



Women and power Shaping Kenya's 2010 constitution

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SUMMARY**
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This study focuses on the role of Kenyan women and gender activists in shaping the 2010 constitutional reform process in Kenya and the outcomes of this in relation to advancing gender equality and a women's rights agenda. Constitutional reform is an important window of opportunity with respect to renegotiating the rules of the game regarding how power is exercised and resources are distributed. For non-elite groups, it is thus a relevant site of contestation for struggles aimed at institutional and political change that address discrimination and exclusion. We aim here to use the Kenyan case to see how women can increase their access to influence and decision-making through political action and social mobilisation.

The 2010 Constitution, as the outcome of growing political and social pressure to address the failings of the post-colonial political order, represents an important milestone in Kenya's political process. Opposition forces and an increasingly mobilised social movement reflected increased demand for democratisation and a more inclusionary and rights-based model of state-society relations.

From the 1990s up until a new Constitution was approved by referendum in 2010, Kenya saw a succession of attempts at constitutional reform, mostly trumped by resistance from political parties and elite actors unable and unwilling to find sufficient common ground for compromise.

Within this process, there is wide consensus that the women's movement and feminist activists were among the interest groups that most effectively mobilised to (1) influence the wider normative content as well as advancing very concrete objectives relating to women's rights and (2) maintain the general momentum behind the constitutional reform process. This included ensuring the process was sufficiently participatory and took on board a range of demands.

Influential feminist activism was not new in Kenya by any means. Rather, the Constitution of 2010 and its gains for women need to be seen against a longer-term continuum of laws and policies that already reflected the autonomy, political capabilities and experience of women's movements and gender activists. Developments since the 1990s indicate a trend towards a thickening of women's activism that attests to growing capacity

for agenda-setting and legal change. This is despite limited access to formal decision-making in formal political space and in a context of patriarchy and discriminatory gender norms.

Key achievements: gender equality and women's rights in the 2010 Constitution

The 2010 Constitution is a progressive text that advances women's participation in political, social and economic life and establishes important gains on women's rights and gender equality.

In terms of the **normative content**, it establishes an ambitious Bill of Rights that contains specific gains in relation to women's rights – as well as on the *justiciability* of rights. The Constitution also establishes a **set of values and principles** trumping any discriminatory law, practice or action – including in relation to customary norms and tradition. Affirmative action measures compensate for historical inequality and discrimination – an especially important victory for women. It furthermore sets up an **institutional framework of checks and balances**, including through strengthened judicial review something women activists actively lobbied for. In sum, the Constitution potentially provides an enabling institutional architecture for the realisation and protection of women's rights and gender equality principles.

Process of change: how women exercised influence to shape constitutional reform outcomes

The strategic choices, modes of engagement and institutional-political opportunities for women's influence are not single factors or moments of change that simply allowed the women's movement to mobilise and negotiate for a gender-progressive constitution. Rather, what emerged was a series of political openings that the women's movement took advantage of, which in turn created further political openings. The women's movement often met with resistance to changes in the status quo. This took many forms, including attempts to foster divisions in

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the movement, rejection of motions on affirmative action in parliament, verbal and physical abuse towards females who accessed political power and political machinations to ensure articles negotiated by both the women's movement and civil society were watered down in the draft that went to referendum in 2005.

No single strategy explains the gains women achieved through the constitutional reform process. Institutional change is an uneven process, and what follows from the iterative layering of strategic action – institutional change – is a complex and uneven sequencing of change and counter-change. However, a number of features characterised how women engaged with the democratisation process generally, and specifically with shaping the constitutional reform process and outcomes:

- *Making use of political opportunity structures:* Kenyan women's activism flourished from the early 1990s, with the formation of a multitude of distinctly political networks, coalitions, organisations and committees. Women organisations embraced the constitutional review process as a key political opportunity and focused their energies on ensuring women activists influenced the process at each stage.
- *Engaging with the state, using formal institutions:* The most effective engagement with parliamentary life has been through the work of the cross-party women's parliamentary association (KEWOPA), which has proved highly effective in generating new gender-sensitive laws and 'engendering' to some extent parliamentary life. Women's engagement with the state has also facilitated an emerging framework of gender machinery, for example the Ministry of Gender, Sports, Culture and Social Services in 2004 and the National Commission on Gender and Development. International frameworks and conventions on gender equality also contributed to informing feminist and gender agendas in Kenya; these were internalised and appropriated to become a locally driven agenda.
- *Strategic use of the law and court activism:* During the 1990s and 2000s, the movement was dominated by female lawyers who articulated their arguments in formal legalistic language,

to negotiate with male politicians in a style recognised and respected by a patriarchal system, to draft motions and bills and later on to analyse drafts of the constitution for their legal impact on women. Women also emphasised the need to strengthen accountability mechanisms to maximise the chances of protecting any legal gains gained through constitutional reform.

- *Networking, lobbying and strategic engagement in different areas:* Women activists used their political acumen to build strategic alliances and coalitions, including lobbying male politicians and key power holders at different levels. They also used media skills to communicate with women not directly involved in the process. The women's movement provided civic education to key interest groups, as well as holding context-specific dialogue with key gatekeepers, such as religious and community leaders, local judges and dispute resolution arbiters to enable sensitisation on many of the issues.
- *Informal strategies:* In a context of restricted formal access to decision-making, women used the space available to them creatively, for example by subverting or contradicting norms for female behaviour, thus attracting media attention to their agenda.

Enabling factors

The main sets of factors that shape, enable and constrain women's capacity for influencing political and public life are as follows:

- *Political and institutional factors:* The change from single- to multi-party rule created political space to negotiate Kenya's new political dispensation. Political opposition, civil society and the women's movement mobilised to push for democratisation and to negotiate a new Constitution. This was an uneven and contested process, punctuated by episodes of violence during elections and weak elite agreement regarding the underlying political settlement. In this context of political change, the constitutional reform process became a strategic channel through which

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the women's movement was able to negotiate new rules of the game.

- *Capabilities and resources:* These include research capacity and academic influence; high-quality technical knowledge and professional expertise; purposive investment in political skills and lobbying capabilities; and the experience itself of engaging in political activism in the different arenas, which helped women develop political acumen.
- *International factors:* Although the constitutional reform process was home-grown, the Kenyan women's movement also benefited from direct support from the international community, mainly through funding for training. Some of this funding was flexible, which allowed women's groups and civil society groups to access funding for short-term initiatives in the lead-up to the 2010 referendum on the Constitution.

Impact of the 2010 Constitution on women's access to political and leadership positions and on gender equality gains generally

The 2010 Constitution has created new opportunity structures for women's access to decision-making roles in public and political life and advancing gender equality. The Constitution is clear that not more than two thirds of members of elective or appointed bodies can be of the same gender. In addition to the two thirds rule, the Constitution stipulates that 47 'Women's Representatives' be elected by registered voters in each county to form part of the National Assembly. This is in addition to the 290 members elected by registered voters of single-member constituencies.

First, there are gains in women's political presence. In the 2013 elections, 47 women were elected as Women's Representatives for each of the counties. Their presence in addition to the women elected at constituency level increased the overall proportion of women in the National Assembly to 19.1%, from 7.5% in 2011. At the county level, seats were allocated to women following the elections to bring the proportion of women in the County Assemblies up to 30%. There were also significant increases in female

representation in the executive and judicial sectors between 2011 and 2015.

However, while the overall picture is encouraging, the introduction of a quota system has created a new set of challenges for women in formal political life. Crucially, the introduction of 47 seats for Women's Representatives does not ensure at least one third representation of women in the National Assembly. In fact, political parties are using the allocation of seats to women to discourage women from vying in the constituency elections and voters from voting for women (using the argument that a vote for a woman is a wasted vote as she already has her seat), thus potentially curtailing the representation of women in the National Assembly to 13%.

The funding system is used to further categorise Women's Representatives as different and lesser than constituency MPs. Women's limited control over the funds they can use to implement projects weakens their influence and access to power.

The quota system is being used to portray women as 'second-class' politicians. In some cases, nominated women are shouted down when they stand to speak, as they are not considered legitimate representatives. Representing women's issues through allocated positions has therefore, for some, become a poisoned chalice.

Second, more women in appointed positions also constitutes an important change in women's access to decision-making roles. It is significant, for instance, that women's presence has increased in a strengthened judicial branch, including in the higher courts. Overtime this presence contributes to changing perceptions and beliefs about women occupying decision-making roles.

The new checks and balances and accountability mechanisms established by the Constitution has further broadened the range of forums for engagement by gender activists has broadened. Recourse to litigation and court action to advance women's rights and hold the state to account is being used to good effect. This combines well with the work of other oversight mechanisms, such as the new National Gender and Equality Commission tasked with monitoring the implementation of constitutional gains on gender equality and protection from discrimination.

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Meanwhile, the informal rules governing power relations in Kenya remain patriarchal: the constraints that limited female involvement before the reforms remain critical factors limiting the impact of the reforms. Female politicians still cited violence, intimidation and more subtle manipulation of voters' expectations of female politicians as key factors dissuading them from entering the 2013 elections. Many forms of political canvassing used by male candidates remain socially unacceptable for female candidates, while gendered ideas of what makes a good leader limit the impact of allocated seats. Most women in Kenya are not in a position to have access to formal justice mechanisms, in order to benefit from the new constitutional order. In a context where legal pluralism characterises much of the institutional reality of the country, formal legal and constitutional change is inevitably limited.

Finally, it is important not to overstate the 'unity' of women in Kenya. Divisions relating to political, ethnic, family, kinship and class divisions and loyalties exist country-wide, and this is no less the case for women in the National Assembly and in the women's movement. For example, although there is some evidence of women using some of the previous strategies to build support on issues, once affirmative action had been achieved divisions within the women's movement soon became apparent. In addition, following the introduction of Women's Representatives, divisions between women MPs became more accentuated. KEWOPA has now divided into three distinct caucuses: a caucus for the Women's Representatives, one for the 16 constituency MPs and one for the 16 nominated female senators. This has weakened its effectiveness.

Conclusions

Kenyan women's influence on the content and implementation of a constitutional reform process shows how such moments for formal legal change are a unique window of opportunity for women's influence. Through negotiating access to decision-making forums in the constitutional review process, women were able to argue and lobby for the inclusion of a raft of gender-progressive articles and a

series of checks and balances on executive power.

There has been a tendency to trivialise legal change, especially where politics and decision-making normally take place through informal channels. Yet legal change can activate changes in incentive structures and affect entrenched interests. What this study, and indeed a growing body of work on the politics of legal change, shows is that we need to 'repoliticise' our understanding of legal change. The technical is political, and in practice this is often undervalued.

Women activists (as is true of all political brokers) are effective when and because they are able to navigate formal and informal institutions, practices and relationships, through politically savvy engagement that straddles these different arenas and sites of exchange and decision-making. There is a need for more research on what this looks like, drawing on an emerging body of work in feminist institutional analysis.

However, there is also a need to temper our enthusiasm for how much formal change can translate into meaningfully transforming multiple levels of norms, belief systems and practices. In the challenges of implementation, there is a need for a much finer analysis of how constitutional change can affect norms, belief systems and practices. The transformative impact and sustainability of constitutional reforms are inevitably hostage to wider political economy conditions – like all progressive agendas. Resistance and backlash take many forms. Typically, elite actors will aim to subvert or ignore rule changes that undermine their interests.

Finally it is important to recognise the value of the technical knowledge and expertise of women activists in a range of specialist organisations and think tanks, and the support and presence of feminist academics across a range of disciplines. This contributed to supporting the development of a Kenyan feminist agenda – notwithstanding the important cleavages and divisions among women's voice relating to class, regional, ethnicity-based and religious identities, and political and ideological preferences and allegiances.

Recommendations

- Continue to **invest in women's movements**. This includes organisational support and logistical support to facilitate cross-country networking.
- Support **accountability, oversight and constitutional implementation mechanisms**, and women's engagement with these, including the implementation of constitution oversight mechanisms and strategic litigation strategies that can activate judicial review and oversight.
- Invest in political and technical capabilities to advance on **legal change** to align with the 2010 Constitution. This includes engaging with hard issues like violence against women and support to women's access to land rights and property. Where social norms are 'sticky', this involves multi-level multi-pronged strategies.
- Invest in **national capacity for knowledge production**.
- Invest in **higher education for women**, to support the development of technical skills and expertise required at different stages of policy and legal change and implementation, as well as recourse to different oversight, accountability and legal redress mechanisms.
- Invest in **flexible programming structures that can adapt to emerging political opportunities** as these arise. This can allow for responsive support to changing conditions.
- **Women's empowerment is a powerful agenda, particularly when owned and driven by national women**. Drawing on locally owned knowledge and strategies to identify entry points and modes of engagement to shape programming choices will contribute to more effective support and minimise the risk of doing harm (including in terms of rejection of a women's empowerment agenda on the basis that it represents foreign or Western values).
- **Invest in brokering networks and strategic alliances**, including through creatively navigating informal norms and institutions in political and social space.

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