78

and local government levels<sup>85</sup>. In this arrangement, women on the reserved seats at national level have a separate constituency (i.e. district) from where different women battle it out. Each district is made up of three or more counties. In each of these counties a member of parliament is elected.

There is criticism that Uganda's "add-on" affirmative action design, which has created a public space reserved for women, is flawed in two interdependent ways<sup>86</sup>. In the first place, it provides women representatives in Parliament a larger area of jurisdiction without proportional support or funding for development initiatives. Second, it is confusing as the "add-on" system has been implemented without proper explanation of its mandate. Together, these flaws have reinforced notions of women as ineffectual leaders in the minds of Uganda's populace.

### **3.6 Conclusion**

Affirmative action has through the use of quotas, increased the level of women representation in parliaments around the world and especially Rwanda and Uganda. Though both legislated quotas and voluntary party quotas may lead to permanent increases in women's political representation at all levels, it does not automatically result in equal representation of women and men in political decision making. The persons chosen must work hard when in office to increase development in their country.

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<sup>85</sup> Josephine Ahikire, 'Women's engagement with political parties in contemporary Africa: Reflections on Uganda's experience' (2009) Centre for Policy Studies

<sup>86</sup> Cristina Costantini, Misrepresentation: Flawed Affirmative Action In Uganda's National Parliament <http://broadrecognition.com/politics/misrepresentation-flawed-affirmative-action-in-uganda%E2%80%99s-national-parliament/> accessed on 8<sup>th</sup> april 2013-04-08

## CHAPTER FOUR

### RECOMMENDATIONS AND CONCLUSIONS

#### **4.1 Recommendations**

##### **4.1.1 Proposals for the Government**

Women in Kenya face various challenges as outlined in Chapter Two. Before they can pick up leadership roles in the society, these challenges have to be addressed adequately. Measures should be put in place to ensure that girls are taken to school, especially girls from the rural areas that are notorious for not valuing the girl child. The government should also develop further programs to ensure that cultural factors and other issues like gender based violence are dealt with. By doing this, the government will be trying to even out the playing field for women and men so that they can compete on equal footing.

The executive arm of the government has a lot of discretion and power when it comes to appointment of Directors and Boards of Governors for public and quasi-public institutions or parastatals. In addition, the government in power selects representatives for Kenya's High Commissions and Ambassadorial positions. As much as the presidential nominee in some instances would require the endorsement of the entire National Assembly, it will be an important first step to increase the overall number of women in such critical governance positions through executive appointments. In other words, the President has enormous powers to increase the number of women in appointive positions and in doing so, help build the confidence of the electorate in women as leaders.

#### 4.1.2 Proposals for Political Parties

At the party level, a number of affirmative action measures include the following:

Re-organization of women's wings of political parties as integral parts of the party structure with an inbuilt system for the women leadership to graduate into decision making positions within the main party<sup>87</sup>. The women's wing should be properly resourced financially and logistically to ensure its activeness whether the party is in power or not. This will enable more women to fill up leadership posts and be ready for the parliamentary elections.

In Rwanda, the women wings in the political parties pressed for significant number of women to be put at the top of the party lists and not towards the bottom so that when the party got seats during the election, the women could stand a chance of clinching them.

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<sup>88</sup>. The proposal is that political parties need to, as a matter of policy action encourage and select women as candidates to contest an agreed number of seats that are safe and winnable for the party<sup>89</sup>. Inclusion of this in party constitutions and manifestoes should be part of the important first step towards implementing this proposed action. This is to help reaffirm the commitment of political parties to a 30% quota for women in parliament.

The political parties can also introduce voluntary quotas by establishing that a certain percentage of the nominees contesting for Member of Parliament seats are to be women- preferably over 30 percent. If all the parties do so, then that would be a great stride for affirmative action and women.

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<sup>87</sup> Bernice Sam, 'Interrogating Affirmative Action as a Strategy for Increasing Women's Participation in Politics: the Rhetoric and the Reality' (2009) WILDAF

<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

### **4.1.3 Proposals for Individual 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. Although women are generally much higher achievers compared to their male counterparts, they do not become as visible as the men do, even when the latter have little to show especially with regard to academic achievements<sup>90</sup>. There is therefore 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, especially 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.

### **4.2 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 will ensure equality in the political leadership of Kenya and in the process ensure that the not more than two-thirds gender rule is implemented. In the main, 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

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<sup>90</sup> Nyokabi Kamau, *Women and Political Leadership in Kenya* [2010] HBS 79

of affirmative action is towards justice, peace and development in any given society. With this in mind, affirmative action should be encouraged and especially the use of quotas.

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