

Why won't women participate? Making sense of the functional inconsistency of gender equality legislation in Kenya

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Abstract

Devolution is one of the key features of Kenya's 2010 constitution. Through budget and economic fora in the 47 counties, a platform for increased citizen engagement in governance processes is provided. There are also specific provisions in favour of women, to aid in the reversal of their historical exclusion from political affairs and strengthen their political agency. Using the case of the Maasai community, this paper investigates both descriptive and substantive representation of women in patriarchal set-ups. It demonstrates that these provisions notwithstanding, women still have a hard time getting their voices heard in the public space, as politics of engagement hinge on patriarchal considerations that far outweigh formal rules in a political system that is an embodiment of the dialectical relationship between primordial and civic publics. Backed by empirical data from biographical narratives and focus group discussions therefore, the paper illustrates that in patriarchal set-ups, empowerment via civic engagement can only be realised through tactful navigation of the primordial public and the institutions within it, since political agency in such set-ups is a product of power relationships in and between the domestic and public spaces.

Key Words: Norms, institutions, agency, gender equality.

1. Introduction

When the current constitution of Kenya was brought to a referendum on 4th August 2010, it was overwhelmingly voted for, and later promulgated on 27th August 2010. While it signified major achievements in the institutionalisation of democracy and respect for human rights, for most women, the main point of celebration was the codification of a critical mass for the representation of women in political and public service positions. Article 81 (b) states that *the*

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electoral system shall comply with the principles that not more than two-thirds of the members of elective public bodies shall be of the same gender. This is aimed at promoting the inclusion of women in political representation, a culmination of efforts by feminists and civil society groups that gained momentum in the early 1990s.

Beyond political representation, this gender quota is also to be applied in all public decision-making processes. It is also part of the national values and principles of governance per Article 10 of the constitution. According to subsection 2 of this article, these values and principles include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people and; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

These provisions point to the reality of institutionalising norms of equality and inclusion. This is very important for women, since constitutional protection from gender-based discrimination formalises their individual and collective rights (Austen and Mavisakalyan, 2016). For Kenyan women especially, this protection is crucial in a political environment that is dominated by men and influenced by patriarchal norms. The further provision of additional platforms for participation under devolution in Chapter 11 of the constitution, means that Kenyan women can now participate in political processes beyond voting or vying for elective positions.

The decentralisation of power from the central government saw to the devolvement of power to 47 county governments in Kenya. One key objective of this devolution effort is spelt out in Article 174 (c): 'to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.' The new structure of governance also allows for citizen participation to the lowest unit of community organisation in Kenya, the village council. The membership of these structures is also to adhere to the two thirds gender rule, further institutionalising the political agency of women.

Taking all these provisions and structures into account provides evidence of the dedication by the Kenyan government to citizen participation and gender equality. In this paper, I investigate the operationalisation and consequent realisation of these constitutional objectives.

2. Approach

To achieve the stated objective of this paper, I study the Maasai community in Kenya, dominant in Kajiado and Narok counties. I investigate how the provisions for equality in citizen participation interact with the community's organisation structure to influence the equality position of women.

The community's gender relations are defined along socio-economic factors such as age, wealth and leadership skills (Coast, 2000; Hodgson, 2001; Spencer, 1993). Social organisation is therefore hinged on age and gender, as these define the rules of engagement and logics of appropriate conduct. A key aspect of this organisation is age-sets and age grades. Whereas an age-set includes a group of peers from a broad range of ages, age grades are used to formally categorise men according to their status. Initiation through circumcision ascribes men to an age-set, but the same is not available for women, who are instead promoted to a higher grade upon marriage. This marks the difference between men and women, since, generally, the position of a woman is in relation to the male head figure in her life. It is from this that the masculine nature of the public space is developed. As Bourdieu (2001) observes, relations of kinship and marriage assign a social status to women, defining them along male interests, thereby reproducing men's symbolic capital. In no way therefore, does the Maasai structure consider the status of women as individual subjects.

This structure is however not uniformly and strictly adhered to by the Maasai in Kenya today, mainly due to the influence of formal education and the criminalisation of female circumcision. It however represents a system that guides the community's logic of appropriateness, as far as individual conduct in communal and public settings is concerned. But how wide is the logic applied, and how influential is this approach to the position of women in relation to the state? To understand the relationship between the Maasai public order and the civic public order, I will briefly look at the general approach to public conduct in most post-colonial African states as explained by Peter Ekeh (1975).

3. Different spheres, different rule sets

Ekeh (1975) points out that over the years, the private and public realms have been generalised as sharing a common moral foundation. This characterisation, he warns, cannot be applied in the African context, where there are in fact, two public realms that have different moral linkages with the private realm. He

names these, “the public realm in which primordial groupings, ties, and sentiments determine and influence an individual’s public behaviour...and a public realm which is historically associated with colonial administration and which has been identified by popular politics in post-colonial Africa” (Ekeh, 1975: 92). Ekeh elaborates that the primordial public shares the same moral imperatives with the private realm, while the civic public is amoral and lacks the moral imperatives that operate in the private and primordial public realms.

Individuals in the primordial public thus make contributions which are considered moral obligations to benefit the individual as a member of a particular public, which also tends to be ethnic. Of particular interest in this scenario, is that the individual may give materially, but benefits are intangible and immaterial, in the form of “identity and psychological security” (Ekeh, 1975: 171). From this, one can deduce a pattern of enculturation in the way that this primordial public is able to maintain a governance of appropriate and expected conduct. This is structurally different from the civic public, which places great emphasis on economic value, chiefly because of its amoral nature. Also characteristically different in the civic public, is the fact that individuals seek to gain from it, without the moral urge to give back, as is the case in the primordial public. Ekeh explains that this is informed by the myth of abundance in the civic public, as opposed to a need for care and protection of the primordial public. Considering the value derivation from either public therefore, it is to be expected that individuals evaluate their actions against the expected outcomes and consequences thereof.

This existence of separate sources of norms point to the reality of separate codes of conduct, or legal structures. The two publics are governed by different legal norms, introducing a plurality that could either promote or undermine the goals of either realm. In the context of this study, a key outcome of the interaction of these publics is socio-economic, cultural and institutional challenges to the political participation of Maasai women. The background to the Maasai social organisation and power structures points to the exclusion of women from political processes, which fuels inequality. This is in line with the observation that “the norms and procedures of many customary or traditional justice systems raise real concerns about gender equity, human rights, due process, and capture by the traditional elite” (Sage and Woolcock, 2012: 3). One can therefore foresee a challenge in the alignment of gender equality goals among the Maasai.

However, legal plurality does not always signify conflict. As Adler and So (2012) highlight, there is little conflict when the social, administrative and statutory sets of norms line up; conflicts arise when there is competition between the sets of norms, and parties base their claims on different normative orders. It is however possible that decision makers in the non-state realm maintain influence in the state realm, due to the masculine nature of both publics.

This background is very important to the understanding of attitudes and behaviours towards gender equality among communities with a strong connection to statutes of the primordial public. In the next section, I look into how legal provisions on equality are perceived, and how this influences their effect on the status of Maasai women in Kenya. I provide empirical evidence on this, from data collected between March and May 2016, from several locations in Kajiado and Narok Counties, where the aim was to understand how Maasai women engage in public participation forums. Information was collected from nine focus group discussions that were designed as women only, men only and mixed groups of eight each.

4. Influence of laws on social norms

People adhere to social norms to signal that they are good people, especially where social capital stemming from reputation loss is at stake. This is the driving force behind non-state norms which, though unwritten, have the power to control mass behaviour. State norms, as embodied in legislation, can also change the perception of what is considered right or wrong (Jakobsson and Kotsadam, 2010). This way, they can incentivise change, stemming from the ability of the law to express values, which in turn influence behaviour. As Equality Now (2012) points out, the adoption of awareness raising and education on social norms relating to discrimination is important, but established state laws and policies are a major boost to the success of such agenda. The effect of this can be seen in the widespread respect for equal representation in the constitution of public bodies such as ward level development committees and *nyumba kumi* (a neighbourhood security system organised around ten houses).

The way I have selected my (bursary) committee members, there is a person living with disability, youth, women, men, pastor. (Member of the County Assembly, Kajiado South).

It is important to note however, that there is no direct correlation between the signal sent out by legal norms, and the success on the desired attitudinal change. Rather, reactions to legal norms could either reinforce or undermine legislation (Jakobsson and Kotsadam, 2010). The enactment of gender equality laws does not therefore automatically create equality or improved attitudes and support for the same:

In my area, we have a problem as women because it is as if men disregard the women because even when you take a look at Nyumba Kumi or the village elders' initiatives, both men and women are selected but only men do the work. When there is a meeting, it is only the men that attend...It is truly like we have been kept aside, we cannot be involved wherever men are present. We are there in name but not in action. (Women Respondents, Narok East).

In the same way, the criminalisation of discriminatory norms does not automatically eliminate discrimination (Equality Now, 2012). This is especially evident in the case of female circumcision where, among the Maasai, the practice prevails despite its criminalisation in 2011.

Now it is hidden but it is still happening because it will not be made public, it will happen in secret. I will not invite guests, but I will do it. My daughter will not be married if I don't circumcise her. She will remain in my house forever. She will not even be recognised by her age mates. She will be an outcast. They will say she is just a girl, not a woman. I don't think this will end among the Maasai. It will not stop. (Female Respondent, Kajiado West)

Evidently, the existence of a legal provision does not automatically translate to its enforcement either. As Kameri-Mbote (2016: 46) notes, "the effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws." When a law lacks enforceable sanctions, regardless of how high or low these might be, then its effect on behaviour is limited to its expressive function. This is manifested in the quest for gender equality beyond elective and nominative public service positions. There is no formula for the achievement of gender equality in open public forums, and consequences of a gender imbalance are unclear: do the

meetings get postponed? Are the outcomes considered representative and inclusive? Should outcomes regarded as unrepresentative be adopted or ignored? The grey zone created by the lack of a formula or engagement/recruitment criteria means that it is upon the discretion of citizens to show up in equal numbers if possible, and any additional input by county administration to ensure that members of the public are equally informed and supported to attend such meetings. An effort at this is exhibited by the Ward Administrators in Kajiado South, who did their best to contact and facilitate attendance by 10 men and 10 women from each ward, to ensure that the 2017-2022 Kajiado County Integrated Development Plan forum respected gender equality.

The lack of clarity on legislative enforcement is compounded by the fact that at the national level, with 76 women out of a membership of 349, the National Assembly has failed to meet the statutory one third minimum. This practically means that the assembly is in violation of the constitution, but nothing has been done to remedy the situation. This points to a huge gap between policy and practice, as there are clearly not adequate mechanisms to ensure adherence to the law. Licht (2008) however points out, that emphasis should not be on why law in practise differs from written law, but rather, what drives this phenomenon.

5. Effect of legal norms on heterogeneous agents

Platteau et al. (2017) explore the effects of the law on individuals as society members, and under different situations as informed by social norm literature. Following a social norm approach, they argue that there is a positive variation between an individual's utility function with the proportion of the population that follows a certain custom. On the flip side, the negative component is distinct in its reflection of the individual's aversion to the custom or the cost of compliance to it. Taking preference heterogeneity into consideration therefore, the effect of legislation depends on preference distribution in favour of, or against a custom. The more people have an aversion to a custom, the more effective the law promises to be, by acting as a new focal point away from the undesirable custom. This effect is minimised when the number and influence of people with an aversion to the custom is low, and therefore changing the custom cannot be achieved by changing people's expectations. This is made evident in the reports by women on broaching the subject of equality with their spouses:

Even as you listen to the radio with your husband, he tells you that it does not apply to us...They say it only applies in Nairobi. (Female Respondents, Kajiado West)

This excerpt points to two things; it sheds light on the distance of the equality debate from everyday realities and shows that a change in expectations does not necessarily translate to a change in norms. Evidence from this study positions the realisation of gender equality in the study areas, and Kenya by extension, in this category of heterogeneity.

At the national level, the inability of the national assembly to pass legislation on the realisation of the two thirds gender rule in the national assembly points to the weakness of legislation, where the influence of opponents far outweighs that of the supporters. A convergence becomes difficult to achieve, due to the absence of a substantial number of members who could positively influence the outcome of any deliberation exercises. This does not however translate to hopelessness, as there are civil society organisations and female legislators working hard to ensure that the assembly is continuously reminded of their duty.

A similar experience, reminiscent of a tug of war, is shared by Maasai women across Kajiado and Narok Counties in Kenya. Despite a largely collective aversion to the unfair male dominance, the women have not been successful at challenging the power structure. This signals the presence of a stronger factor that limits their capacity for action which Platteau et al. (2017) argue to be the case for homogenous agents. The men remain reluctant to give women 'a seat at the table,' and the women keep pushing for it. This approach is rooted in the socio-economic positions occupied by the women. For women whose husbands fulfil the provision role, the motivation to challenge the political dominance was minimal. On the other hand, are women whose men do not fulfil their mandate to provide, forcing them to work hard and meet domestic needs that the men would ordinarily cater for. This increase in their scope of responsibility therefore provides an additional platform of exposure to existing inequalities, raising their political consciousness along the way. This is exhibited in their push for equality which manifests itself in squabbles both at home and in public.

It is these personal experiences that inform the women's positive attitude towards the gender equality agenda as posited by Bolzendahl and Myers (2004). Evidence of the benefits of exposure is to be found in the statement of a

respondent, who reiterated the need for men to let their wives gain exposure, as she has from her engagement as a community mobiliser.

I would ask the men to allow the women to be free, to go for group meetings and seminars as these open their eyes to even how a woman should conduct herself and manage her home. This way, things will go well and men will notice changes around their homes. The women will learn from each other how to manage their homes, be involved in development and how to take on leadership. (Female Respondent, Kajiado South)

For most Maasai men however, the gender equality legislation is interpreted as a threat to their dominance, which is why they make all the necessary effort to ensure that the subordinate status of women is not changed. This reiterates the argument by Kameri-Mbote (2016), that the capacity of the law on gender equality is mediated by other factors such as men's resistance to the political engagement of women that may be interpreted as a threat. Evidence of this is in complaints by women, of being listed as development committee members but having no input in decision making, or even attending meetings but not being allowed to speak and make any contributions.

In addition, there are men who view the provision on equality as a threat to not just their position of authority, but the fabric of family that holds the community together.

The Constitution has been beneficial even though if we follow it through we might get to a place where it cannot be 100% and we have to resort to customs and traditions as it might cause friction elsewhere. It says that men and women should be equal. If this happens, bad things might happen because we read the Bible mostly where it does not say they are equals. The Constitution can bring difficulty within the family and we have to revert to traditions because, if a wife says, 'I must do this' and the man says the same thing, it might not work out well as one has to calm down so there is peace in the family. (Male Respondent, Kajiado West).

This view points to the desire to hold on to the traditional Maasai social organisation, which is the foundation of Maasai identity (Coast, 2000; Llewelyn-Davies, 1978). This confirms reports by many women politicians that choosing an active political life is mostly regarded as an abandonment of wifely duties, as

politics is more demanding, which makes it difficult to balance the public and family responsibilities. An interview with Grace Oloo from Tudor Ward in Mombasa County by Badurdeen and Mwinzi (2017) confirms this. Ms. Oloo opines that for most women in politics, it is a matter of choosing whether to be a good politician or a good wife. It is therefore not uncommon that marriages fail, when women fail to strike this balance.

Citing the example of women nominated to the Narok County Assembly, a male respondent argued that the conferment of power to women was a bad idea. This he explained, was because the transfer of authority to women distorted the community's organisation structure, where men are the de facto leaders. He pointed evidence to the 11 women nominated to the Narok County Assembly in 2013 to fulfil the gender quota as not enough women were elected. Of the 11, he narrated, four had divorced their husbands and moved out of their homes (even though other respondents agreed with this claim, I could not find evidence to verify this). According to him, the four had become arrogant because, like their husbands, they also contributed to the household income, but unlike the husbands, they were more powerful and influential, and could therefore not continue to be submissive. In his opinion therefore, the legislation was doing more harm than good, and should not be allowed to influence more women

The differential effect of the gender equality legislation on men and women is also experienced in other spheres of interaction. An example is to be found in the observations by Merry (2003) from her study on implementing women's human rights to protection from violence in Hawaii. She reports that in their encounter with the law, men and women responded differently to the effect of the law on their identities of femininity/masculinity and power. By discarding cultural notions of femininity and reporting their husbands, women gained courage and appreciated the help of the law. On the other hand, being reported and therefore having their cultural notions on the exercise of power being questioned, men were surprised and even angered by what they considered betrayal by the women. These views however differed by education and class, with the more educated and those with previous contact with legal authorities being considerably open to legal intervention. Male respondents in Kajiado and Narok exhibited similar tendencies, with the educated and those with more exposure being more supportive of the call to share the public space with women, going even further to suggest that the government considers enlisting their services in civic education within the counties.

However, unlike the women in Merry's (2003) study who receive support from the government, Maasai women that have embraced legal channels have little to celebrate. Among those that have tried to settle disputes that have been unfairly dismissed at the sphere of customary law, there is a spread of fearlessness towards unfair male authority. Sadly, few of them have succeeded, and those who dare to openly question decisions by men must deal with the reputational cost of mocking customary law and daring to question men. They are therefore disadvantaged in their quest to work as role models and educate other women on alternative channels of challenging unfair male authority.

Taking all these into consideration, the discussion will now briefly focus on the engagement of Maasai women in public budget exercises. Guided by provisions by the 2016 County Public Participation (CPP) guidelines, it explores how women and men engage in a civic platform expected to pay respect to fairness and equality.

6. Representation and participation by Maasai women

As a framework, the CPP guidelines spell out the conditions necessary for meaningful participation. These conditions are; clarity of the subject matter, clear structure and process, access to information, opportunity for balanced influence, commitment to the process, inclusive and effective representation, a climate of integrity, a belief in the value of public input, capacity to engage, complete transparency, and bearing in mind standing conditions of the participants. For purposes of this discussion, I will only focus on two of these conditions: inclusive and effective representation and opportunity for balanced influence, as they relate directly to women's freedom for political participation.

6.1 Inclusive and effective representation

This condition calls for the establishment of mechanisms that will ensure outreach to all the relevant stakeholders. According to Rowe and Frewer (2000), public participants should comprise a broadly representative sample of the population of the affected public. This way, ownership, implementation and enforcement will follow through. Bingham et al. (2005) support this view by pointing out that successful governance calls for processes that include all stakeholders. Broad representation ensures the legitimisation of stakeholder

knowledge and redefines expertise in ways that provide spaces for the experiences of those affected by social policies.

For this to be realised, communication needs to be made in a timely and effectiveness manner, to ensure citizen preparedness. Poor communication was however a critical issue in the focus group discussions and was also acknowledged by government officials. The Keekonyokie Ward Administrator for example, noted that such poor timing is especially unfair to the women. She argued that unlike their male counterparts who mainly focus on single tasks, women must manage extensive responsibilities related to managing households and planning group meetings and activities. This burden of unpaid care work limits women's mobility (Ortiz-Ospina and Tzvetkova, 2017), and they therefore require more time than the men would, to plan accordingly if they are to be present and actively engaged at such meetings.

We've been having a problem with...the passing of information even between us and the head office...they publish something in the newspapers today and say the event is for the day after tomorrow...you know women's affairs require planning; if you want to take them for a trip next week, tell them last week so they prepare throughout this week. So if you say today that the meeting is tomorrow, it's difficult to find them. (Ward Administrator, Narok East)

Poor outreach also breeds a conducive environment for elite capture due to the dominance of particular voices during meetings. An example of this is found in the lamentation of the gentleman from Keekonyokie Ward, on the lack of equal opportunities for opinion sharing. The few dominant voices end up being interpreted as the public's position, even though they tend to be mainly peri-urban, educated and close to administrative powers. Considering the patriarchal set up, these voices also tend to be mostly male.

When people discuss politics, as a woman, you remain quiet. It is men who decide. We keep quiet and are led by men. (Female Respondent, Kajiado West)

This affirms one of the main arguments against participation, that open and fair as it might be envisioned, in reality, it is only the voices of the powerful and organised that succeed in private deal-making processes (Innes and Booher, 2004). The excerpt above also points to the failure of public participation to

challenge unfair power relations, such that for most Maasai women, despite the provision of this affordance for political engagement, decision making largely remains *business as usual*.

This reflects the existing attitudes towards the inclusion of women in other public, albeit traditional, spheres such as group ranches. A group ranch is a system of communal, instead of individual, land ownership among the Maasai, which supports communal grazing and where proceeds from rent – especially to tourist and business ventures - are used for such communal development agenda as education. This system is however being replaced by the more widespread individual land ownership system, due to the reduced nomadic pastoralist nature of the community. On the absence of women members in group ranches² for example, a member of the Kuku Group Ranch in Kajiado South admitted that the reason for this is that there is an awareness of the power women wield thanks to their numbers. Decisions that contravene group ranch's governing by-laws are therefore made to ensure that women continue to be left out of decision making. These decisions are supported by a dictatorship that locks out men who would be in opposition.

It is not right not to give them membership and voting rights. Why do we call them to vote for Councillors, Senators and MPs but exclude them from Group Ranch elections? National voter registration is currently ongoing, why aren't we registering them in the Group Ranches? It is just dictatorship because those in power do not want this issue resolved. (Male Respondent, Kajiado South)

This allegation was made by a male respondent who was particularly angered by the reluctance of the Kuku group ranch's committee to register women and give them voting rights. The matter was debated at length, in what I believe was triggered by the presence of one of the committee members in the focus group discussion. The gentleman in question remained quiet throughout the debate on the group ranches. The respondent highlighted that this is transferred to public forums where, even though men and women are supposed to equally enjoy freedom of expression, speakers are already pre-determined to avoid

accountability. This dominance thus rules out any chance for fairness in representation and by extension, fair prioritisation of development agendas.

Respondents argued that women who get to speak at public forums are reportedly specially selected, to give the impression of fair representation, while the women only support the agenda of the men in power. This affirms observations by Kabeer (2005) who, in the case of India, points to deliberations where women are merely proxies for husbands or powerful men within their families or caste. The chosen representatives thus act as proxies for the political elite, and not genuine representatives of the public, as the legitimacy of their positions is riddled with tokenism. Since “language, consciousness, and the structures of power are all socially determined” (Moglen, 1983: 132), the women who then benefit from such set-ups further align themselves to agendas that are favourable to the men.

6.2 Opportunity for balanced influence

Rules of engagement at public forums are supposed to ensure a balance of opinions and avoid dominance or bias by a section of the public. The participation process should therefore be conducted in an independent, unbiased way. Understandably, one of the biggest issues with participation, Hanna (2000) points out, is who controls information and whether the same is trustworthy. Participants in public forums need to be assured of the freedom to air their opinions and that the same will be given due consideration. This freedom of expression is a right for all citizens as stated in the CPP guidelines. Doubts in the legitimacy of participants' efforts therefore discourages commitment, faulting the process and consequently, its outcomes.

Respondents reported that pre-set agendas rule out fair input by citizens, locking out genuine deliberations and thereby threatening the legitimacy of the entire process. The excerpt on the suppression of the voices of those without close relations with administrative and political officers alluded to the lack of equal opportunity to assert influence in participation exercises. A respondent reiterated this in explaining that his enthusiasm for public forums had waned because even when called to meetings, there are no benefits to be gained.

Sometimes you are called to a meeting whose benefits for participation are not evident because when you get there, you don't have a chance to give your opinion as it is dominated by the strong ones...I therefore second what the man has said; it gets to a point where the women, or

even us men, opt to stay at home and do our things as going to such meetings bears no fruit because there are those who already have an agenda and a strategy to push it through. So when some of us go, we are nothing more than pictures because everything has been discussed and decided. (Male Respondent, Narok East)

This excerpt makes it clear that not everyone is free to express their opinions, with the elite dominating, and the rest merely providing quorum to qualify the agenda. This confirms the argument by Cooke and Kothari (2001) that tyranny is a real and potential consequence of participatory development, contrary to the empowerment rhetoric that accompanies it. Such accusations also contribute to the critique of a lack of genuine commitment to the actualisation of public participation and equality. This issue is particularly highlighted in this case where opinion sharing remains problematic regardless of the CPP guidelines' pre-requisite for a commitment to the participation process, by ensuring openness to public opinion in decision making.

The transformative power of public participation is thus brought to question, with its independence being curtailed by hidden powers. As a face of power, hidden power fuels the exclusion that follows from agenda setting behind the scenes (VeneKlasen and Miller, 2002). When the hidden power manifests itself, as in the argument presented in the excerpt above, it negatively influences individual power to act and consequently, the collective action that would follow from individuals working together. In the end, the continued lack of independence strengthens the power of certain individuals, further limiting the power of the general public in decision making.

The respondents' remarks additionally point to an elite domination that takes away neutrality from public forums, further subordinating men and women who are outside certain power circles. Instead of providing opportunities for citizens to engage with government more closely, which is a key argument for participation, the process as effected in Kajiado and Narok has created a platform where those with close ties to public officials are able to benefit more from the devolution, often at the expense of those outside the power circles. Considering the power structure of the Maasai community, women constitute a majority of these outsiders, effectively negating the goal of public forums as an opportunity for the political empowerment of women. What efforts are there then, to remedy this situation?

7. Deterrence effect of the law

Kenny and Patel (2017) explain that through the provision of rewards or imposition of punishments, laws can either incentivise or dis-incentivise norms and behaviour. In instances of deterrence, the law introduces a payoff by making it costly to follow a certain norm (Platteau et al, 2017). Breaking the law therefore invites punishment from state authorities, mainly through the court system. This reconfigures the implication analysis by individuals in their exercise of either personal or collective action. Law thus becomes a driver of change, with its effect relying heavily on enforcement.

The criminalisation of female circumcision adopts this deterrence approach, such that, even though it still prevails, there is an awareness among actors of the cost of being caught. It is this cost that deters many from engaging in the practice.

...we are now against FGM because we were educated on its negative consequences. Many became afraid and the message spread especially since there was tough punishment for those who perpetrated the act. (Male Respondent, Kajiado South)

The gender equality legislation also comes with sanctions, such as the revocation of nominations that do not meet the two thirds gender rule, or enforcing the nomination of more members to meet this requirement. Beyond this scope however, there are no sanctions to deter non-compliance at, for example, the ward and village levels where the effect of the law would be more beneficial to the women in its application within public participation. This has allowed for the descriptive representation of women discussed under heterogeneous conditions, which leaves no room for substantive engagement that would ensure the goals of the gender equality laws are met.

The absence of effective enforcement mechanisms for gender equality diminishes impact, since “Enforcement transforms the *de jure* (law, mandate, command, decree or agreement) into the *de facto* and enables both women and men to enjoy rights and resources” (Chiongson et al., 2011: 16). This explains why gender equality for Maasai women continues to be elusive – it remains written, with no relevance in practice. It is also why attitudes on equality as something that applies in the capital, Nairobi, prevail, as there are no efforts at

enforcement, to encourage adherence and create resonance in the daily lives of the Maasai.

8. Conclusion

This paper has explored how legislation influences people's attitudes and behaviour. It points to the realisation that the effect of legislation depends on the status of an individual, as well as the direct influence of legislation on their daily experiences. This explains why men and women are affected differently by gender equality norms, as it has a lot to do with their socio-economic conditions and their geo-political location. Sunstein (1995) points out that just like preferences and beliefs, social norms are not pre-determined, but are a product of complex social forces that include the law. This complexity introduces subjectivity to the understandings, meanings and lived experiences of gender equality, in both formal and informal institutions.

Experiences of gender equality legislation among the Maasai points to the failure of state law to translate into everyday practice. One of the reasons for this, is the lack of involvement of the people in drafting and discussing the legislation. Beyond involvement, Licht (2008) points out, once the regulations are in place, compliance relies on normative attitudes of guilt, pride, disapproval and shame. But what happens when regulations do not evoke any of these strongly enough to effect change? Evidence shows that for many Maasai men, the passing of gender regulations has had little impact on their attitudes towards the status of women. If anything, the process of gender mainstreaming has provided a platform for them to guard the status quo, with the additional aid of political influence.

As Kameri-Mbote (2016: 47) highlights, "gender equality in all realms represents a struggle for scarce resources and power and is vigorously resisted by those already privileged." This resistance can be explained by the non-universalistic attitude towards equality among men. As Llewelyn-Davies (1978) explains, the requirement for equality challenges the existing Maasai social order and male hegemony. Resistance is therefore bound to happen.

This resistance could easily be dealt with through a commitment to training and enforcement from the government; after all, it is in the state that resources and the wealth of a society are located (Oyewumi, 1997). This is however not the case. There is an apparent lack of clarity on what qualifies as gender equality

in participation, and consequences of non-compliance further fuel the non-incentive for compliance. One could therefore argue that Kenya joined the global trend of constitutional amendments to increase the percentage of women in political spaces (Krook, 2008), without paying respect to the contextual realities of different communities. This systemic failure has created loopholes which frustrate the goal of reform envisioned by gender equality laws, to create environments where men and women can engage on a transparent and equitable basis.

Chiongson et al. (2011) point out that the dynamic nature of laws and institutions as social facets is reflected in the shifting power dynamics and the formation of new alliances through socio-political arrangements. They therefore end up being interwoven with group and individual identities and are reflected in the same. It is the positioning of men as power brokers under customary law that has perpetuated gender inequality. The proximity of Maasai men to political institutions puts them in a better position to find ways of making the new system work to their advantage. With the penetration of state laws that could threaten this position, men have managed to form alliances that ensure that their influence transcends the informal space. This is reminiscent of observations by Oyewumi (1997), on how Yoruba men were better positioned to take advantage of the new legal system during colonialism.

By finding pockets of power under the new legal system, influential Maasai men are able to assert influence in the formal space as well, perpetuating injustices against women. This delegitimises government agents and agencies among the women (Bilz and Nadler, 2014), and among men who would not be inclined to cooperate in the strategic alliances. This situation confirms the argument by Ekeh (1975), that even though the civil public sphere subordinates the traditional public sphere, the two realms are not rigidly separate, because the actors are the same. As a legal norm therefore, gender equality cannot be approached under the assumption of neutrality of the public space, or it will, as the case of the Maasai shows, do little to improve the status of women.

To counter the challenges outlined in this discussion, it might be worth considering the creation of parallel platforms for women's political engagement. Fraser (1990) refers to these platforms as alternative/counter publics. She argues that in stratified societies, subaltern counter publics provide subordinated groups "parallel discursive arenas" where they can "invent and circulate counter-discourses", allowing them to formulate their own interests and needs (Fraser,

1990: 67). In Kenya therefore, this could be operationalised through the pre-existing informal women groups, where women come together to save money and support peer lending. With economic empowerment as their goal, the groups have been an asset to both Kajiado and Narok county governments, who rely on their networks to mobilise women for programs such as economic training. Unfortunately, the potential of these groups as a political resource has not been utilised.

McNulty (2015) reports on the success of this approach in Peru, where the institutionalisation of women groups as political entities has contributed to significant improvements in the political engagement of women. Women groups have created an avenue where women openly discuss issues that they would otherwise not openly discuss, even though they are of high importance to them. Women groups as subaltern counter-publics would therefore expand the discursive space while at the same time countering the issues presented by considerations of appropriateness that limit women's contributions in deliberative processes. While this may be argued as exclusionary and therefore contrary to the goal of inclusion in a deliberative democracy, it bears the potential to offset the unfair cultural public participatory privilege of men among the Maasai.

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