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Time for Harvest

Mukabi Kabira

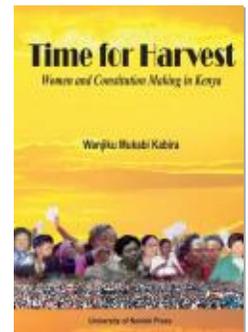
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Women's Negotiations at Bomas National Constitutional Conference (2003-2004)

Introduction

In chapters IV and V, we highlighted the views of the women of Kenya from all corners of the country. Women shared the views which they wanted included in the constitution. They were present in almost every hearing session. As mentioned earlier, the Constitution of Kenya Review Commission (CKRC), through its regulations and in line with the spirit of the Review Act, ensured that both men and women were mobilised to present their views. The women commissioners had spoken in one voice at the CKRC in all matters related to women and in other matters specifically related to Kenyans in general. They, like all other commissioners, tried to reflect the views of Kenyans. At times, there were tense moments at the CKRC. Issues of devolution for instance kept on being postponed and often times, the Attorney General Amos Wako, who was a member of the commission, was viewed as the voice of harmony. He understood the politics of constitution making very well. There were also many court cases, challenging different aspect of the process. Political struggles to defend or control the process were the order of the day. But then, constitution making as we were often reminded was not a legal but a political process; we were reminded of this often by many players. It was about negotiating a covenant between the people and its rulers. It was developing an agreement and therefore could not be an easy task.

Preparation of the CKRC draft and national constitutional conference

Having negotiated the process, collected the views of Kenyans and prepared the CKRC draft, the commission was ready to organise for the National Constitutional Conference (NCC). The CKRC was chaired by Prof. Yash Pal Ghai and later by Abida Ali Aroni. The Technical and Drafting Committee of the Commission was chaired by the late Prof. Okoth Ogendo. He was intellectually alert and was very informed in matters of the constitution. Actually, Prof. Ogendo was the guru of constitutional review matters and

processes. It was his committee that prepared the reports, constituted different technical committees of the members of the commission and guided these committees through analysis of the views and identification of constitution matters and those that were to be left to policy development. Among the sub-committees constituted were:

- Structures and Systems of Government;
- Constitutionalism;
- Electoral Systems;
- Bill of Rights;
- Environment and Natural Resources;
- Defence and National Security; and
- Constitutional Commission.

The CKRC also prepared the detailed National Report whose short version was called “The Peoples’ Voice”. In addition, it prepared the Technical Appendices and other Technical Papers that were to be tabled before the delegates’ conference at Bomas. This process was not without drama. There was a time when it was rumoured that the draft constitution was ready for circulation. We still had not gone to Western Province to collect people’s views, nor had we covered North Eastern Province. There were people who had assumed that the concept of “people driven constitution” was a public relations exercise. To give the commission its due, it took the concept of “people driven constitution” very seriously. This is exemplified by the way they meticulously collected and documented the voices of the people in every constituency in Kenya, without exception, in addition to receiving views from national organisations, faith-based organisations, trade unions, professional organisations, non-governmental organisations and political parties. The CKRC draft of 2002 and the National Report 2002 is testimony to these processes.

After the draft constitution was ready, copies were made and the two leading newspapers, that is, *The Nation* and *The Standard*, carried the whole draft in supplements. All those with access to the dailies could therefore read the draft verbatim. Live Radio programmes from the Kenya Broadcasting Corporation (KBC) and Citizen Radio covered various chapters in all possible languages. Other radio stations like KISS FM, CAPITAL FM, and KAMEME FM carried adverts. There were also discussion programmes on television channels.

Validating the process

The Commission went to the grassroots once again but this time to receive people’s opinions on the draft in what was actually a validation process. After a day or so of studying the draft, constituents would submit comments to the commission. The commission revisited all the constituencies and received people’s views on the draft constitution. Later, CKRC prepared appendices that

were tabled together with the draft constitution and the National Report, to the delegates at the Bomas National Constitutional Conference. It was a very thorough job: harvesting people's views, translating them into constitutional and policy proposals, getting people to validate the proposals through debate and amendments, and finally, tabling the proposals, the amendments and also the National Report for debate by the National Constitutional Conference delegates.

It was the hope of the Commission that the country would have a new constitution before the end of 2002; even if the elections were to be held a few months later. The Commission had prepared Transitional Provisions as well. It had guarded the views of the people and was ready to table them before the delegates. Were the constitution to be completed just before the elections or soon after, it would have been alright since a lot of consultation had already been made. The transitional Provisions had taken care of the constitution transition.

In October 2002, the Commission was at Bomas of Kenya – which we had chosen because of its role in promoting the culture of the various ethnic communities in Kenya and where the initial consultations, which were chaired by the Attorney General Amos Wako, had started in 1998. The Bomas of Kenya venue was a home for all ethnic communities. Believing in our diversity and our richness, we found it a most appropriate place for us to negotiate our co-existence and propose institutional mechanisms for our country's governance.

The CKRC had organised a three-day technical meeting with constitutional experts who had responded to the draft constitution. At the end of this meeting, the CKRC became the National Constitutional Conference Secretariat. So, we put everything in place including the programme and invitation of the delegates who duly arrived and registered. On the eve of the conference however, word went round that Hon. Daniel Arap Moi, the then President of Kenya, had used his powers to dissolve parliament.

With parliament dissolved, one-third of the conference delegates were subsequently no longer delegates. These were the members of parliament who, by virtue of being parliamentarians, were delegates. They were 210 out of the 600+ delegates. Prof. Ghai, however, insisted that the conference would go on, there was confusion at Bomas because word had gone round that the conference had been suspended until further notice. Delegates did not know what to do next. They kept on asking, "Should we come tomorrow or should we not?" Prof. Ghai's views were that the Conference would take place. However, by the end of that afternoon, Bomas did not belong to the delegates anymore. The General Service Unit (GSU), a branch of Kenya's Security Forces, camped at the neighbourhood of the conference ready to forcefully evict the delegates. Prof. Ghai and a few delegates went to Bomas the next day

to test the waters. As expected, they found the gates locked and the security forces ensured that the message was understood: “No conference until further notice!”

Already, members of Parliament were readying for fresh campaigns. Delegates had no choice but to go home. The Commission began dismantling the fourteen tents erected for the fourteen technical committees. We returned to the Commission offices at Ken-Com to think of the next move since the term of the Commission was due to end in January 2003. The Review Act had anticipated that the new constitution would be in place for the country’s 2002 general elections.

Reconvening of the Bomas Constitutional Conference

The December 2002 elections witnessed the overwhelming defeat of the Kenya African National Union (KANU) Government and subsequently, the end of the Moi era. The new year, ushered in the new leadership of the National Rainbow Coalition (NARC) Government led by President Mwai Kibaki. It was a new year of great expectations. These expectations would soon be shattered by the battle between the two sides of the NARC Government, that is, the National Alliance Party of Kenya (NAPK) and the Liberal Democratic Party (LDP)⁷. The Bomas Conference was reconvened later in 2003 with new MPs delegates and would continue up to April 2004.

Composition of delegates at the National Constitutional Conference

The composition of delegates at the Bomas Conference had been negotiated through the legal and administrative instruments that guided the review process. The delegates were⁸:-

- All the 210 members of parliament.
- Three delegates from each of the 74 districts, one of whom had to be a woman. The election of these delegates, which was designed by the commission was done through colleges of the local authorities.
- Representatives from political parties.
- 25 per cent of representatives from Civil Societies’ Organisations (CSOs) which included Religious Organisations, Non Governmental Organisations and Women’s Organisations.
- Observers, composed of representatives of institutions, organisations, and international observers, among others.
- All the CKRC Commissioners, who were managers and rapporteurs for the conference proceedings and who had no vote. Prof. Okoth Ogendo was the Rapporteur General while Prof. Ghai was the Chair of

⁷ See Ochuodho, 2011 and Khamisi, 2011 for the conflicts in the nascent NARC government.

⁸ See appendix II for the full list of women delegates

the Conference. P.L.O Lumumba was the secretary. The late Hon. Bonaya Godana was elected the first of the Vice Chairs while Sultana Fadhil from Coast and Koitamet Olekina from Rift Valley were the 2nd Vice Chairs.

The three Vice Chairs were elected by the delegates at the commencement of the conference. The seats were hotly contested and it became clear at this early stage that regional alignments and interests were going to play a big role in the conference. This was soon followed by the establishment of the fourteen technical committees whose leadership was also divided by region. From the onset, it was evident that regional politics would dominate the conference.

Women's participation at the National Constitutional Conference

One of the best experiences at the conference is the fact that from the onset negotiations for the review structures. The process had factored in women's representation after intense lobbying and negotiations during Safari Park consultations I, II, III and IV as described in Part I of this book. Never before had such a broad spectrum of women attended such an important national conference, which was highly political and guided by regional interests. Their number, although not substantively big, was enough to make them feel the warmth of each other, appreciate their commitment to the women's agenda, recognise their various capacities and skills, and their common goal.

As a result, women found their place at the National Constitutional Conference. The struggle by women leaders – described much earlier in this book – had begun to bear fruit. The various stakeholders had to implement the Affirmative Action principle that women had negotiated during the 1998-2000 consultations for the law and the process towards the making of the New Constitution. Women in the constituencies and their organisations had presented their views in a very articulate manner. The commission had harvested these views through the process of winnowing. In addition, women commissioners had stood in the line of duty and had vigilantly guarded women's interests. The ground was ready for the women delegates to water the seeds and nurture their growth.

Women delegates

Among the district delegates, women had their 30 per cent. Women parliamentarians were very few, forming not even 10 per cent of the total. Within civil society organisations, we managed a total of less than 25 per cent. However, women representatives at the National Constitutional Conference were focused, articulate and committed women, a majority of whom had been in line of struggle for many years. They had negotiated the process, mobilised the women to participate in the review process, and had prepared position papers. In addition, they had identified their strengths and were ready to carry

on from where women at the constituency level and at the CKRC had left. They were ready to plant more seeds to replace those that had fallen on the rocks and ready to water those that had germinated.

Among the key women at Bomas who came through women's organisations were:

- Ms Atsango Chesoni* – She was a very active member of the Committee on Legislature. She later became Vice Chair of the Committee of Experts on the Constitution and continued to safeguard women's gains.
- Mrs Martha Koome* – Who was Chair of the Bill of Rights Committee at the conference and Federation of Women Lawyers (FIDA) Chair. She, like Atsango, came in through Women's Organisations. During the Conference, she was appointed Judge of the High Court of Kenya.
- Ms Caroline Ng'ang'a* – Who was Chair of the Committee on Representation of the People. She came to the conference through political parties.
- Ms Joyce Majiwa* – Chair, Committee on Transition who also came in through Women's Organisations.
- Ms Sultana Fadhil* – A lawyer and one of the three Vice-Chairs of the Conference. She was elected to the position during the conference. One of the three Vice-Chairs had to be a woman.
- Ms Happy Gloria* – Member-Devolution Committee, District Delegate Busia, Western Kenya.
- Mrs. Nyathogora* – Member -Devolution Committee, District Delegate Nyeri, Central Kenya.
- Ms Wambui Kanyi* – Committee member on Representation of the People who came from Civil Society Organisations.
- Mrs Mwamburi* – Committee member on Devolution who came in as – District Delegate from Coast Province.
- Mrs Jane Kiano* – Maendeleo Ya Wanawake Trustee who came to the conference through Women's Organisations.
- Mrs Kamla Sikand* – Women's Organisations representative.
- Dr. Ruth Kibiti* – Who coordinated women meetings and who came to the conference through Women's Organisations.
- Mrs. Ruth Rop* – Who came as a district delegate from Uasin Gishu – Rift Valley Province.
- Prof. Maria Nzomo* – Women's Organisations

- Mrs Rose Waruhiu* – Women's Organisations representative.
Mrs. Grace Ogot – Who was a member of the Sulumeti Consensus Committee.

These and many other women camped at Bomas.

The women commissioners were rapporteurs and, therefore, other women could consult with them when necessary. Women met twice a week at the *Nyama Choma* place on Tuesdays and Thursdays. They shared their experiences with the committees and strategised together. Women's organisations such as FIDA, Collaborative Centre for Gender and Development (CCGD), Women Political Alliance of Kenya (WPAK), Women Political Caucus (WPC), League of Kenyan Women Voters (LKWV), Education Centre for Women in Democracy (ECWD), among others, attended the weekly meetings at Bomas, prepared position papers and even organised for women to have longer meetings and monitor the process. It was a very intense process and women gave it their all and commitment. The synergy between the women delegates, women commissioners and women's organisations was the catalyst to the focused and fruitful negotiations that women engaged in, at the conference.

Women's lobbying and negotiating strategies at Bomas

During the Bomas national conference, women delegates demonstrated their power to negotiate, indicating skills, qualities and the personality needed to move their negotiations forward. These qualities included being skilled, accountable, positive, consultative and well prepared. The qualities were observable in committees such as the Committee for Representation of the People where women wanted to adopt Proportional Representation (PR) as an electoral process. Delegates demonstrated their capacity to do research, to listen to other members of the committee and account to the larger women population in the country and let them know what was going on in the conference. These would in turn advise the delegates to adjust their positions when alternative proposals were tabled.

The delegates consulted with women commissioners on specific issues such as Mixed Member Proportional Representation (MMPR), Devolution, and the Bill of Rights, among others. They also consulted with members of specific committees and received feedback. In addition, the delegates consulted with the chairs of the committees, sometimes to be given more time to consult with their constituents. Often, they would work under pressure to prepare for the following morning while closely monitoring what was going on.

As in the earlier negotiations of the processes, namely; Safari Park negotiations, women delegates at Bomas clearly:

- Defined their problems at every stage and agreed on how to handle them;
- Developed strategies to address problems in the committees and at the plenary;
- Negotiated with influential individuals at the conference;
- Assigned roles and responsibilities to each other. Sometimes, it was a question of who would get the data to help women argue the case, for example, on Proportional Representation or on district elections;
- Called on experts to clarify the issues and advice them;
- Organised meetings outside Bomas to consolidate and share their strategies;
- Agreed to stick to principles but understand details for the purpose of pushing their case;
- Identified a coordinator, most of the time Dr. Ruth Kibiti, to bring them together at short notice, if the process was not going on well;
- When mediating teams or negotiating teams were required, women identified those who would be listened to by the other teams. At one time, Mrs. Grace Ogot was appointed to join a negotiating team when contentious issues on the executive and devolution threatened to break the conference. The team, which had other leaders like Bishop Sulumeti, Hon. Raila Odinga and Hon. Kiraitu Murungi, came up with a position that was then tabled in the plenary;
- Women had their eyes and ears on the plenary. They identified issues that if not addressed at the committee level, would be raised and addressed in the plenary. They would monitor what they had agreed on in the committee to ensure that it was indeed what was presented in the plenary. It is interesting to note how often issues of representation of the people, devolution and commission on gender kept disappearing, at the plenary;
- In committees, women would communicate with their eyes, notes and even ask to consult when an issue came up and they had no agreed upon position.

Generally, women had the issues at their fingertips in Bomas, the reason being that they had the human and intellectual capacity. They proved to be the most organised and focused group at the conference. The outcome of their work at Bomas is entrenched in the Bomas draft constitution; their basket was full at the conference.

Once again, women delegates were on the line of duty during the National Constitutional Conference (NCC) processes at Bomas in the same way that the women commissioners had ensured that the structure of the commission, the legislative and administrative framework, civic education, mobilisation of women to participate in the process, collection and collation of views and preparation of the draft, all took on board women's views and perspectives. Women commissioners had picked the baton from women leaders who had

negotiated the legislative framework and had ensured that was entrenched in Affirmative Action review law. The leaders had planted the seeds: women in the commission were to continue watering the seeds: They in turn handed over the baton to women delegates at Bomas to continue tending the crop and planting more.

Women commissioners had ensured that, the CKRC draft of 2002 took on board women's interests and tabled them at Bomas for deliberation. The women at Bomas received the CKRC draft, studied women's gains and negotiated for retention of the same. They also expanded provisions for women. When structures like devolution were expanded, women ensured that their interests were taken on board. When issues of representation and legislature were debated, they also ensured that their interests were taken on board. They did the same in other committees for instance, when land issues and proposals on Bill of Rights were being negotiated. Women were there to safeguard their gains in the CKRC or to expand them whenever they could. Thus, the Bomas draft is the most women friendly draft of all the constitutional drafts.

Women's focus on critical committees at the National Constitutional Conference

Although women were generally very active in all the committees during the National Conference deliberations, there were, however, some committees that attracted women's focus more than others. These committees were: Committee on Representation of the People, Committee on Devolution of Power, Bill of Rights, Legislature, and the Committee on Constitutional Commissions. This should not be surprising because in the four committees, the question of ensuring women's representation in parliament, the local authorities and in all decision making positions, was an area that women had been working on for many years as evident earlier during the discussion on the struggle for Affirmative Action as part of the path travelled by women. They viewed NCC as the opportunity to negotiate and entrench the principle of Affirmative Action which had been denied them by parliament, over a period of time. They felt they were emerging from the shadows and were about to exhale. Devolution of power was very important to them also because of the various structures that the process was going to create in allowing women to reclaim their space. The Gender Commission was a tool to help them monitor the implementation and hold the government accountable for the decisions made in relation to women. It was therefore very important that they focus on this very important commission.

Women and representation at the National Constitutional Conference

In Part I, we discussed the key unifying factor in the women's struggle; the effort towards representation at all levels of decision-making. The focus for eighteen years of women's struggle, was parliament, local authorities and other decision-making bodies. In 1992, as we have seen, women endorsed at least 30 per cent which would be the critical mass necessary for them to make a difference in an institution. Actually, for many women, Affirmative Action had always meant 30 per cent representation in decision-making positions. This is why several draft constitutions, that is, CKRC 2002; 2004-2005 Bomas; Wako Draft; Referendum; 2010 Harmonised draft; and indeed the new constitution 2010; have specific percentages at every stage. Women had carried out research and had looked at various models of representation, for instance, the district representation in Uganda and Rwanda; political parties' nomination in Tanzania; proportional representation in South Africa; the quota systems and twinning in countries in Europe, among other models. For these provisions to find a place in the draft constitution, women had to do a lot of work. We present some highlights on women's representation in critical committees.

Women in the Committee on Representation of the People

Ms. Caroline Ng'ang'a, the convener of the Committee on Representation of the People, that is, the committee responsible for proposals on political parties, parliamentary and local authorities representation, as well as issues of electoral processes and boundaries, among others, was a woman of great wisdom and focus on issues of representation. She became that committee's chair after Prof. Maria Nzomo who was considered to be from Central Province but rather to be either from Eastern or Nairobi dropped. The province which was to provide the chair for this particular committee was Central Province. At Bomas, even the chairing of committees was region-based and some provinces were more adept at the implementation of this principle than others. Central Province seemed to have been caught napping when this region-based principle was being crystallised and later implemented. They realised after the distribution of the chairs of the committees had been done that, Representation of the People's Committee, which was being chaired by Prof. Nzomo, was supposed to have been chaired by Central Province. They soon woke up from their slumber and protested. Since Maria Nzomo could only be replaced with a woman, Caroline Ng'ang'a, an official of the Labour Party of Kenya, took the mantle. She did not disappoint.

For women, this committee was critical because it held the key to women's political party representation as well as the process for getting into other institutions such as parliament, regional and local governments. Ms Caroline Ng'ang'a, who was also a candidate for the 2002 elections, understood the

importance of this committee. She urged women to propose issues that they thought needed to be considered by her committee. This was important because it clearly demonstrated why it was critical to have women at decision-making positions.

One of the key debates, as mentioned earlier, revolved around Proportional Representation (PR) method or the District Representation for implementation of at least one-third women's representation in the electoral bodies. The PR method was also debated by the Constitutional Review Commissioners. Mixed Members Proportional Representation (MMPR) was proposed in order to accommodate various groups, including women. This was attractive to women because the MMPR method was one that would promote better representation for the diverse groups, strengthen political parties and also ensure every vote counted. Women proposed this method after thorough discussions and analysis of papers by experts on the electoral processes. However, it was clear to women that it would be difficult to achieve one-third women's representation through this process without a lot of antagonism from the men whose minds seemed to be like concrete, that is, permanently set on the majoritarian system of national elections. It was also clear that the MMPR method was not fully understood by both men and women delegates.

Women spent a lot of time discussing this at the lunchtime consultations which they used to hold every Tuesday and Thursday. They invited experts to explain the PR method, how it works, which countries had adopted it, and so on. For a long time, women tried to fully understand it and do their arithmetic on what percentage this would give them. In the meantime, men had already rejected the MMPR method saying that there would be too many nominated members of parliament or of local authorities, who would not have reached there through the "hard way," that is, through direct elections for individual members at the constituency level where "the winner takes all" is the principle.

It would be difficult, after going through the draft constitution, not to recognise the work that the women representatives had done in translating the views of women collected throughout the country into constitutional provisions. The result of the hard work is evident in the provisions quoted earlier in this chapter. Their level of consultations, level of understanding of the issues that concerned them was beyond question. Their process of consultation and their appreciation of each other was something that one could not fault. If there was a group at Bomas that was focused on what they wanted for those who sent them to negotiate the constitution, it was the women. They stuck to their course with unparalleled commitment and sense of purpose.

At different times before and during the negotiations, women were told that they had to come up with an acceptable process of implementing the proposals on representation. The proposals they made were to have women elected at the district unit by both men and women. They argued that this process: was

simple; easy to implement; would provide a training ground for women to compete in the mainstream elections; socialise women into competitive politics; give rural women a greater chance to get into parliament; that districts already existed and there were clear boundaries; communities could identify with these districts which have appropriate infrastructure, and the units are small and enough for women to campaign.

They went further and said that women at the district level would: be nominated by political parties; solicit for these nominations and work to promote that political party, by selling the political party programmes and constitution among other benefits to the party.

In addition to all these, women representatives mapped out the role of women in parliament. They argued that a district woman representative would:-

- Support the other MPs elected in the mainstream election at the constituency level.
- Like others, their primary role would be legislative.
- Women would bring the interests of the districts and their parties to parliament.
- Would promote women's agenda and ensure domestication of international conventions and protection of marginalised groups.
- Promote gender mainstreaming at national and local levels, among other roles.

Women even went ahead to suggest that they should not hold the district seat for more than two terms in order to give opportunities to other women. Then, they would direct their efforts in the open field. In addition to this, they even proposed proportional representation through political parties or a combination of both district representation and proportional representation. They left no stone unturned in trying to ensure that a method, acceptable to all, was arrived at to implement this principle of Affirmative Action. However, this remained one of the most controversial proposals made to members of parliament. We note that at every stage of the debate on the constitution, the Affirmative Action proposal always came to the fore. This is also seen in the way it is reflected in the four draft constitutions.

This proposal for district representation may have looked easy for many women, but it brought in a new political dimension. Male politicians began to count the number of districts and how that would affect the ethnic and regional balancing in parliament. The question of what would take priority, ethnic or women's interests, came to the fore. Balancing parliamentary power, ethnic and regional power became an issue and women became desperate. This went on until Caroline Ng'ang'a, the Chair of the Committee on Representation, called in a few women to review the issue. Subsequent discussion went as follows:

Caroline Ng'ang'a: Ladies, I cannot keep on holding back the discussions on the electoral method. You have taken a long time to decide whether you want us to go through the MMPR method or whether you want us to go through the current system and then have special constituencies for women.

Wambui Kanyi: I agree with Caroline. I am in the committee and I know that decisions have to be made soon. We are running out of time.

Rhoda Maende: I think men do not want a Proportional Representation (PR) system; so why are we holding on to it? We shall never win, so let us move to our plan B.

Kanyi: I wish we could convince these men that would be better. We have tried to explain to them that it is a better electoral process—that every vote counts and that, it strengthens the political parties as institutions.

Maende: Wambui, I agree with you, but are we the ones to carry the burden of strengthening political parties and promoting democracy when men don't want it? These men don't care. Why are we carrying the burden?

Atsango Chesoni: You guys have to make up your minds. I am in the Committee on the Legislature. We are making a decision and I cannot just go and propose that we shall have one third in parliament and in the upper chamber without knowing how this will happen. You have to make up your minds so that we synchronise.

Happy Gloria: I am in the Devolution Committee and we have proposed at least one third women's representation in the district level governments through special seats. We have also agreed that women will contest special seats after the main elections in order to ensure at least one third representation. At the locational level, we have proposed fifty percent representatives and the committee has agreed.

Mwamburi: I am also in the Devolution Committee. We tried to get one third for regional governments but we did not manage. The proposal, however, has a substantive number of women. We have also proposed special seats for women in parliament through the district representation but we have forwarded that to the committee on the legislature.

Ng'ang'a: I can now see that the other committees have gone for special seats and the men in my committee don't care about the PR system, so why are you holding on to it?

Kanyi: I think.....

Ng'ang'a: No, Wambui, we cannot continue talking about the merits of the PR system. We have to make a decision.

Chesoni: Make the decision today and not tomorrow.

Ng'ang'a: No, Atsango. You know the committees have procedures and since this decision was banked for later debate; we can't do it today.

Chesoni: Okay, but make it the soonest possible.

Maende: I suggest we ask Dr. Ruth Kibiti to call the women to the tent and at the same time propose we agree on the special seats. We have neither time nor the energy to deal with a system which the men are rejecting. We won't get what we are looking for.

Nyathogora: I am also in the Devolution Committee and I suggest we take special seats and then think about the method of election later.

The work done by women in this Committee on Representation and other Bomas Conference is reflected in Bomas Draft, later in Wako Draft and 2010 Draft. Some gains have gone down the drain like the 30 per cent women's representation in the National Assembly but a lot has remained.

Devolution of power, the most contested concept and structures

One of the most contentious issues throughout the process was devolution of power. Kenyans were clear that the centralisation of power had deprived many of access to decision making and resources. "Centralisation of political power and power to distribute resources was wasteful," it was argued many times, "it keeps the energy of communities locked up and frustrated." However, the debate has always been, "Should we devolve within a unitary state or should we go federal so that the federal governments have both economic and political powers?"

So, the Devolution Committee debated various levels of government, what power needed to be devolved to the lower levels including regional, district and locations. As usual, politicians never ceased to amaze. Many argued that devolution should go to the constituency level, for obvious reasons—MPs would call the shots and control power at that level as they do with the Constituency Development Fund (CDF). This proposal was however defeated quite early in the negotiations process.

The other concern was what powers should go to the regions, the districts or local government: even what names the heads of districts should be given. The word "District Governor" did not go down well with Members of Parliament but there were many councillors in the committee who were comfortable with "Governor" because that meant power.

The fears around majimbo (federal governments) had been debated often. Those for majimbo argued that this would: make leaders accountable; promote citizen participation; bring economic independence; decentralise political power; promote public accountability; enhance control of resources by communities; introduce a measure of self determination; and that unitary systems suffocate local leadership.

On the other hand, those for unitary government argued that a unitary government:

- Would bring national unity;
- Authority of state could not be compromised;
- Federalism would promote ethnic tensions and hatred;
- Multi ethnic counties would be difficult to manage through federal systems;
- Federalism would lead to geographical dispersion of authoritarianism at the local level among other problems.

Both sides ignored the arguments or lessons learnt from other countries. For instance, the fact that 40 per cent of the world's population live in federal states in Africa, including Ethiopia, Nigeria and South Africa.

Sometimes, because of our ethnic suspicions and historical experiences, marginalisation and competition over resources, devolution remained the most contentious issue during the whole review process. This was the case in the CKRC, Bomas Constitutional Conference, and negotiations around 2005 referendum draft, 2009 Harmonised Draft, and the 2010 referendum debate and after.

Questions about costs, boundaries, powers to the devolved governments, and the constitution of the same were the order of the day. The debate was at times acrimonious, often based on perception of who or who was not guiding the debate on ethnic and regional interests, among other interests.

Discussions on distribution of power went on before, during and after Bomas and indeed were carried over to the debate on the Harmonised Draft 2009/2010 and in the referendum campaign with those in the 'No' camp arguing that there was no devolution in the Draft 2010 constitution. Some of the politicians would not agree that devolution was not a static pattern, that it was a process around which communities would organise themselves on how to make decisions and policies related to them, that a state can have local authorities in a unitary, that as it happened in early years of independence, we would have strong local authorities, that local government counties could also be strong and autonomous.

But those who wanted regions looked at them much more as structures for political bargaining and negotiations than as economic structures. The fact that in all cases, arguments were not about regions collecting taxes and contributing to the centre, indicates that even for those who wanted regional governments, they did not argue for economic independence of these regions where major taxes could be collected by the regions and contribute to the centre. This could be so because some saw Coast, Rift Valley, Nairobi and sometimes Central regions as having the capacity to become economically independent. The fixation with giving major powers to the central government to collect all

major taxes and then having a finance allocation commission to deal with equalisation of resources, is based on these assumptions and fears that some regional governments would not be able to sustain themselves.

In 2010, it was interesting to note that in his response to the debate on the proposed constitution, the Parliamentary Select Committee (PSC) chair said, “the system of Government we have crafted is a unitary state within which we have devolved powers to the counties.” It may also, be remembered that at the Bomas Constitutional Conference, Hon. Oloo Aringo had tabled a motion to make Kenya adopt a parliamentary system of Government. As the debate was in the plenary towards the end of the conference, he was asked whether he still wanted to raise and table the motion. His response was that there was no need to do that “because what we have now created is a parliamentary system”. These were two opposing views.

Women had to keep reminding themselves that constitution making is a political process and Kenyan politics, as the late Kijana Wamalwa had said, “is about putting some cards on the table and others under the table.” Often, discussions about ethnic diversity would come up but mainly in relation to how to protect our ethnic groups, that is, “ourselves” from “others”. The question as to whether we are a nation was hardly discussed. However, we had continually argued that the perpetual problem for Kenya had been misuse of power and this had to be avoided because power had to be at the service of the people. We had to be less territorial and devolve it to ensure control of the same by the citizenry.

Often, the question of how our history of more than forty years could inform our structures of devolution was obscured by suspicion of the various ethnic groups and ethnic king pins. In some cases, as in the case of papers presented by various scholars including Mr Julius Kipng’etich and Mr Gerrishon Ikiara, there were discussions on:

- The need to maximise on incentives and the commitment of devolved governments to contribute to the centre;
- The need to reduce dependency and promotion of independence of the units of devolution;
- Creation of an enabling environment for devolved governments to compete;
- Deal with issues of residence and enjoyment of benefits;
- Financing of the regional devolved governments;
- Economic viability of units of devolution;
- Specific financial responsibilities of each devolved unit;
- How to deal with taxation and revenue collection issues;
- The revenue sharing formulae between the central governments and devolved governments.

Scholars such as Mr Ronald Watts, Prof. Richard Simeon, Prof. Peter Wanyande, Prof. J.B. Ojwang, Prof. Walter Oyugi, and Dr. Gerrishon Ikiara, among other scholars, presented intellectual arguments on the systems of government with special focus on devolution. Generally, the scholars raised issues on the structure and values that we wanted to deal with, values of sharing, inclusion, people's participation, equality, freedom within the units, creating options, innovations, and so on. Some wanted the process to make fundamental changes and to set up the path in which the constitution would follow.

As noted earlier, what happened in the negotiations on the devolution of power was often coloured by ethnic tensions, suspicions and fear of domination. It is no wonder that we had provincial councils in the 2002 CKRC Draft, regional governments in the Bomas Draft, no regional or provincial Governments in the 2005 referendum Draft, regional governments in the 2009 Harmonised Draft, no regional governments in the 2010 constitution, and finally, the 47 counties.

People's views on devolution

As we saw earlier, many of those who gave views to the commission were poor people. They saw the constitution as a tool to deal with their dogged lives. They had reason to think so because Kenya is not a poor country; only a country of inequalities. When we come to the gap between the rich and the poor, we compete closely with Nigeria and Brazil. When we come to corruption, we have been in headlines for being among the most corrupt countries in the world. It is, therefore, not surprising that majority of Kenyans wanted power to be devolved to the lower levels of Government. It was argued, as evident in all the draft constitutions, that is, the CKRC 2002; Bomas 2004; the Referendum Draft 2005, Harmonised Draft 2009; and the 2010 constitution, that devolution would:

- a) Give powers of self-governance to people at all levels and enhance the participation of people and communities in the exercise of the powers of the state;
- b) Strengthen national unity by recognizing diversity in ways that promote among all citizens, the sense that they belong to Kenya and share in its government;
- c) Ensure the democratic and accountable exercise of power;
- d) Increase checks and balances and the separation of powers;
- e) Promote social and economic development throughout Kenya;
- f) Ensure equitable sharing of national and local resources throughout Kenya, with special provisions for marginalised areas;
- g) Facilitate the decentralisation of central government powers and the location of central government institutions and departments away from

the capital territory in order to ensure equitable distribution of resources in all the provinces;

- h) Provide essential services to the people effectively and economically;
- i) Protect and promote the interests and rights of minorities and the disadvantaged groups.

It was evident that Kenyans wanted power to be devolved to the lowest levels possible. It is also worth noting how much faith many Kenyans had in village elders. They said these were people they could call upon at night, they knew them and the elders knew them too. In that respect, they wanted to govern themselves at the village, location, district, regional and national levels. They were unhappy with those governing them at the national level who did not understand their culture, ‘who beat and arrest men in front of their wives and children’—an act equivalent to stripping them naked. “When a man comes back from the cells, where does he go? How can he look at his wife in the face when he has been beaten up in her presence?” asked a man in Butula constituency in Western Kenya.⁹

They wanted to be given an opportunity to exercise instant justice. “Why”, they asked, “would you take a chicken thief to the police when all the neighbours have seen him steal the chicken with their naked eyes? Why not get the elders to tell him to give back the chicken and also pay a fine?” asked a man from Narok North Constituency. They argued that one goes to court and never wins. The lawyers come and confuse everybody with arguments and counter arguments after which a thief, whom one knows very well is a thief, is released. For them, this was not justice.

They did not understand why registration of births and deaths could not be done at the village. After all, they are the ones who bury the dead and are present when children are born. Therefore, why not register both deaths and births at the village and pass on the names to those dealing with national statistics. “Even title deeds—everyone knows what land is whose at the village level.”

In short, Kenyans were saying that they were tired of a centralised system of government and wanted to reclaim power and deal with many issues at the local level. For them, government was too heavy and too far from them. It was oppressive. It should not even decide who the village chief should be. They wanted to elect the chief themselves. It was a message loud and clear. Kenyans wanted devolution of power to the people so that they could be engaged in decision making and manage their own lives.

As mentioned earlier, the Committee on Devolution was very important and women played a critical role. It was in this committee, as well as in other

⁹ Author's own notes

committees such as the one on Representation of the People, where issues of the domination of small communities or groups by big or large communities were debated. People thought about boundaries, about human and natural resources and how to deal with inequalities in terms of resource distribution and representation.

There were those who felt some communities were tied together by a blood knot and should be allowed to work together. Domination by big ethnic communities, protection of minorities, ethnic groups, retention of ancestral homes, political and economic power, were major issues in devolution. There was a struggle, for instance, on Mt. Elgon. Some wanted it to be in the Rift-Valley region while others would say, "Over my dead body; Mt. Elgon belongs to Western Kenya." Others like Teso, small as it is as a district, wanted to be a region by itself and work directly with the central government. They did not want to be in the Western Province/region. They said, "either we are alone or we go to our brothers in Uganda."

Kenyans presented different histories and their indigenous profiles for specific areas as a way of legitimizing their decision for recognition as different entities. That is why the Teso people, wanted to be recognised separately from the Luhya family group. People from North Rift differed on what kind of a region they needed. The Marakwet, Turkana and Samburu did not want the domination of the Nandis. They wanted to be independent of them. Kirinyaga people did not want to be in Central Kenya. They were, for example, comfortable with just being the Embu, Mbeere, and the Ndia. Others wondered whether Laikipia District should be in Central or Rift-Valley Region. "What about Nakuru? It should go to Central," Central people would say. "Over our dead bodies," Rift Valley leaders would respond.

Broadly speaking, the committee on devolution agreed that in creating a region, it was important to look at the following:

- History of the people
- Culture
- Economic viability
- Interdependency
- Integration of the people
- Fostering unity
- Economic viability

Women's negotiations in the Devolution Committee

Women in the committee on devolution were very focused. They participated fully in the committee. It was an important committee because it was dealing with issues at the community level, meant to give power back to the people.

Let us have a glimpse of how women negotiated at this committee:

Women on the devolution committee

Convener: We have agreed on establishing 14 (fourteen) regions and two people from each region to form the regional assembly.

Committee Members: Yes.

Ms Happy Gloria: Chair, we should then ensure that each region brings in a woman?

Male delegate: That cannot happen. That would mean that women will be 50 per cent instead of one third.

Mrs Nyathogora: What is wrong with women being 50 per cent in the regional assemblies?

Mrs Helen Korir: We can then propose that the regions will have 3 delegates one of whom should be a woman.

Male delegate: We have agreed that we need to be aware of the costs. We do not want very expensive regional assemblies. So, let us leave them as two from each region.

Mrs. Mwamburi: Then there will be no women in the regional assemblies.

Male Delegate: Chair, let us go on. We have agreed on two delegates.

The women decided to consult again on this issue. They had successfully argued for the one third women's representation in the Lower House whose membership was to come from the constituencies. They had also successfully negotiated for the one third in district councils and 50 per cent at the locational government. They, after consultations, agreed to ask for a general provision that would bring a law to ensure the principle of Affirmative Action was implemented.

The provision on Balance of Gender and Diversity was adopted. It says:

228 (a) (i) At anytime, not more than two-thirds of the members of any assembly, council or executive committee constituted under this chapter are to be of the same sex.

There were those moments when women gave in to resistance only to raise the issues later. The spirited effort that women demonstrated in the Devolution Committee was unparalleled. They were very faithful members of the committee. They worked on details, followed them up to the committee level, to the plenary and even to the drafters. They contributed to the debates substantially and when it was time for representation to the various levels of government, they became very focused. Often, I received notes from women in the Devolution Committee asking me, "Prof, which decision will give maximum gains for us?" At one time, one male member, noting that women

were seeking direction from me raised objection saying, "Prof. needs to be reminded she is not a woman. She is a Rapporteur and a Commissioner."

Well, I knew I was a Commissioner and a Rapporteur who was also a woman. How can one be neutral on the strategic or any other needs of women? But I did not say this. I was in the constitution drafting process because women had sent me there. Women talked to each other using all manner of languages, for instance, body language, writing notes and going out to consult. They worked together so purposefully and with so much determination as only women could master. It was a joyous struggle at Bomas.

A sample of women's contribution at the committee of the whole house

The session was chaired by Delegate Fadhili Sultan, vice chair of the conference.

Hon. Delegate Martha Rop: My name is Martha Rop, number 509 from women's organisations, Uasin Gishu District. I agree with my colleague from Mt. Elgon and I support him to move from group of sixteen to eight which is Turkana, West Pokot, Marakwet and Mt. Elgon. Most of the time, these people have cultural ties. Going back to number nine, I want Keiyo, Uasin Gishu, Nandi North, Nandi South, Baringo and Trans-Nzoia to be under one region. This is because they are so close together. These districts should remain together. That would be a wise thing to do. In any case, there is no tribalism here. There are so many different tribes. Zone number ten, that is Kericho, Buret, Bomet, Nakuru and Koibatek should be merged together so that the people of Koibatek won't get tired of moving all the way from the boundary in Nakuru. We have to fight for them too. The people should be near the means of transport. Those are my views. Thank you.

Hon. Delegate Fatuma Sheikh Mohammed: Thank you Madam Chairlady, my name is Fatuma Sheikh Mohammed Delegate number 254 from Wajir District. When we were considering the zones, some of the considerations involved historical, religious, economic and cultural aspects. Those are some of the things that we were considering. If we just look at North Eastern, it was divided into two groups, that is, Wajir and Mandera and then Garissa and Ijara. I could have considered that as okay. We don't have to put the four districts together because we have a very large area e.g. Wajir which covers 56,698 square kilometres at least. So, we have to divide that area into two, we cannot be in or grouped into all the four districts. And another thing, I support devolution. It is the answer to our problems, especially we people from the North Eastern because we have suffered a lot in the hands of the provincial administration. Thank you.

Hon. Delegate Julia Ojiambo: Thank you very much Madam Chair. Madam, I want to talk on the area of distribution of resources to devolved areas. And I want to say madam chair, that initially, to be able to deal with the inequality that has existed and continues to exist in areas that have been marginalised, some criteria must be worked out to distribute the existing resources before these marginalised areas can take off. I know, madam chairperson, that we have said that resources will be equally distributed, but this will continue to marginalise the areas that so far are poor because they will remain where they are whereas those who have enjoyed wealth will take off and will continue to grow. So, I would want to suggest that factors such as surface area of devolved units, population, and more importantly, poverty index be considered. Poverty index is going to be very important because that is the only way we can bring resources to those areas that have nothing up to now. Even if we start to think of industrialisation of those areas, this is not going to be achieved for some time while others will still be growing. So, that is an area I would like the committee that will be looking at this again to delve into.

Madam Chair, there is also the area of boundaries that I would like to support and I think it is important as we talk about these new units that we are creating. I want madam chair to refer to our boundaries particularly in Nyanza and Western. We are talking about our land resources but we have forgotten about water resources as well. And those of us who come from the lake area do know very well that a lot of our water resources have been left unattended to and little attention has been given to our land. Busia in Western Province, for instance, has lost almost fifty kilometres of our land and water to Uganda and Nyanza. I think in some areas, in South Nyanza, almost six hundred kilometres have been left to Uganda. We would like the Boundaries Commission to work speedily and get this rectified so that we have a definite boundary on Lake Victoria between Kenya and Uganda.

Lastly, Madam Chair, I just want to say that we appreciate, very much, the focus that has been given to Affirmative Action and I would like the conference to continue with the same spirit. We talk about getting women on board, we are also considering other areas that need to be given Affirmative Action. I would like to state here that, we are not suggesting that women who are not worth of being leaders be leaders. Women are worth being leaders and they know what leadership is. Even if it is nomination, this country has capable women. I would like to suggest to the men who are in this conference that, they should regard the women who are out there as leaders too, just as they regard the women who are inside this conference, who are able to contribute to the leadership debate, just as much as the men who we have inside here. So, I appreciate the sentiment that women should be brought on board. I

want finally to support fully the devolution of power and resources because this is what Kenyans have been waiting for, for a long time and we are here to support it and to ensure that we take power back to the people of this land. Thank you, Chairlady.

Hon. Delegate Fatuma Boru: Madam Chairlady, my name is Fatuma Boru, District Delegate from Isiolo District. Madam Chair, I would like to visit unit five of the regional units. When we are thinking about units, the following factors, amongst others, must be taken into account:

1. The units must not be too large in terms of territorial size. Madam Chair, the total area of unit 5 in size is 126,740 square kilometres. It is equivalent to the total sum of the area of units one, two, four, ten, twelve, thirteen, fourteen, sixteen, seventeen and eighteen. In other words, it covers an area of eighteen units, therefore, unit five has too expansive territorial size.
2. The third option of eighteen units seems to be more acceptable to the majority of Kenyans, the main reason being that it took into account the factor of cultural homogeneity, harmony, integration, as well as considering ethnicity and historical factors, factors which seem to have taken centre stage in the formulation of those units in option three. Isiolo, Marsabit and Moyale have been in Eastern Province for 40 years and we have been marginalised because we have been swallowed by bigger tribes. To give you an example, we are put together with Laikipia which alone has a population of 322,187 persons as compared to Isiolo, Marsabit and Moyale with only 275,818 persons combined. Thus, Laikipia alone constitutes 44 per cent of the entire population of unit five. Madam Chair, in terms of proposed levels of government, the zone or sub-region becomes a principle level of devolution. After examining all the above mentioned factors, Isiolo, Marsabit and Moyale will be rightfully in the separate unit of its own for viable devolution. Thank you.

Hon. Delegate Teresa Usunga: I am delegate number 441. Actually, I have been wanting to speak and I thank you Madam Chairlady. At least ladies think about ladies. Thank you, (*Laughter*). I am grateful for all that has been done so far. Now, when we look at any area, we will find that the people who live there really matter, what they do in that place and also how they organise their lives in that place really matters.

So, even as we are looking at devolution of power, we see the type of people who are in a given area and then we also find that according to the way the zones have been presented, there are zones that shocked me, especially when I was looking at Nyanza. I find that Nyanza has been divided into about three parts and Kuria is in Trans Mara and Narok and then you also find Kisii is alone, that is to say Kisii Central, Gucha and

Nyamira. Actually, some people may be too used to one another that it will take them quite some time to be used to being different. As things stand, we know that Nyanza has five sons: that is Luo, Kisii, Kuria, Suba and Central Nyanza, that is Nyando. So, generally, when we look at the whole thing, we see there are areas which are more fertile than others or richer than others. So long as people are able to agree that they need to be inter-dependent, and need to help one another in many ways, that will be alright. Actually, I have much more to say but let us give other people a chance. Thank you.

These presentations clearly indicate that women did not only focus on their specific issues but also contributed significantly to other aspects of the debate. I have quoted these five women delegates from different provinces in order to demonstrate how women participated in the process. As noted earlier, the debate on devolution and mapping out regional boundaries was one of the most contested areas during the national conference. These women were making their comments in the committee of the whole house, that is, the plenary of the conference where Dr. Musonik Arap Korir, Dr. Mutakha Kangu, Prof. Yash Pal Ghai and I presented the proposals on devolution. It is clear that on this very critical issue, women had their say. Concerns on equal distribution of resources, regional boundaries, sizes of the units, criteria used to create the units and fairness in dealing with the units, are clearly stipulated. I note too that women focused on areas where they belong, where they have knowledge of the communities and their interests but also where they have information on population and available resources.

It is also important to see the reconciliatory manner in which women discuss very sensitive community issues. We note that it is very important that women's perspectives on all discussions, including community/ethnic specific, regional and national be sought. Women in this plenary debate were articulate, focused and informed.

I have gone into details on the Devolution Committee to show the weight of the issues the committee was dealing with and how women had to deal with many issues beyond their own. This was, politically, a very active committee. Debates were often very emotional. It was about ethnic and regional power. At the same time, it was about protection of the minority communities. It was about real and perceived inequalities; about power distribution; and about history. Factual and mythical ethnic fears were played out in the open on a regular basis. Some people did not want regions while others did. Let us sample some sentiments:

Hon. Shitemi said: "To hell with regions. If they exist, they should exist only in an advisory role."

Hon. Kosgei: "Zones should remain as coordinating bodies."

Hon. Biwot: "Districts should be the principal level of devolution. We need to figure out how they relate to the administration. The national level should have reduced powers while a location is the place of real action for development."

Hon. G.G. Kariuki: "Take power back to the people, through national, district and locational levels. We do not need regions."

Hon. Galgalo: "Let the districts deal directly with the national level. Most functions should go to the county level. The province should be the main focus of devolution."

Hon. Kisiero Mathenge: "Let zones coordinate, but they should have no power to make laws or collect taxes."

Hon. Katuku: "Have the district as the centre for devolution."

Hon. Mwachiro: "Real power to the region."

Hon. Godana: "Devolution of power should protect minorities—we need to consult more."

Ms Lydia Kimani: "Have powers devolved to the district."

Ms Helen Korir (from West Pokot): "We need to find out how a community will benefit from the resources."

Mrs Mwamburi: "61 per cent of Taita Taveta is occupied by animals."

Ms Helen Korir, "Let power go to the district."

Hon. Raila Odinga: "Devolution must protect minorities. We should think about how Teso people can be protected like the German small states or New Haven. We should make exceptions where there is need and when it is justified."

Mr Shitemi: "If ethnic groupings will be better, so be it. We need to recognise we belong to tribes and live the way individual tribes want."

Mrs Grace Ogot: "Gem division was taken to Butere. Take it back to Luanda."

Mr Serut: "Mt. Elgon should be moved to Rift Valley."

Mr. James Foster: "We need to ensure that national resources, such as oil, do not belong to a particular community but the hosting community should have some access to its benefits."

Mr Syongo: "We need to make provisions for the local people."

Ms Happy Gloria: "We need to understand the cultural background of the people."

Mrs Martha Rop: "Koibatek should go with Kericho."

Mrs Sofia from Samburu wanted to retain a zone where the Samburu people could feel secure.

Mr George Kinyua: Wanted Nakuru to be put together with Nyandarua, Baringo and Laikipia in order to avoid tribal clashes.

As can be seen, the Committee on Devolution was where tempers sometimes ran very high. One could tell it was about control of resources, particularly land. It was about how to ensure equitability.

In pursuit of the Gender Commission

The women in the Committee on Constitutional Commissions had a hard time trying to retain the Gender Commission on the general list of commissions. This is interesting because the Gender Commission was proposed countrywide by women and had appeared in the initial CKRC 2002 draft. By the time the draft was presented at Bomas, the Gender Commission had been made part of the Human Rights and Administrative Justice Commission. One gender commissioner was to take care of gender issues. When the draft was disseminated, women proposed again that the Gender Commission be reinstated in the draft on equal basis with those other commissions. The debate was carried out in the Sub-Committee on “Commissions and Management of Constitutionality.” However, the membership was set at four commissioners while other constitutional commissions had nine members. At a conveners’ meeting, I raised the issue on this disparity. Prof. Okoth Ogendo supported me and insisted that if we agreed with the principle that we needed a Gender Commission, then it had to be treated like all others. Our request was however not granted. The drafters retained the four commissioners even after delegate Cecil Mbarire raised the issue in the plenary. Worse still, the Gender Commission did not appear in the draft that was eventually tabled for adoption. Women commissioners had to follow it up with the drafters, look at the resolution of the conference and have the Gender Commission reinstated with its nine members. We had gone full cycle but thankfully, we now have the Human Rights and Gender Equality Commission in our new constitution which was promulgated in 2010 and the Gender and Equality Commission has been created.

Remaining accountable to women and monitoring progress at the Bomas Conference

We have stated that women from all the twelve Technical Committees of the conference met twice a week over lunch hour, shared their views and asked for support from one another. At other times, they met outside the conference vicinity in hotels, mostly, to strategise. Women’s organisations and women leaders who were not part of the conference attended the Tuesday and Thursday meetings at the Nyama Choma Tent at Bomas. They brought research information they had collected and offered whatever support they could to the female delegates. Women’s Political Alliance – Kenya (WPAK); Women’s Political Caucus (WPC); Federation of Women Layers (FIDA); Collaborative Centre for Gender and Development (CCGD) and the Education Centre for Women in Development (ECWD), among other organisations, brought in data, statistics, concept papers, and so on, and linked up with the women at Bomas to ensure women won their battle. It was during such sessions that women solidarity and respect for knowledge, their different roles

and skills came to the fore. It was an experience to behold, an experience worth celebrating. Women were in sync with each other and with their universe as exemplified by their resolve in the committees. In the Devolution Committee, the Committee on Representation of the People, Bill of Rights, Legislature, among other committees, women from various ethnic communities and different cultural backgrounds were completely in harmony as they pushed their agenda forward.

Keeping their eyes on the goal

One agrees that women had a sense of purpose in their negotiations. They wanted to achieve a level of representation that would give them a critical mass, that would make their voice heard and their visibility in these institutions apparent. That is why, for instance, they were more focused on ensuring that institutions of governance such as parliament, district and regional governments, had at least one third representation of women. Their idea was to get to the institutions first. They, therefore, hardly focused on the nature of those institutions. The opportunity to enter these institutions finally came with the promulgation of the constitution on August 27th 2010, giving women the chance to transform to become institutions of service the institution the people, institutions that should take on board women's world view. The need to think about these institutions, even as women focus on their participation in them is paramount because they need to change. For example, at Bomas, women gave little attention, to the proposed power of the president in terms of being the head of government, head of state and chair to the cabinet. According to them, the conference could decide whatever they wanted.

As to what powers the prime minister could have and how he/she could be appointed or dismissed, there were critical provisions which were to later contribute to the collapse of the Bomas process and to the lost 2005 referendum. There was a time when the other eleven committees could not meet because of the issues that were being discussed in the Executive Committee. Many delegates would fill the tent of the Executive Committee and sit outside because there was no more space inside. There were times when the same happened in the Devolution Committee.

Surprisingly and most unusual, women did not question the nature of power of the various institutions being created although they wanted to be part of these same institutions. This notwithstanding, women's struggle during the review process had a sense of purpose, a desire to achieve their primary goals: the flowering of energy into something concrete and worth their while. They were united in purpose. They wanted to be part of the institutions, have at least one third representation in all the institutions, that is, parliament, upper house, regional governments, district governments, locational committees, all commissions, and so forth. This, they negotiated for and more or less achieved

their target at Bomas; and more or less in the 2005 Referendum draft. They also negotiated for many other provisions, particularly in the Bill of Rights, in the national values and goals, citizenship, land and property and in the constitutional commissions.

Women's struggle, with focus on clear specific issues, was based on their concrete personal and collective experience. For a long time, women in Kenya were ridiculed; they were taunted, often being asked, "What are women looking for? Women are their worst enemies; they are the majority, why do they not vote for each other?" The struggle of women in the review process reached such a high level of unity of purpose and solidarity that no one could question. This solidarity, as we have seen, was manifested during the negotiation of the process at levels of the review process. The constitution of Kenya was promulgated by His Excellency President Mwai Kibaki on August 27th 2010 in a day which, for women, was their day of harvest.

Focus on the second part of the covenant at the Bomas Conference

As we noted in the introduction to this book, women were negotiating a double covenant in the following way:

- *The first covenant:* Women wanted to negotiate their space as equal citizens who had the right to equal treatment with men on all matters and as a category of citizens who had to take their place in leadership and play their rightful role in shaping their destiny and that of their nation. They wanted positive measures to deal with hundreds of years of oppression.
- *The second covenant:* Women wanted to negotiate along with other Kenyans to reclaim the peoples' sovereignty, that is, to re-assert the citizens' role as the source of power that the state had misused in governing them; their right to sovereignty; and to check state excesses and misuse of people's power. Kenyan people wanted to get their rights as human beings, their control in decision-making, and their capacity to determine who would govern them and how they would be governed.

Like all other Kenyans, women had suffered from the State's appropriation of people's power and misuse of the same. People had lost their lives while negotiating the covenant. Women were less prepared on the second part of the covenant. They had not debated issues such as the executive structure, transitional provisions, parliamentary system vis a vis presidential systems, devolution of power structures such as the regional governments and judiciary, among others. The issues of representation at all levels, inheritance, ownership of land, dual citizenship, social economic rights, human rights, the rights of the elderly and the marginalised were their main focus.

The Bomas Conference was also about ethnic, regional, community, and religious interests. Nothing demonstrated this more than the election of the Vice Chairs of the conference and the lobbying that went on at night before this was done. Religious leaders and, other groups had the shock of their lives when regional interests took precedence and none of them managed to secure a seat. Those elected were: Koitamet ole-Kina for Rift Valley, Bonaya Godana of Eastern Province and Sultana Fadhil from Coast. Ironically, when women went to elect their own representative, the issues at stake were turned into a perceived polarisation of elite vis a vis grass root women, the same strategy used by politicians to divide the women. Fadhil, who was not seen as coming from Nairobi, got the seat but Rose Waruhiu, who was viewed as elite and coming from Nairobi, lost the contest.

The regional power game was demonstrated a lot more at the Devolution Committee, particularly when it came to the discussions on the regions. It was the same in the committees on Transition, Executive and on issues of Representation which were raised in the plenary and elsewhere. The process took regional and ethnic positions thereby blurring women's voice as a group and making regionalism and ethnicity the major weaknesses of the Women's Movement. Let me elaborate on this:

In the process of constitution making, two of the most contentious issues, as we have seen had to do with power sharing: between the president and the prime minister; and between the central and the local levels of governments.

The Committees on the Executive and that of Devolution were the most fiery. The two committees were always packed. The Executive Committee in particular had the political heavyweights in attendance all the time. On its part, the Devolution Committee had some of the shrewdest politicians of the time such as Hon. Nicholas Biwott, Hon. Joseph Kamotho, Hon. Henry Kosgey, Hon. G.G. Kariuki, Hon. Marende (later to become speaker of the National Assembly), Hon. John Serut and Hon. Zadock Syongo, among others. The Devolution Committee was chaired, first, by the late Crispin Mbai and then by Dr. Adhu Awiti. The Executive Committee had Hon. Martin Shikuku as the Chair. The other politically active committee was that of Transition whose Chair was Ms Joyce Majiwa. Members of this Transition Committee included Hon. Raila Odinga. The mandate of the Transition Committee was to determine when the new constitution would come into effect and how transition would be managed.

We have seen that, the question of the nature of the institutions that would be created and whether these institutions would be friendly to women was an issue that women did not address at Bomas.

Women needed to reflect more on institutions, the institutions' nature, philosophy and values; factors that often lead to undermining or silencing their

experiences and strategies of resistance. By the time, the conference became very divided, leading to a walk out by the government side led by Hon. Kiraitu Murungi, on the last day of the committee of the plenary while their nemesis remained in the plenary to continue with the debate, the issues that were controversial were very few but major namely:-

- whether the provision that made the president head of state; head of government and chair to the cabinet should be retained;
- whether Kenya should have four levels of government, namely, national, regional, district and locational.

The committee that was negotiating these provisions was led by Bishop Sulumeti. Some of the members of this committee were Hon. Raila Odinga, Hon. Kiraitu Murungi, Hon. Ruto, and Hon. Grace Ogot, among others. The provisions were contested. When the government group walked out, those who had wanted the prime minister to be head of government and chair to the cabinet and to retain the four levels of government carried the day. At the end of the day, all other critical provisions were passed by the charged plenary. There was hardly any debate on other issues. The story was over. The plenary, chaired by Prof. Ghai, was in a hurry to complete and adopt the draft constitution because there were rumours that the group that had walked out had gone to court to stop the process. It was a session that left a lot to be desired and one that shocked many.

Somewhere along the line, in the midst of this dramatic hurry, Hon. Ruto introduced a motion to the effect that since the president that was created by the conference was not an executive president, the manner in which he/she was to be elected needed to change. He proposed that a college of local authorities and parliament be the one to elect the president. Although this motion merited serious discussion, it was not debated; it was thrown out immediately.

Then there were those who were proposing to introduce Pastoralist Commissions, Fishing Commissions, etc. Dr. Lumumba, who was the secretary to the conference, walked to where the CKRC commissioners were watching the events in disbelief and exclaimed: "Someone help me, the conference is going wild!"

Prof. Ghai looked very tired but he was determined to complete the adoption process. He stood with his hands supporting his back and his scanty hair almost standing up as the conference, anxiously and mechanically, went through the remaining proposals and completed the process without further debate.

At that moment, many women watched in disbelief at the events unfolding before them. Fortunately for them, they had negotiated their issues before hand, sometimes under very difficult circumstances, and had achieved their goal. But at that moment, politics had taken over the process.

I have gone into details about the last committee of the whole house and the adoption of the draft constitution because at this stage, what was at risk was no longer the women's agenda but the whole constitution. Therefore, I cannot emphasise enough the need for women to focus on the processes, the politics and the institutions along with their issues. Very often, women have been told that they need to focus only on their issues. For many years, they did this. The period between 1992 and 2010 demonstrates that they were focused and clear about their own issues. They worked closely together during the negotiations at Bomas I, Safari Park I, II, III and IV. They facilitated civic education of women and ensured presentation of the views by women from all over the country. Their solidarity and negotiations at Bomas clearly demonstrates that they had properly and completely negotiated their part of the covenant and participated in negotiating the 2nd part of the covenant to ensure state organs did not appropriate the people's power. But as they reclaimed their space in society, they found out that they were overwhelmed by the political power struggles between parties, communities, and regional blocks in these entities' search for co-existence, power and resource control. The governance structures, the electoral processes, devolution of power, and debate on creation of regions sometimes caught the women off guard. Yet, these are the issues that derailed the Constitutional Review Process. Most of us women, talked about reducing powers of the president, devolution of power, among other the issues but we had not thought through issues such as the benefits or otherwise of presidential systems of government, parliamentary system of government, our own historical experiences with the institution of government, regional governments, ethnic marginalisation, the land question and ethnicity, among other issues.

The basket of fruits from the Bomas negotiations

The following is the summary of women's gains at Bomas. It is to be noted, however, that these gains would later be safeguarded throughout the rest of the Constitutional Review Process, a struggle which was to take the next six years. The one major gain at Bomas that was eventually lost as we were about to harvest in 2010 was the 30 per cent women's representation in the National Assembly. Instead, we harvested the special seats, one from each county, which added to about 13 per cent. Nevertheless, we harvested close to 27 per cent senate representation and 30 per cent in county assemblies.

Specific harvest areas in the 2010 constitution

Chapter three: National goals and values

Article 12(2(i)): The state shall ensure full participation of women ... and all citizens in the political, social and economic life of the country.

Article 12(2(j)): The state shall implement the principle that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.

Chapter four: Citizenship

The right for a woman to confer citizenship through:

Citizenship by birth:

Article 16(1): Every person born in Kenya is a citizen if, at the date of the person's birth, either the mother or the father of the person is a citizen.

Article 16(2): Every person born outside Kenya is a citizen if, at the date of the person's birth, either the mother or the father of the person is:

- a) a citizen who was born in Kenya or
- b) a citizen by registration or naturalisation.

Article 16(3): If either parent of a person died before that person was born, for all purposes of this chapter, that person's citizenship at the time of death applies as if that parent had survived until the birth of that person.

Citizenship by marriage

Article 17(1): A person who has been married to a citizen for a period of at least seven years is entitled, on application, to be registered as a citizen of Kenya.

Article 17(2): Citizenship is not lost through marriage or dissolution of marriage.

Chapter five: Culture

Article 26(2): The functions of the Commission (on culture) are to establish the criteria for recognition and honouring of national heroes and heroines.

Chapter six: the bill of rights

Implementation of rights and freedoms

Article 30(5): All public officers and state organs, and their employees have the responsibility to equip themselves to understand and deal with the needs of special groups within society including women, persons with disabilities, children, youth and members of marginalised groups and communities and of particular ethnic, religious and cultural communities.

Freedom from discrimination:

Article 36(1): The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 36(4): Despite clause (1), the State shall take legislative and other measures, including but not limited to Affirmative Action, programmes and policies, designed to benefit individuals or groups who are disadvantaged, whether or not as a result of past discrimination

Gender

Article 37(1): Women and men have the right to equal opportunities in political, economic, cultural and social activities.

Article 37(2): Women and men have equal rights to inherit, have access to and manage property.

Article 37(3): Any law, custom, culture or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.

Article 37(4): Despite clause (1) the state shall:-

- a) Protect women and their rights, taking into account their unique status and natural maternal role in society; and,
- b) Provide reasonable facilities and opportunities to enhance the welfare of women to enable them realise their full potential and advancement.

Article 40(5): A child's mother and father, whether married to each or not, have an equal responsibility to protect and provide for the child.

Article 40(6)(d): Be protected from discrimination, harmful cultural rights and practices, exploitation, neglect or abuse

Article 40(6)(i) iv): Be treated in a manner, and to be kept in conditions, that take account of the child's disability, gender and age.

Family

Article 41(4): Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

Rights of persons held in custody

Article 75(2)(h): A person held in custody has the right to privacy, including the separation of women and men, to the extent compatible with the presentation of law, order and discipline.

Chapter seven: Land and property

Article 77(2): The government shall define and keep under review a national land policy ensuring the following principles:-

- (b) Security of land rights for all land holders, users and occupiers in good faith.
- (f) The discouragement of customs and practices that discriminate against the access of women to land; and other properties.

Property rights of spouses

Article 82: A surviving spouse shall not be deprived of a reasonable provision out of the estate of a deceased spouse whether or not the spouse died having made a will.

Legislation on land

Article 86(1): Parliament shall enact legislation to:-

(d) Regulate the recognition and protection of matrimonial property and in particular, the matrimonial home during and at the termination of marriage.

(i) Establish a land fund to enable citizens to gain access to land for public purposes.

Chapter nine: Leadership and integrity

Conduct of state officers

Article 96(2): A state officer shall not:-

(e) Use the influence of their office to sexually or physically abuse any person, or to attempt to obtain sexual favours or the other undue advantage from any person.

Chapter ten: Representation of the people

Part I – The electoral system and process

General principles

Article 101(1): The electoral system is based on the right of all citizens eligible to vote and to stand for election to legislative and elective bodies.

Article 101(2): Voting shall be by secret ballot.

Article 101(3): Elections shall ensure a fair representation of women and men, persons with disabilities, workers, older members of society, youth and marginalised groups and communities.

Article 102(3): In the Interest of Affirmative Action

(a) Five percent of the seats in the national assembly or the legislature of a devolved government shall be reserved for persons with disabilities, the youth, workers and marginalised groups and communities.

(b) Eight and one-half percent of the seats in the senate shall be reserved for persons with disabilities, older members of the society, workers and marginalised groups, and communities. So that at least one-third of these seats go to women.

Part III – Political parties

Basic principles

Article 111(1): A Political Party shall:-

f) Promote and respect human rights and gender equality and equity.

Political parties' fund

Article 113(1): There is established, a Political Parties' Fund.

Article 113(1): A Political party shall be entitled to financial support from the state through the Political Fund as may be prescribed by an act of parliament.

Purpose of the fund

Article 114(4): Thirty per cent of the money allocated by Parliament to the Political Parties' Fund shall be distributed equally among the registered Political Parties annually on date to be prescribed by an Act of Parliament.

Article 114(5): Parliament shall, by legislation, prescribe the method of distribution of the balance of the money allocated to the Political Parties' Fund by reference to the number of voters secured by each political party in the previous National Assembly elections and the number of women candidates and members of marginalised groups and communities elected through the party at that election.

Chapter eleven: The legislature

Part II: Composition and membership of parliament

Membership of the senate

Article 122 (1) (a) One member elected from each district by the district council of the district acting as an electoral college to represent the region of which the district forms part.

(b) Two women elected from each region by an electoral college consisting of all the elected members of the district councils within the region.

(c) Such number of marginalised groups, half of whom shall be women, as satisfies the requirements of article 102 (3) elected after members have been elected under clause 1(a) and (b).

Membership of the national assembly

123 (i) (a) One member elected from each constituency as may be provided by law;

(b) One woman elected from each district, each of which shall comprise a single member constituency;

(c) Fourteen members elected by marginalised groups;

(d) Speaker who shall be an ex officio member.

Chapter fourteen: Devolved government (p137)

219 (i) Election of district councillors

i) District government

(a) One member elected for each of such number of wards, with such boundaries, as prescribed by Act of Parliament, passed after taking into

account of the recommendations of the electoral and boundaries commission.

(b) Such number of special seat members all of whom are women, as are required to ensure that at least one third membership of the council comprises women elected after members have been declared elected under paragraph (a) and

(c) Such number of members of marginalised groups, including persons with disabilities, older persons and youth, provided that at least two shall be persons with disabilities, as prescribed by an Act of Parliament.

Locational government (148)

224 (1) A locational council consists of representatives elected by registered voters who meet the requirements for residence in the location prescribed by act of parliament.

2) An election for the purpose of clause (I) shall be conducted in such manner as is prescribed by act of parliament, being a manner that ensures that equal number of men and women are elected.

Chapter eighteen: Constitutional commissions

290 (2) (a) Entrenches the one third principle

Chapter twenty: General provisions

Definitions

Article 307 In this constitution, unless the context otherwise requires:-

“Affirmative Action” includes any measure designed to overcome or ameliorate any in equity or the systematic denial or infringement of a right or freedom.

These gains were isolated from the Bomas draft by women’s organisations including WPAK, FIDA, and CCGD among other organisations who kept vigil throughout the process.

Summary

It is evident that the women at the Bomas Constitutional Conference did not let down those they represented. The women from the constituencies had given their agenda. The women in the CKRC had ensured that the agenda for Kenyan women was comprehensively tabled at the National Conference and that the women delegates took the baton and ran their part of the relay race.

Let it never be said that women are not great negotiators. The basket full of fruits in the 2010 constitution is a testimony to their capacity to negotiate. Apart from

women's gains that we have listed, "the constitution has one of the best Bill of Rights in the world," so say many experts. The Bomas draft had the 1st, 2nd, and 3rd generation of rights entrenched. It entrenched the social economic rights which majority of our rural women and those living in the slums desperately wanted. It proposed devolution of power to the communities through the district; it mapped out our national values, goals and principles that should guide us as a nation. The draft captured the political institutions, elections, political parties, land environment, security, public finances, and other institutions of governance.

It is clear that social justice is an important theme in the new constitution, so is national unity, diversity, and respect for culture and marginalised groups. Bomas draft has many provisions that ensure the protection of women, children, youth, persons with disability and elderly persons. It had provision for the recognition of communities and minorities and provision for addressing poverty and even regional disparities and almost all these were later reflected in the new constitution that was promulgated on August 27th 2010.

Women had their moments. They demonstrated their love for each other and for their lot. They had received the baton from the women in the CKRC who had ensured women's agenda was in the 2002 draft after having received and collated the views of Kenyans. There were many moments during negotiations where ethnic barriers were broken and where the rural-urban divide, educated versus less educated, the rich women versus poor women, were broken—they had a unity of purpose. Their personal and collective experiences brought them together to form a political force that was felt by the whole conference. It was an experience to behold—a most wonderful experience, a clear demonstration of love and power of women. More often than not, the men at Bomas were afraid of facing this combined women power.

Women's organisational and negotiation skills at Bomas merits special study. I hesitate to speculate what theory explains how women behaved in this particular part of the process. But the theory that will eventually emerge and be adopted must grow from women's experiences as women and be informed by events at the Bomas Conference and thereafter. We cannot emphasise enough that the Bomas Constitutional Conference, the Safari Park negotiations, and other negotiations thereafter, brought the best out of the women of this country.

Of great significance is the fact that women from Kenya's many ethnic communities could focus on what unites them and consolidate their interests and end up with a draft constitution that beats any other in the world in terms of its focus on women, and the whole concept of inclusivity. Kenyans, and indeed other multi-ethnic nations in our region, should acknowledge our ethnic diversities and our values and interests that bind us together.

