

CHAPTER: AFFIRMATIVE ACTION

The Mandate Of The Commission

The Review Act provides an expansive agenda for affirmative action and the inclusion of the historically marginalized and minority groups into the national fabric. Section 3 of the Review Act demands that all organs of the review process must ensure that the final outcome guarantees and safeguards the well being of the people of Kenya. In particular, the review process must ensure the following:

- ❑ Gender equity;
- ❑ Equal citizenship;
- ❑ Equality and redress of the discrimination or hardships suffered in the past;
- ❑ Respect of human rights and fundamental freedoms;
- ❑ Equitable access to national resources;
- ❑ Full and inclusive participation in public affairs; and
- ❑ the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth.

Affirmative Action: General Principles

Affirmative action and positive discrimination are often used synonymously. Affirmative action suggests positive steps to achieve the improvement of the conditions of a section of the people who for various reasons have been excluded from enjoying the benefits of development. On the other hand, positive discrimination suggests treatment that assists one group of people to catch up with the rest in the society. Both concepts therefore have in common, the notion that there are certain sections of society that are disadvantaged and whose condition must be redressed.

Positive discrimination has been the subject of a great deal of controversy, not least litigation, especially in the United States. It tends to become more controversial when one identifiable individual can argue that he or she has suffered because of a programme or decision and that exercising positive discrimination could benefit another identifiable individual. It is in relation to this fact that often emotions tend to run high, and individuals so discriminated are prompted to litigate. In this case it is not just the risk of privileged sections of the society resisting erosion of that privilege, but positive discrimination is seen to pose a threat to those being discriminated against even if the benefits are societal. It is hence argued that the way to deal with the disadvantaged in society is not by adopting protective and discriminative measures but by providing equal opportunities and level playing ground for all. This argument is prevalent in the

neo-liberal ideologies based on the free market principles as reflected in the policies of the World Bank and the International Monetary Fund. These policies in their character do not favor subsidies or public funded social services. This approach is therefore hostile to the basic principles of welfare-based affirmative action as well as to positive discrimination.

Affirmative Action in the context of the review process is seen as a direct response to historical concerns of gross inequalities that characterize Kenya's social and economic environment. The key concerns include:

1. Exclusion of whole regions and communities from enjoying the benefits of national development;
2. Unequal development;
3. Unequal distribution of national resources; and
4. Unequal participation in decision-making and management of public affairs especially by women, people with disabilities, the youth, pastoralists and minority communities.

Conceptually, affirmative action is about a whole range of interconnected issues including remedying historical injustices; providing level playing ground and equal opportunities to all; promoting inclusive participation by all in decision making; providing special assistance to the marginalized areas and communities; and ultimately, ensuring dignity, equality, justice and unity.

Affirmative Action in the Current Constitution

The 1963 Constitution of Kenya was in a way alive to the idea of affirmative action as it made direct provisions for the protection and inclusion of minority communities in the governance system. As to equality of citizens, reference was made to Sections 14 and 26, which in a nutshell stated that every person in Kenya was entitled to the fundamental rights and freedoms.

The current Constitution however, makes no direct assertions on the place of minorities and the disadvantaged other than making provisions under Chapter Five on the protection of fundamental rights and freedoms of the individual, which by their very nature, are not justiciable. At the same time the language and tone adopted in the Constitution do not reflect the idea and philosophy of affirmative action. Nonetheless, Section 82 provides for the protection of individuals from discrimination on the grounds of race, tribe, place of origin or residence or local connection, political opinions, colour, creed or sex.

Affirmative Action in other Constitutions.

Virtually all other Constitutions make provisions for equality before the law, and for non-discrimination. Most Constitutions provide for equality rights to be limited or derogated in specified circumstances or in general terms, if these are reckoned to be justiciable in a democratic society. Few Constitutions specifically contemplate that such limitation or derogations may provide for some form of Affirmative Action. Even more rare are the classes of rights for which such affirmative action may be taken.

The Constitution of Canada provides a specific recognition of the possibility of a “law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups. Such law, programme or activity would inevitably be consistent with the Charter of Rights and Freedoms and not just necessarily contrary to it. The provisions of Section 15 of the Constitution do not however, impose any duty on the State to put in place any, programme or activity that has its object the amelioration of conditions of disadvantaged individuals or groups’. It simply prevents any such programme being unlawful thereby making provisions for Affirmative Action.

The Constitution of Malaysia makes provisions that require special treatment of the Malays especially in the areas of education in public institutions, employment in public service and licenses among others for economic activities. Article 153 aims to mainly benefit the indigenous inhabitants of Malaysia who constitute the majority of the population. There is an obligation on state to exercise the government functions generally to protect the interests of the Malays.

The Indian Constitution makes a number of provisions on the possibility of programmes aimed at benefiting those in certain castes, tribes and backward classes generally. These are coupled with a general non-justiciable duty on the State to take affirmative action, which may nonetheless, be potentially enforced by the courts. Article 14 on equality before the law and Article 15 on prohibition of discrimination on grounds of religion, race, caste, sex or place of birth prohibit discrimination by the State. Article 16 on equality of opportunity in matters of public employment provides for reservations of quotas, if the state is satisfied that there is inadequate representation for certain section of society. The provision is however, not mandatory or obligatory. As a directive principle of state policy Article 38 makes provisions on securing a social order for the provision of welfare of the people.

The South African Constitution makes an exception to the general equality provision as it relates to the victims of past discrimination in addition to

obligations in the area of land, education, housing and health among others, which are not limited to past discrimination provisions. Article 9 on equality and non-discrimination makes it clear that positive measures may be taken to fulfill the general equality provisions especially as they relate to situations of past unfair discrimination. Article 25 on property imposes a duty on the state to take steps to foster equal access to land. Of greater implication is the duty of the state to take steps to realize the rights to housing and to health with no reference to past discrimination.

What the people Said

Many people spoke on the issue of marginalisation. Their views may be summarized as follows.

- Pastoralists feel their way of life is despised, and their need for land is misunderstood.
- Communities near the boarder feel their loyalty is doubted, and that the services and facilities they receive from government are inferior and often inappropriate, their needs are not appreciated.
- Muslims feel they are religious minorities who have suffered discrimination and whose rights have been trampled on, and values and institutions eroded.
- The Ogiek face eviction from the forest where they live, and effectively from their way of life.
- A recent report stated that 16 Kenyan languages are in danger of extinction.
- Asians feel politically marginalized, even though not economically (Goans specifically are economically weak, and, by reason of historical chance, often stateless).
- Communities who live near game parks (especially those who used to live or graze their cattle in the park areas) feel marginalized by their exclusion from that land, and also by what they see as the preference for wildlife over human life.
- On the coast people see that valuable plots are occupied almost entirely by non- local people.
- There are communities who see water piped from their areas to tourist hotels while they have no reliable supply, or electricity cables by pass their settlements.
- Kenyans with disabilities feel marginalized: unable even physically to participate because buildings, footpaths (where they exist), transport are inaccessible, their needs in terms of communication (for example through sign language and Braille) and education needs are not met.

- People with disabilities are deprived of education, or job opportunities and of the chance to participate fully in society.
- Facilities at working places including all working aid should be made more appropriate for the use of persons with disability.
- The constitution should provide for appropriate legal definitions of person with disabilities and protection against discrimination.
- Every institution, company and organization should employ at least two disabled persons.

- Women feel marginalized: one of the lowest proportions of female legislators in the world, a lower rate of participation in education than men and otherwise not adequately involved in business and government to the same extent as men. Customary law denies women inheritance of land and often leaves widows and their children destitute.

- The State should provide facilities and opportunities to enhance the status of women to enable them realize their full potential and advancement.
- Women ought to be integrated in all levels of decision making, be allowed to express their views and a women's bureau be established to monitor progress.
- The Constitution should outlaw religious and cultural practices that discriminate against women indirectly or directly.

- The elderly are relegated on the sidelines of life in many ways, especially when they are frail.
- Youth believe they are denied full opportunity to participate in employment and more broadly in government and society.
- People with disabilities (or with conditions that are not disabling like albinism and HIV/AIDS) are denied the same rights as others, either by positive act or by neglect.

- Various groups are deprived of access to land as a result of past policies of the colonial and independence governments.
- Slum dwellers are deprived of basic sanitation.
- People in the Northern districts of Eastern, North- Eastern and Rift Valley Provinces are deprived of the same chances for education, of access to water and of security in comparison with those in most other parts of the country.

- Poor people generally are deprived of access to basic needs especially education, medical care, housing, transport, sanitation, and full participation in decision-making.

Commentary

Issues of social justice and exclusion are basic to affirmative action, and constitute some of the major concerns raised by Kenyans in their submissions to the Constitution of Kenya Review Commission. Social justice suggests a notion of a positive effort to achieve an equitable system of governance and society that affords everyone access to basic goods and services necessary for essential livelihoods. The word justice in itself suggests that the objective must be the removal or reduction of inequality in the society.

The analysis of the views presented to the Constitution of Kenya Review Commission and indeed the analysis of the context of the Review revealed that both the governance and the economic system exclude a large proportion of the people of Kenya. This is reflected in the high levels of poverty estimated at over 60% of the total population. The worst hit are women, people with disabilities and minority communities.

While democracy is about inclusion and ensuring justice to all, in recent years there has been a growing divide between the haves and the have not with a large section of the society feeling left out or excluded from sharing the benefits of development. It is these concerns that the review process seeks to address through affirmative action and other interventions including the rationalization of the power and decision making structure of the Kenyan society.

Many submissions called for affirmative action on behalf of women, people with disability, the youth, and pastoralists and for all those people on whose areas of this country have suffered discrimination in part or are in special need of development. It is proposed, however, that programmes of affirmative action, justified by full data and using appropriate means and goals, be transparently operated, limited by time, adequately monitored. In addition, they should not amount to unfair discrimination.

The objects of review and the people's recommendations place great emphasis on social justice and the basic human needs. The Commission is convinced that these can only be achieved if economic and social rights are made justifiable. This then is the place for Affirmative Action.

Women's issues were very prominent in the submissions to the Commission. They ranged from the fact that women hold only 4.1% of seats in Parliament, domestic and general sexual violence, discrimination in inheritance, to low enrolment in school. It has been proposed that there be a provision setting out women's rights clearly. Women's claims for fair treatment, supported in many places by men, have been so clearly expressed and the sense of past injustice is so great that, although there is an element of overlap with the general non-discrimination provision, it is felt this is justified, in the interests of ensuring a clear statement of the position of the over 50% of the population who are female. It is for these concerns raised that women aired their proposals for the new Constitution.

The principle of equality of men and women was insisted on as a basic requirement for the enjoyment of rights. Women insisted on the entrenchment of women's rights in the Bill of Rights. Among the rights echoed by most submissions and memoranda by women's organization, groups, individuals and resource persons include: -

- Abolish discrimination under exception of section 82 of the Constitution in regard to marriage, divorce, burial, inheritance, and personal law issues, with a view to removing cultural concessions.
- Eliminate customary and religious laws that violate women's rights and are in conflict with the rights and duties protected under international laws that Kenya has ratified.
- Constitution should establish a Domestic/ Family Court at a District level managed by majority women to deal with domestic violence.
- There should be a mandatory cabinet posts reserved for women.
- Value be put on women's work as family care providers and national builders through formal and informal work.
- Establish rehabilitation centers for lactating imprisoned mothers rather than put them up in jail.
- Reintroduction of the affiliation Act.
- Outlaw retrogressive socio- cultural practices that impede on women's rights to participate, access and control resources.
- Respect for and upholding of cultural, ethnic, regional and communal rights and diversities but out law traditional harmful practices.
- Mandatory but guaranteed testing HIV/AIDS before solemnising marriages.
- Equal opportunity Act should be passed, giving women access to education and gaining employment.
- Establish a gender commission for gender equality as a Constitutional and an autonomous statutory body with a framework that will provide for mandate.
- Women should be allowed to control their sexual and reproductive lives.

- Women should be entitled to their children and property within and outside marriage.
- Individual spouses entitled to their own funds, businesses or industries that are not claimable by other spouses.
- Measures be taken to protect women refugees and children as they are most disadvantaged by wars and displacement.

The elderly in society have in the past felt marginalized. The justification for treating older persons separately causes them to be ignored hence making them in some ways, a vulnerable section of the community. From the collection and collation of views from the people the Commission established that there is evidence that many older persons suffer neglect and abuse as well as being excluded from full participation in society. There is a need for a general recognition of the rights of the older persons including a special mention of the rights to participate, to pursue personal development, to work, to be free from all forms of exploitation and abuse, to live with dignity and respect, and to retain autonomy and to reasonable care and assistance of family and State. There is also the need of a special plan for their retirement, to share their knowledge and skills with others, and remain active in society.

On the basis of submissions from individuals and organizations Persons with Disabilities have felt marginalized. The memorandum from people with disability is that they do not want or need to be treated as objects: as objects of pity or charity or even of policies decided exclusively by others. They need respect, rights, a voice and recognition of their full citizenship. The definition of disability needs to be clearly defined in the Constituion this definition should also include conditions like epilepsy, albinism, HIV/AIDS and other conditions which form the basis of discrimination but which objectively do not necessarily cause any reduction in abilities.

Recommendations

The Commission therefore recommends that:

- The Constitution should include a clear statement of obligation to embark on a fully researched, carefully structured and properly funded rolling programme for positive action to strengthen equality, or affirmative action, and of meeting the basic needs. This statement should then go into the Human Rights Chapter, thus turning the power to carryout Affirmative Action into a duty in some circumstances.

- The Constitution should propose criteria for objectives, methodology and process, including emphasis on transparency, participation, emphasis on genuine need, monitoring, clear criteria for success, and time limits.
- The Constitution should:
 - (a) State that the diversity of the nation should apply in the executive, public service and judiciary;
 - (b) State clearly that the ethnic diversity of the nation should be reflected in the police and correctional services;
 - (c) State clearly that the principle of ethnic diversity applies to all constitutional commissions and offices;
 - (d) Ensure balanced development, including compensating for past neglect of certain areas;
 - (e) Ensure obligation on part of the state to foster Kenyan languages, including the obligation, where feasible, to make public information available in local languages;
 - (f) Recognize and promote the principles applicable to constitutional commissions to have regard to the interests of disadvantaged sections;
 - (g) Emphasize affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development;
 - (h) Provide for the principle of inter-generational equity;
 - (i) Make it clear that regard for future generations extends to resources as well as to the environment generally;
 - (j) Provide and define criteria for allocating resources to marginalized areas in order to ensure equalization of opportunities and access to development;
 - (k) Make provisions on institutional, legislative and policy arrangements for the implementation of affirmative action for the marginalized, disadvantaged and minority groups and areas; and
 - (l) Make provisions on redress, reparation and compensation for historical injustices committed on the people of Kenya.

Affirmative Action in the Draft Bill.

Affirmative action cuts right across the entire Draft Bill; principles of inclusion and social justice are imperative themes of the text.

National goals values and principles

Article 3 Recognize ‘the diversity of its people and promote the culture of its communities’ – a lot of people told the Commission that their loss of dignity is the disregard of their culture and lifestyle. If more respect is paid to their culture they would have better control of their lifestyle.

Article 6 access of all to independent and impartial and competent institutions of justice (this would necessitate some form of legal aid for those who could not otherwise have access to lawyers or courts)

Article 11 Fullest participation of women the disabled, the marginalized communities and sectors of the community in the political social and economic life of the country (this identifies, broadly, categories and states a general principle rather than modalities – more in the nature of a charter).

Article 12 ‘(at least one third of the members of all elective and appointive bodies shall be women’) states an important goal that women have been asking for but it does not specify how this is to be achieved.

Article 13 recognizes the special responsibilities owed to children by society, state and parents to ensure their material and moral well being.

Article 14 commitment to social justice and ‘through appropriate policies and measures, to providing for *all* Kenyans the basic needs of food, shelter, clean water, sanitation, health, a clean environment, and society so that they live a life of dignity and comfort and can fulfill their potential’ (affirmative action on a grand scale! – basic needs for all, so that those who need assistance must be provided; but it does not identify groups or criteria for special assistance; nor the modalities but does refer to ‘appropriate policies and measures’).

Article 15 'equitable development... eliminate disparities in the development between regions of the country and sectors of society, and manage national resources fairly and efficiently for the welfare of the people' (this form of equitable development would bring resources and services to the people who are disadvantaged; special measures may be necessary to achieve this balanced development; this is a means to affirmative action; the deprivation of many communities has been due to the unfair, inefficient and wasteful use of resources.

Article 16 'recognize its responsibilities to future generations of Kenyans, by pursuing policies for the sustainable management of the environment'- this is an important principle/objective of inter-generational equity.

Citizenship

Article 16 emphasizes equal rights and especially the equal entitlement to passports and Ids (the disadvantages of some communities, especially Somalis, is due in part to the denial of citizenship or relevant documents to them.)

Article 33 refers to the 'full and equal enjoyment of all rights and freedoms while article 34 elaborates on prohibited grounds for discrimination special reference to the poor and marginalized. Article 34, allows special measures despite equality provisions says that affirmative action has to be on the basis of genuine need but does not require but merely permits affirmative action.

Article 35 provides a framework for gender policies equal opportunities of men and women in political economic and social activities and that customary rules must conform to constitutional principles and respect dignity of women.

Article 77 (2) (b), introduces Mixed Proportional Membership that requires that 50% of total must be women.

Article 106 (1) (b) requires that at least 30% of the members of the Senate will be women.

Art. 77 (2) (a) political parties must nominate at least 1/3 of its political candidates from amongst women.

Art. 214 requires that at least 1/3 of the local councils must be women.

Art. 90 requires that political parties must be democratic and must involve women in their activities.

Articles 19 & 20 provides for equal rights to pass citizenships to children; equal rights of husbands and wives of Kenyans to acquire citizenship.

Article 50 protects rights in connection with work by the general non-discrimination provision and the specific provision on work rights.

Article 70 rights of women prisoners should be protected including protection from violence; separation from men; right to wear decent clothing and not subjected to treatment which contravenes the religion etc (this rights as expressed in gender neutral terms, but will have different significance for women than for men)

Children

Article 37 covers the rights of children.

Youth

There is a general prohibition on discrimination on the grounds of age.

Article 77 (2)(c) requires political parties to include among the list women representatives including women.

Disabilities.

Article 39 covers the disabled persons.

Older people

Article 36 specifically guarantees equal rights to older members' of society, including some provisions requiring special treatment.

Provisions especially relevant to poverty,

Article 59 gives the right to access to housing.

Article 60 gives all the freedom from hunger and the right to food.

Article 61 gives the right to clean water.

Article 62 gives everyone the right to reasonable standard of sanitation.

Article 63 protects the environment for ‘present and future generations’.

Article 64 protects consumers (who are particularly vulnerable in Kenya, again especially if they are poor).

Recognition and respect for communities and minorities.

Article 213 the provisions on devolution.

Article 230 (m) and (o) where devolved governments have rules and mechanisms for the protection of minorities and the promotion of their rights and interests.

Article 102 (1) is a provision for political representation of minorities.

Land, Environment and resources

Provisions on land are of special relevance to members of communities that have been deprived of land in the past, and to individuals within the poorer sections of society.

These are covered in articles 232 & 235.

Balanced development.

There is a great deal of concern that this country’s past resources have been unevenly distributed. The principles of devolution include equitable sharing of resources, with specialized provisions for marginalized areas. In Article 243 (c) are provisions relating to Public Finance and Revenue Management are’ equitable sharing of natural resources....taking into account the specialized provisions for marginalized areas.

