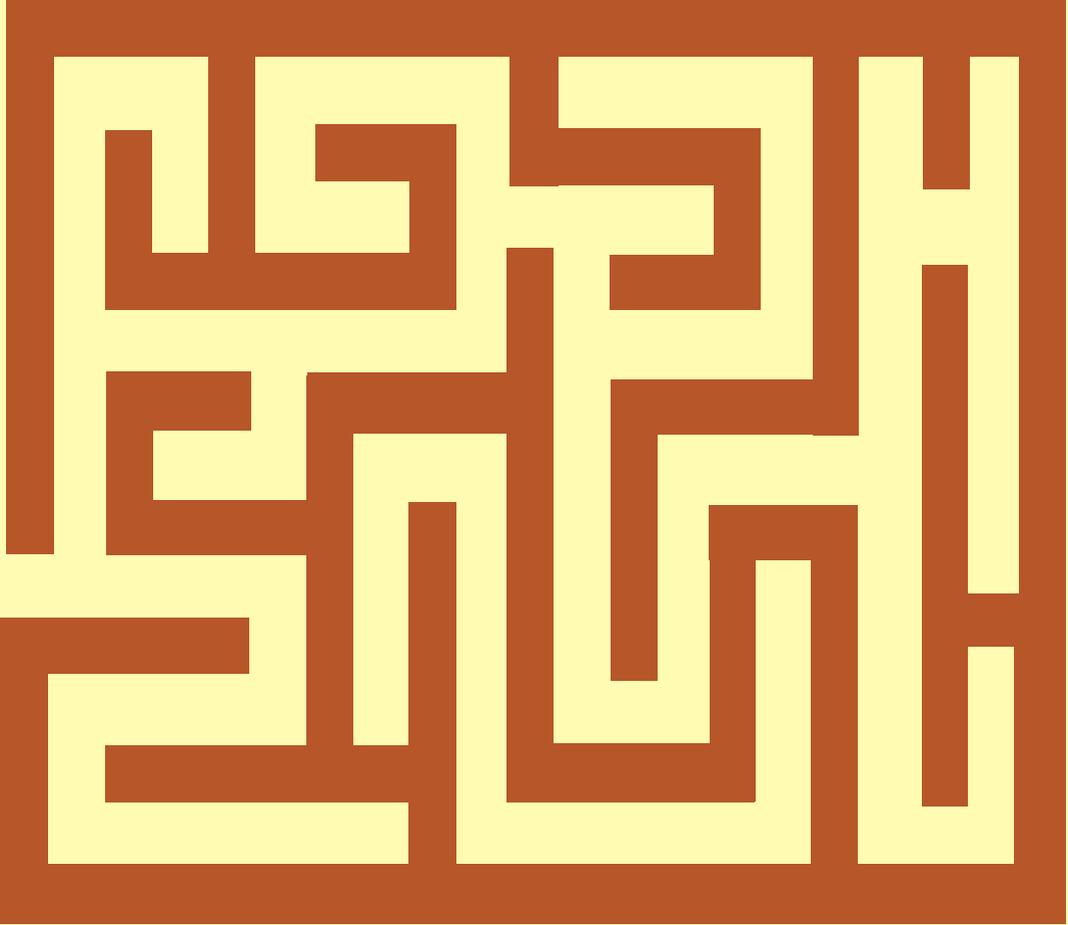


Constitution Making



Power Dynamics, Intrigues & Struggles
Kenyan Women Reflect

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Foreword



The initiative for a new constitutional dispensation has been a long and arduous journey in Kenya's history, with few milestones and a myriad challenges. Since Independence, there have been many attempts aimed at constitutional review. Successive administrations have and continue to dangle the prospects of a new Constitution as a political carrot mainly used during the election period to garner favourable votes.

The issue of constitutional review has been a political high card, and this has placed the process largely in the purview of the political class to the exclusion of other groups of interests, particularly women. It was not until the National Constitutional Conference (popularly known as Bomas) was constituted, that women inter-alia other interest groups, were afforded the space to participate in the review process.

This documentation of the voices of women Delegates presents a general overview of the gains and losses made by women during the Constitution Review Conference. It highlights the participation of women in the decision-making structures and brings out valuable lessons on their perceptions, attitudes and experiences during their engagement at Bomas.

This publication will serve as a lobbying tool for the passage of legislation on Affirmative Action by first and foremost bringing women nationally on board the constitutional review process. At the same time the strategy will engage with Parliamentarians to sensitise them on the critical importance of passing legislation on Affirmative Action to increase the space for more women to meaningfully participate in decision-making processes.

A handwritten signature in black ink, appearing to read 'Judy Thongori'.

Judy Thongori
Chairperson (CREAW)



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We first and foremost thank the women Delegates who took time out to share their rich experiences of the Bomas process and without whom this publication would not have been possible. CREAW also thanks Philo Ikonya who carried out the interviews with the women Delegates and captured their divergent views and candid opinions of the review process. Pamela Mburia edited the original content, and we greatly acknowledge her professional input.

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To all of you we say thank you!

A handwritten signature in black ink, appearing to read 'Ann Njogu', written in a cursive style.

Ann Njogu
Executive Director (CREAW)

Introduction

“I should like to see the time come when women shall help to make the laws. I should like to see that whiplash, the ballot, in the hands of women. As for this city’s government, I don’t want to say much, except that it is a shame - a shame; but if I should live twenty five years longer - and there is no reason why I shouldn’t - I think I’ll see women handle the ballot. If women had the ballot today, the state of things in this town would not exist.”

The struggle for freedom has known no boundaries - whether national, racial, political, etc. As early as 1901 Mark Twain was able to recognize the transformative change in leadership that women could bring if afforded the chance to participate in governance. Over 100 years after Mark Twain’s speech the state of affairs (at least in Kenya) has not changed. Women are still being denied opportunities to participate in governance and to contribute to the development of policies that should determine their destiny.

Rarely has there been change in the status quo without substantial sacrifice being made by both the protagonists and the antagonists. The Civil Rights movement in the United States and the struggle against apartheid in South Africa are glaring examples of the lengths to which negative forces will go to safeguard the status quo. In Kenya, our nation’s founding fathers had to sacrifice life and limb to achieve that elusive yet so critical reality called change.

Advancement of women in Kenya is undermined by the fact that women are more often than not unable to meaningfully engage in decision-making processes which would enable them to enjoy and exercise their fundamental rights. Kenya also lacks the legal infrastructure which would create an environment for meaningful participation of women in decision-making processes.

The key towards safeguarding the right of women to meaningfully participate in decision-making processes lies with constitutional review and amendment to incorporate principles such as Affirmative Action. However, constitutional review has been an ill fated process that has dogged Kenya since Independence. To date, Kenya’s Constitution does not uphold fundamental rights and freedoms of citizens nor does it check autocratic systems of governance that plunder the nation’s resources and operate outside the law with impunity.

Throughout the process of constitution-making and review in Kenya, history has shown that participation of women in these initiatives has been minimal at best. From the Lancaster House Conference in 1963, which gave birth to the Constitution that was largely negotiated by Joseph Thomas Mboya, Jaramogi Oginga Odinga, Martin Shikuku, Joseph Ngala and Pricilla Abwao (the only woman) through to the repeal of Section 2A allowing for multi-party democracy and finally to Bomas - the most comprehensive and ostensibly representative review process - the voice and role of women in these important processes has not featured with much prominence, if at all.

Although the constitutional review process at Bomas included women from diverse interests there emerged challenges which affected the scope of their contribution to the process. Ultimately, what carried through was the will of the political class who wrestled the process away from 'Wanjiku', resulting in the production of the infamous 'Wako' Draft which was eventually rejected by Kenyans during the 2005 referendum.

Justification

With the eminent collapse of the Bomas constitutional review process, the recent stalemate on the constitutional review process from all actors - whether government or civil society, and the never-ending political theatrics that centre on the Constitution, it is important for women now more than ever to take stock of gains and losses made, challenges faced and lessons learnt.

Various groups such as the media, civil society, Government and the private sector have produced numerous accounts of the constitutional review process. However, none has focused on the experiences of women and the role they played in pushing the process forward, especially at Bomas.

Critical aspects that need to be looked at include:

- How fair were the processes in terms of meaningful participation of women?
- What challenges did women face while engaging with these processes and what pitfalls can be identified and interrogated so that the same are not repeated in future?
- What gains were made for women in terms of expanding the space for their inclusion in such processes?
- Did the Bomas experience set a precedent for inclusiveness?

It is also important to measure how gender-sensitive the process was in accommodating women within the various dynamics that were integral to the process - from participation in the various committees to interaction with fellow delegates.

Overall Objective

The overall objective of the documentation was therefore to capture the voices of women who were involved in the constitutional review process at Bomas and produce an advocacy tool for awareness creation on the gains and losses made by women. The lessons will be useful in informing the engagement and participation of women in future constitution-making processes.

Methodology

Design

The documentation comprised a desk review and basic exploratory study involving the appraisal of the Bomas process from the perspectives of 18 women who participated in the constitutional review process.

Sampling

The appraisal adopted a convenient sampling procedure targeting women who represented diverse interests during the review process. Using the official list of delegates, CREAM identified 18 women who were involved in the review process at various levels as Delegates, Committee Chairs or Commissioners.

Data Collection Methods

Data was collected using in-depth interviews with all the 18 women selected for the study. There was a detailed interview guide and a standard questionnaire to gather basic demographic profile of respondents.

The in-depth guide included specific themes that had to be explored. The themes included the following:

- Women and their participation in the decision-making processes at Bomas;
- Perceptions and attitudes about women during engagement in the review process;
- Achievements and losses for women in terms of their participation within the process.

The Voices of Women in the Constitutional Process

The exclusion of women from decision making processes, most notably those pertaining to constitutional review - whether by circumstance or by design - has served to marginalize a critical constituency whose voice can no longer be ignored as women form more than 52% of the entire population of Kenya.

Ann Njogu a human rights defender reflects on the history of the constitutional process:

“Looking back on the aftermath of the Constitution born out of the Lancaster House Conference in 1963, I would say there was increasing but sporadic pressure for constitutional change during the late 70’s and early 80’s from various actors, most notably Kenneth Matiba and Charles Rubia. It is of note that lack of a structured cohesive pressure mechanism comprising diverse stakeholders ensured that critical constituents - the women- were not visible in these processes.

I feel one of the reasons why the process is taking as long as it has is the fact that Kenyans always wait for a constitutional moment to happen instead of creating one for themselves. One such constitutional opportunity presented itself during the 1992 elections resulting in the repeal of Section 2A and the introduction of multi-party politics.

It would be fair to say that the 1992 post election period saw the re-grouping of the opposition joined by political, professional, development and religious organizations to accelerate the pressure for comprehensive constitutional reforms. This, to some extent, opened up paths for more women to take part in the process - although not as a formidable voice on their own.”

The post 1992 election period, running up to the 1997 General Elections, saw mounting pressure on the Moi regime from various actors such as the civil society, churches and parliamentary parties. This culminated in the inter-party negotiations within the framework of the Inter-Party Parliamentary Group (IPPG) in August 1997. The IPPG agreed on a number of reforms to be implemented before the General Elections, resulting in the enactment of the Constitution of Kenya Review Act.

The subsequent rejection of the Act by stakeholders saw another opportunity for women to participate in the process through the formation of the Sulumeti Committee comprising 12 persons nominated by political parties, civil society, women and religious organisations. Chaired by Bishop Philip Sulumeti, the Committee's task was to hold consultative meetings with the 19 stakeholders. This resulted in the amendment of the 1997 Review Act was to specifically include, inter-alia, the National Constitutional Conference more popularly known as Bomas.

General Overview of the National Constitutional Conference

The National Constitutional Conference was established by the Constitution of Kenya Review Act for the purposes of debating, amending and adopting the Draft Constitution. Its 629 delegates were constituted as follows:

- 223 members of the National Assembly;
- 210 representatives of districts elected by County Councils;
- 29 members of the Constitution of Kenya Review Commission (CKRC), as non-voting members;
- 42 persons representing political parties; and
- 125 representatives of religious, professional, women's groups, trade unions and NGOs (sec. 27(2)) and other interest groups chosen in accordance with regulations made by the CKRC.

In the composition of the Constitutional Constituency Committees, the need to ensure broad representation of all peoples in the Constituency including marginalised groups was taken into account. As a principle, at least one third of the members of the Committee had to be women.

“The Constitutional Conference was held at The Bomas of Kenya in Nairobi. I would describe Bomas as a melting point for all of us until we politicised it. Prior to that, we had perceived ourselves equal as Kenyan. Bomas was the place where mama mboga could argue with an MP and also the place where people tried to deal with rogue parliamentarians but they did not have a say. Obstacles were set up each time.” – Hon Millie Odhiambo, Nominated MP

Very much in the same manner in which a Constituency Assembly is representative, the National Constitutional Conference attempted as much as possible to accommodate delegates representing diverse interests.

“Peoples of Kenya I had never heard of: the Wata, Ogiek, El Sanguin, Chemwen were there with us. Seeing them and trying to understand what it means to be from a small community and how one is let down in this country, not even counted as part of the nation and missing in representation everywhere including in civil service was an amazing discovery for me.” - Rose Lukalo, Kenya Community Media.

Selection of Delegates

In order for the National Constitution Conference to operate as a truly representative structure, a selection method was required to ensure that delegates were chosen according to a set criteria envisioned in the Review Act as a method to vet their representative capacity .

“The delegates were to be chosen in a manner that was formalised in an Act of Parliament. We needed institutions and the only ones in place were the local Councils and Municipalities. There was a variety - the district delegates and then special interest people, there were workers, and others in the special interest categories selected. I do not know if all sectors followed the same criteria but they all selected and presented their delegates.

Very basic criteria were followed such as at least the requirement of Form IV education so that we could follow the discussions. But when different interest groups were given a chance they sent their own people and most of the time they did not follow the criteria.”
- Salome Muigai, Commissioner and Rapporteur, Bill of Rights

In practice, however, the criteria for selection as a delegate to the National Constitutional Conference seemed to have differed depending on the geographical location and the interest the would-be delegate purported to represent.

“There was a call for applications from the NGO sector. This was advertised in the local newspapers. In my case I put in an application and I was interviewed by a panel and selected. That process was free and fair. I did not scrutinise the process thoroughly at the time but later I found people of integrity and not associated with scandals from this sector.

When I met with all the other delegates, I found out that all were selected following certain criteria. I do not know if the criterion was right, but there was one.” - Rose Lukalo

Experience in particular fields and recognition of an individual within the Constituency based on community work emerged as an influencing factor in the selection of some Delegates.

“I was representing the women sector in Nairobi district. In my opinion I was selected because of my participation prior to Bomas. Most of the people who wanted to represent women had not been part of the local meetings, which I was regularly engaged in.” - Nancy Abisai Nancy

Although the criteria of selecting Delegates was being used throughout the nation ostensibly to obtain national representation, it is curious to note that there were instances where acute lack of awareness on the process was evident, especially at the community level.

“I was in every Constituency in Nairobi for the hearings, which were held before the National Conference at Bomas. I mobilised women and I went to many places to share with them what agenda might be important for women at Bomas. I knew nothing about the legal or important nature of the Conference. I was meeting different women to discuss governance matters under the Engendering the Political Process programme sponsored by donors, and I believed in the women’s cause. We had made good networks in the Constituencies. I had also worked with Maendeleo ya Wanawake and it helped me get exposure.

One of the coordinators at the Constitution of Kenya Review Commission called my attention to the fact that I could also serve as a Delegate. I had up to this point been taking forms to other people to apply as Delegates. I had actually tried unsuccessfully to lobby four women lawyers to be part of the process. They were people who had been involved in public life, but even as I looked for people who would be in the process they were not interested. But at that time, I must say, it might have looked to them like a small community affair.

As far as district Delegates were concerned, I had been told people were being selected by elected local Councillors. I participated in an interview done by the Councillors in which one explained why he/she should be a Delegate to the Conference. We went before all the Nairobi District Councillors, the Mayor and the Deputy Mayor. Some of the women Councillors were interested in going to the Conference and I nearly gave up considering that they were part of the decision makers. I made my case and I was selected.

I did not spend money to buy anyone or do any favour to get it. Later, I was to learn some Delegates bought their way through .” - Nancy Abisai Nancy

At times, the strategic positioning of a delegate and access to information played a vital role in providing a vantage point for selection as a Delegate.

“My association with the civil society for a long time was relevant. I was actually tipped to apply by the Kenya Community Media Network. They told me that a media person was needed and asked me to apply. My knowledge and history of human rights, the fact that I knew where we were and what needs to be done and a broad knowledge of development issues and that I had the sector’s interest at heart helped.” - Rose Lukalo

The ability to access information on the selection process put the recipient at an advantage over constituents who may not have been in a position to access the information as easily.

The selection of Delegates varied in terms of the interests and geographical scope of the representation. Selection of District Delegates was a rigorous process to ensure that competent Delegates were chosen to represent their Constituencies. However, this was not necessarily the case everywhere.

“The criteria depended on specific sectors and I think even different districts did different things. Every district was advised to include a woman in its three representatives and to look to young people with an ordinary level of education. I think I remember being utterly disappointed with some district delegates, and I can point out the ones from Kisii area. I raised the issue with a civil society leader from the area and was informed that the poor selection followed the dynamics of the politics of the area as influenced by a prominent politician from there.” - Atsango Chesoni

It would then appear that there were gaps in the vetting processes which if functional would have been instrumental in arresting the dilution of capacities by prohibiting participation of individuals who were unable to articulate concerns of their constituents.

“I do not think we can speak of the process as free and fair because it was not an election but a selection. I saw political activists who stood a greater advantage of getting in as Delegates because they were the women in the limelight. Some people definitely came in because of some connection, personal or political party level and then once they applied, they qualified. I also saw women who had vied for political office. Although there were basic criteria, I still saw some people at Bomas who looked like they had absolutely no idea about what was going on. Some had a grasp on issues but the language was a problem. They participated, presenting issues of concern but not legal issues. They spoke about distribution of resources and cultural issues. There were people who looked like they knew nothing about what was going on. There was a woman I sat with and I never heard her speak even once, that was in the Committee of the Bill of Rights. Some who spoke, like one man I remember, were so irrelevant that it was obvious they were challenged to engage.” - Millie Odhiambo

“Very basic criteria were followed, such as the requirement of at least Form IV education so that we could all follow the discussions. But when different interest groups were given a chance they sent their own people and a lot of times they did not follow the criteria.” - Salome Muigai

Interrogating Delegates' Understanding of and Commitment to the Review Process

Aside from the selection criteria outlined in the Act there did not seem to be a mechanism to validate a Delegate's true understanding of or commitment and contribution to the process.

“Some Delegates sat and never talked, so I felt they did not understand the process and the content. We had been taken through the process and some people did not understand it still. They appeared like they had just been brought to take part in the Conference. I found that intriguing.” - Roslinda Simiyu, Trade Unionist

With only a limited number of Delegates being chosen, there curiously began to emerge a competitive environment motivated by what would seem to be factors other than passion and commitment to the process.

“When the CKRC was being set up, and in terms of seeking Commissioners, 6000\$ a month became very attractive, so people who had previously not been interested in the reform process became very interested and some of us, who were dedicated to the process, became a problem. I was told that no one reached me at that stage because I was not interested in anything to do with the Constitution. Consequently I was not nominated at that point because false stories had apparently gone around that I was not in the country then!

After this process I made up my mind that I could lobby effectively with progressive women in order to influence a women's rights agenda. Having been the first casualty, I had all the vigour for this. When it came to choosing Delegates and since people knew of my earlier work and interest in the constitutional review process, I was invited through a telephone call from a woman friend. It is because she was making the list of categories of representation that she thought of me. She had twenty slots left and she was selecting people to make the twenty. I was asked to choose between helping her choose Delegates and being one, and I chose to be one of them.”(Atsango Chesoni)

With hardly any system in place to monitor Delegates playing truant, the meaningful participation of some of them could not be achieved. Accountability measures were minimal and allowances could not be withheld even when a Delegate did not attend the sessions. This glaring gap may perhaps have fuelled truancy amongst Delegates.

“I was intrigued by MPs coming to collect allowances without attending the sessions at Bomas. When people asked for more money, I had a problem with that. I came from far in North Eastern Province and all was all right with me since our food and accommodation were paid for and we had a fair allowance. I thought that was all we needed but some people, it would appear, did not regard that as a fair allowance.” - Sophia Abdi Noor, Nominated MP

Commitment to the process was difficult to secure without an accountability mechanism in place. The lack of genuineness on the part of some Delegates to actively participate in the process may have compromised the technical integrity of the process and unknowingly polarized Delegates.

“Some Members of Parliament who hardly attended meetings would show up on Friday to collect their full allowances. There was nothing the paying officers could do to stop them. And this included some well-known politicians. This was embarrassing. The rest of the delegates who had left their families to participate in the process full time were not amused.” - Prof Ruth Oniang’o, Nominated MP in the 9th Parliament

Understanding the nature of divergent interests within the women’s sector at Bomas

As the review process made progress, curious administrative, technical, political and socio-cultural dynamics began to develop. It would have been desirable for women Delegates at Bomas to galvanise their efforts for the advancement of the women’s agenda in the process. Unfortunately, this was an idealistic notion which, for the most part, did not work to their advantage.

“The election of the second Chair to the Conference had to be done. One woman leader pointed out that she wanted a specific person to take the position. She was not supported as the majority of participants felt that Nairobi women wanted to get every post on behalf of other women. They chose someone from Malindi, a woman magistrate. What struck me about this division was that the women of Nairobi refused to listen to what the other women were saying - that there was a rift between us. They were stating, through this complaint, that we were different even when we wanted to speak as women. Many women turned their backs on the process so that instead of agreeing that we had the same issues and working around them, we allowed a physical reality to separate us” - Rose Lukalo

There were numerous points of friction among the women just as among other Delegates whenever debates about substantive issues took place. The women could have used this opportunity to empower themselves by understanding power dynamics better so as to avoid getting pulled into processes that were polarising them. This, in reality, added little value to the women’s agenda at Bomas and only served to splinter the women sector during the process.

“The greatest challenge for me at Bomas was the ability to be accommodative as all tended to split. Even the woman constituency was almost damagingly split as women were spoken of during the Mixed Member Proportional Representation discussion - elite women from Nairobi and those from the rural areas. Accommodating one another and taking other people’s interests to the fore seemed to be an issue, with people not knowing whom to trust. The delegates were not seeing themselves as beneficiaries of positions taken and there was lack of tolerance for other opinions as people took hardliner positions. They

would not agree. I got to learn that religious differences can run very deep. The issues of the Kadhi Court divided us sharply and I felt that it was not possible for us, spiritual as we meant to be, to work together. High levels of intolerance were observed and this affected the process negatively. A palpable hindrance stood between us.” - Tabitha Mwaniki, Delegate representing Seventh Day Adventist Church

“Despite the acrimony we did great work for the women and although people refused to heal the rifts, they will acknowledge it in time. Women decided to split. We were not listening to each other’s needs. The Nairobi women did not listen because they are used to seeing themselves in great numbers in places. Positions, the rural women said, always go to Nairobi women. At that point, they could not see themselves as the Luyha woman from Nairobi, the Pokot woman from the city who would also try to get the same opportunities.” - Rose Lukalo.

Differences in positions and interests are not necessarily indicative of underhand politics at work and many times can add value to a process in terms of looking at issues objectively rather than subjectively. However, within the Bomas process, points of divergence were numerous. For the women, these were at the worst of times based on rural/urban divide and at the best of times along political lines. This then begs the question: “Could the fact that a female Delegate disagreed - substantively or otherwise - on women’s participation in decision-making processes be indicative of lack of mobilisation of collective agreement on this fundamental issue or signal the sacrifice of the women’s agenda at the altar of narrow-minded politics and personal gain?”

“I overheard one powerful woman Minister then say with fury that, “the first people who need to be recalled are these Delegates!” She was also furious about the possibility of a Bicameral House which people had already voted for. That was going to be in favour of more women in Parliament. Of it she said, “...that will never happen!”

With the ever-widening divide between women threatening to appear any time during the process, it was evident that a solution needed to be reached expediently to curtail the springing up of detracting side shows that would ultimately stall the process. Although this was not a blanket approach applied throughout the women’s sector, there were individual efforts to reign in negative divergent forces and steer the discussions back on course

“Once Bomas was convened, the class division was quite evident. The issue of the Nairobi woman vs. the woman from the village came up. I could see this was a problem within the women community. As Commissioners, we intervened and the picking of a woman as the Vice Chair of the Conference helped to ease the tension.” - Abida Ali Aroni, Commissioner, Vice-Chair and final months’ Chair, CKRC.

It is important for women to note that the divisions that often emerged were not always a result of a visible hand working to divide them but rather, strong forces against a group socialised to fight itself and to look down on its own achievements or possibilities of solidarity.

Hardships, Gender Specific Abuse and Harassment

As a whole, Bomas was not a very friendly environment. There were suspicions, enmities and other poor relationships at work. It was a crossroad for socio-political dealings.

The versatile dynamics of the Bomas process manifested themselves in different ways. Although there were positive steps made in the substantive process, there was a heavy price that was paid by Delegates - physically and emotionally. Much of the toll taken out on women Delegates could be attributed to generic issues such as security, physical separation from their families and the state of working and living conditions during the process. However, there also emerged a darker side to the challenges faced by women during the review period at Bomas. Harassment (sexual or otherwise) towards women was evident and was cross cutting, irrespective of their background and societal status.

“One morning, I walked into Bomas a little late. I sat with my committee extremely motivated and ready to do even more work like the previous day, when a clique of human rights activists and I had managed to secure numerous progressive clauses for the women and marginalized groups. Little did I know that because of our enthusiasm, we had been marked and one way of silencing us was through intimidation. A fellow delegate walked up to me and commented that the short skirt I had worn the previous day was an issue that had been discussed at length by some delegates in my committee that morning. Further, that a resolution had been passed, mandating a female delegate, who was also a nun, to warn me against provocative dressing which had allegedly distracted male delegates. This was all geared to embarrass me and shut me up. That was sexual harassment aimed at toning-down my participation.”

“I could not understand how my dress could interfere with constitutional clauses which we were discussing, and even manage to gain priority over all the more important clause beneficial to the nation. At that moment, I understood what it must feel like for a woman to be undressed by the public and gang-raped or to use more common parlance, suffer mob justice. I however used the opportunity to introduce a clause that can give women the freedom of expression, including their choice of dress. How I wish that draft had become law!” - Ann Njogu, Delegate, Association of Professional Societies of East Africa (APSEA).

The vulnerability and nature of harassment of women during the Bomas process could be attributed to different factors, depending on the woman or “class” of woman who was subjected to it. Due to the nature of the review process which drew participation of women and men from across Kenya, exposure to urban culture also seemed to increase rural women’s vulnerability to harassment.

“Some women, we used to hear, got confused - even highly educated ones. Men fought at their doors in the hotels. These women got mixed up by city life. We used to tell the rural men to learn from these women and to take their wives out to the cities more often. The men used to watch this and blame the women.” - Nancy Lung’ahi, District Delegate

With no visible structures to protect women from harassment, it left many women vulnerable to various other abuses including physical assault. The atmosphere of mistrust and fear generated within the process also bore heavily on the support women gave to other women who had been subjected to harassment and assault. In some cases such as that of Commissioner Salome Muigai, women who witnessed the physical assault on her were reluctant to help her seek redress.

“I was physically beaten by a male colleague - a Commissioner - because I was not toeing the political line he wanted us to follow. What pains me is that fellow women who witnessed this assault did nothing to help me redress the same.” - Salome Muigai

Harassment towards women was not only projected from male Delegates but was also in verbal form from other women through gender-insensitive remarks.

“There was verbal harassment from women colleagues. I will quote one woman who was a Commissioner with us saying: “We are very happy to get five positions as women but we have lost one seat to the disabled”. Suddenly, I was no longer a gender expert, and the knowledge I had brought along was no longer valuable. Other times, I would hear a woman professor who was also an MP say: “We are very happy with our five Commissioners; we have Phoebe Asiyo, Nancy, Prof Wanjiku Kabira, Abida Ali, Kavetsa and Salome (myself) who is our disabled person”. What was greater harassment was hearing a person who is a professor ignore my gender knowledge and other expertise and I was suddenly just a Commissioner for disability.” - Salome Muigai

“There was tension and worries. At personal risk, people in the women’s movement labelled me. I sensed, heard and felt betrayal especially by middle class people in the human rights movement. I could name names of people whom we thought fought for human rights and who were now contemptuous of such rights. They understood what they were doing: they wanted to play on the easier side of things. I found them also contemptuous of the grassroots delegates. This worried me profoundly about our country. What were the real motives that people had? That politicians behaved the way they did was not too surprising, but human rights activists too? These were people whom one thought understood the struggle. That was disappointing.” - Atsango Chesoni

The levels of intimidation towards women in the process would seem to range from physical assault and harassment to more sinister methods such as the alleged tapping of Delegates’ phones.

“I can’t tell who did it but a very oppressive environment of fear and mistrust was created. A lot of things created uncertainty and fear of the process. That is when we began to understand that there were other forces at work, that we were being followed. That our phones were being tapped!” - Rose Lukalo

“Our phone numbers were made public as we were serving the public, and this resulted in strangers calling me to complain, while others would call us names. My biggest challenge was ignorance on the part of those who thought Bomas was a big joke.” - Nancy Lung’ahi, District Delegate

Even at the best of times the process itself was intimidating, depending on variables such as the Committee one was in, social and political dynamics and the general ability and freedom to articulate issues deliberated in the Committee. It was not uncommon to find certain interest groups in a Committee usurping and running with the processes of that Committee to the exclusion of others.

“The legal fraternity formed some kind of clique and captured the process, claiming that it was a process mainly for lawyers. They behaved as if they were the only ones who knew what should happen. This disempowered the process. Everyone knows how we want to live together even if we might not know the legal language for it.” - Rose Lukalo

Women encountered specific challenges which were peculiar to them as mothers and spouses. The working hours and commitment to the process demanded that a lot of time and energy was put into the various mechanisms or deliberations that were necessary to substantively move the constitutional review forward.

“I am a mother of five, and including the number of children I look after, the number comes to 12. One tries as a woman to be in public life and be a good mother. I tried. When I got to the house, I could not read my documents in preparation for the following day because my husband wanted me to do this and that. In the evening he wanted to pick me up early. When I got busy he would be unhappy. I did not have all my freedom. It was good to have time to prepare but I would feel I had no such luxury as preparation time.” - Roslinda Simuyu

Unlike most men, women more often than not have to juggle professional careers with respective commitments at home, which largely entail running of the household and general wellbeing of the entire family. At Bomas, it was no different as women were required as Delegates to expend considerable energy and time to the process, sometimes at the expense of their wider commitments to their families.

“I owned a salon and a boutique. I lost both of them because of Bomas! When the Conference ended I had to close down. There was this fuss about us receiving 5,000 shillings per week. We lost much more!” - Hellen Mungathia, Delegate, Religious Sector

“I gave up my own work and committed myself fully to Bomas. I work on consultancy basis and that went out. Being in the Steering Committee on Media, I had to be there early. I used to drop the kids to school. Now I could not as I wanted to be at Bomas at 7.30am. This work affected my earnings negatively, my interaction with the kids too and family and friends. Bomas took over my life because over the weekends I would take work home - the spill-over from the week. We became very political in the family and spent all weekends trying to figure out what was happening. Initially I did not mind but in the end I began to resent it because here we were giving our all and then it was interfered with politically. I began to resent it and to ask myself: ‘Is it really worth it?’ ‘Why am I doing this?’ There was absolute frustration.” - Rose Lukalo

“It consumed a lot of my time. I had to pick children up late. I would come early to attend Convener meetings and they would run late. We would run late into the night with my little girl. I am a widow and so there was no one to worry about at home. I have never been so exhausted in my entire life. I used to stay sometimes in the evenings for the Steering Committee meetings. And sometimes some training sessions for Conveners ended as late as 6 or 7pm. It was hard.” - Caroline Ng’ang’a, Delegate, Labour Party of Kenya

Bastions of power behind the scenes

All the deliberations concerning substantive issues within the review process took place within structures set up for this purposes i.e. the Committees. However, from time to time, caucuses would be convened for lobbying support to push particular issues to go through deliberations. At the same time, it would appear that aside from these officially sanctioned lobby meetings, a host of subsequent behind-the-scenes caucuses were frequently convened by the various interest groups and power brokers.

“Legitimate meetings were advertised and I would attend them. I attended the regional caucuses, women’s caucuses and those were fine. But we just kept on hearing things were happening behind the scenes. We heard things such as that the Administration Police entertained different people, at venues of meetings, that money was slipped under doors of Delegates so that they found it in their rooms and it was to sway their opinion on an issue. People would come in to find money. Once a certain Minister came to a Steering Committee and said that now he would like to stay in a hotel and get to know Delegates better. To do this, he had to go through the CKRC to get money. This lent credence to the idea that there was a subterranean current under the obvious proceedings at Bomas.” - Rose Lukalo

“I remember one morning, when I got to Bomas and found my fellow colleagues huddled in some group discussing the happenings of the previous evening. Apparently, the Central Kenya delegates had been invited to a caucus by some powerful Cabinet Ministers from the said province. Though i am from central, I could not be mobilised. I later learnt that delegates who were seen as “problems” or non-conformist, were not invited to

such caucus. But, what struck me most was that the agenda of the meeting had been for purposes of strategizing on selfish interests of the province and supposedly for their benefit! My dismay was even more when I understood that a few power brokers could, under the pretext of pushing for communal interests, hood-wink an entire delegation into pushing their narrow and selfish agenda against the very people the Bomas process was supposedly seeking to secure; and worse, for such delegates to be so hood-winked into an ethnic agenda.

Such meetings were not uncommon and were widespread amongst all communities. They revolved around class interests. The most shocking of them all was the one held after the Bishop Sulumeti committee had met with all critical stakeholders, way into the night, and had reached some consensus on the issues that threatened to cripple the process. The following morning, there was an air of jubilation, of relief and of anticipation at Bomas for the deal that was set for announcement at plenary. But, when we began the process that day, Bishop Sulumeti was appalled when the same stakeholders denounced the deal and we were back to the deadlock! Of course another meeting had been held way into the morning and after the Sulumeti one and at which, a reversal of the deal had been made!”
- Ann Njogu, Delegate

Media Coverage of the Bomas process from the perspective of women delegates

The media in Kenya, as in anywhere in the world, play a major role in dissemination of information. At the same time, they are instrumental in forming the public perception on issues reported. This largely depends on the manner in which the issue is captured, understood and put out by the media.

It would seem that although the media covered all aspects of Bomas, they seemed to concentrate more on non issues, which served to throw public perception of the process into disarray.

“The media got very interested in salaries of the Commissioners and the allowances. They were fixated on the Nissan Patrol cars that staff from the Commission used to drive all around the country to get the views of the people. The media should have concentrated more seriously on the role of educating the public. However, they were more interested in selling headlines.” - Nancy Abisai Lung’ahi

One can understand the ordinary Kenyan’s reaction to this matter and perhaps even the media’s. A disreputable 9th Parliament had raised the salaries of MPs to the third highest in the world in a poor country, and here was the CKRC who were also taking home a sizeable allowance.

“The media kept on giving a false figure to our salaries saying we earned 1.2 million shillings while in reality we earned Ksh.300,000. That is not the money I used to make in

my private practice. I made more. At first I felt very hurt until I learnt there is something about money that makes some people stop reasoning. Professors had left teaching jobs, they had taken up a precarious and dangerous job at a reasonable salary and they needed to be paid well. The allowance given to every Delegate was good. Where did the complaints come from?

Newspapers failed to give constitutional issues the weight they required and they gave prominence to gravy train stories. The media fell for theatrics. They harangued us for the money. They bashed us for the money but we also knew about constitutional issues. We had to visit 210 Constituencies. It is not the type of cars that we had that should have mattered so much but that is what it tragically turned into, almost overlooking the many risks we took travelling everywhere.” - Nancy Barasa, Commissioner

By and large the media focused on turning the weaker aspects of Bomas into sensational news at the expense of the process.

“The media could have played a critical role in seeking accountability from various duty bearers in the whole process. However, the media was happy playing a peripheral role of focusing on non-issues as opposed to real core issues! Where was the patriotic media that would have put self interest aside and instead make a deliberate and purposeful attempt at using its most powerful medium to expose the retrogressive hegemonic forces, the forces that had for years resisted the writing of a New Constitution? The forces that were anti-people? A media that would have set national agendas of substance as opposed to setting agendas that threw scorn into the whole process?” Ann Njogu, delegate.

“When history is written, our media will have to justify where they put their emphasis. It was very easy when there was something critical for someone to set the media on salaries, play the bait and the media would take it. In the meantime, people were strategising for their own gains. The media kept on getting derailed. I do not mind them bringing something to the people’s attention once, but to keep going back to reporting about the big cars was lack of responsibility.” Salome Muigai

“I did not want the allowance increased...in this country we have issues about money and payments. We had had the MPs hiking their salaries, thereafter the whole CKRC Commissioners’ saga on salaries. This created the idea that there is a lot of money to be tapped in the country. The media also over-emphasised this. It was one of their side shows. The other was to keep on portraying the people at Bomas as illiterate, without bothering to count the senior professionals who were there. This was upsetting. Some District Delegates were doctors and lawyers.” - Rose Lukalo.

The beginning of the end

Many questions can be asked about the effectiveness of the Bomas process. Some may argue that constitution-making, which ideally should be a people-driven process, is too technical a task to be entrusted to the masses. One mode of constitution-making would be to convene a National Constitutional Conference representing as much as possible all interests such as Bomas purported to be. The Bomas process, however, did not envision political coups that were hatched to take over the review. These included the amendment to CAP 3A - The Constitution of Kenya Review Act and politicians abandoning the process. It was ill-equipped to manage the systematic breakdown of the process, which eventually saw politicians take the review out of the hands of the people and into Parliament. The process was never intended for deliberation by parliamentarians and the biggest coup pulled off was to ensure that the document produced by Bomas would be vetted and distorted in Parliament before being presented to Kenyans in a referendum.

“The lack of political will to allow the process to continue freely, the environment and the entire climate around the country were not conducive. This is a very political process and once we saw that reality, we went and did a 360 degrees turn and we were exactly back to the place where Moi was before - no room for change. I doubt that any sitting Government can make changes which will reduce its power.” - Rose Lukalo

“For me, the biggest fraud and coup that took place in Bomas was when the Attorney General came to receive the final draft as was stipulated under the Review Act after the process was over and to enable him take it for publishing and thereafter bring it back to parliament for total adoption or whole rejection. There was so much expectation that he would now ensure that the newborn baby birthed at Bomas, was sheltered from the hegemonic dominant and divisive forces: only for him to announce to all and sundry that he had received the draft, not as the Attorney General of the Republic of Kenya but as a delegate, Right there and then, I knew that our draft would never see the light of day, and that he too was part of those Hegemonic dominant forces. I felt betrayed, then angry and frustrated! Why should he, in heavens name, imagine that out of all the delegates that were in the room, he was more special as to have been given the onerous task of receiving the draft other than for the fact that he was the Attorney General of the Republic of Kenya with obligations under the Review Act. From then on, was downhill for our new born baby! - The Bomas Draft” Ann Njogu, delegate.

Further, a process like this would only be successful if there was the critical ingredient to an important process like this! Political will by all but especially, the President.

One of the greatest threats to the entire process was the emergence of individual versus national interests. This problem was underscored by allegations that would emerge, pointing to bribery of delegates and politicians who chose to abandon the process rather than use dialogue to resolve areas of divergence.

“It was such a historical opportunity but we had no business squandering it. History does not give you too many opportunities. Bomas stalled because Kenyans, at a certain time, stopped being Kenyans and became individuals. The way of thinking became more of ‘as long as I’m looking for what I will gain, even if we lose it, I do not care’. We had come together as Kenyans and here was a Constitution we were making together. We started looking at other interests vs. other people, we lost the Kenyanness. Whether that was shown I do not know, but we lost our capacity to create a Constitution. We win or lose together - there are no winners and losers. For some reason we thought some could lose and others could win.” - Salome Muigai

At Bomas, there were many competing interests who failed to ascribe to principles of nationalism. The lack of consensus-building and poor management of these competing interests seems to have contributed to the overall stalling of the process.

“I learnt many lessons from the Bomas process. Key among them was that for politicians, personal interests come before anything else. The interests of the country come second. Bomas failed because our leaders were pursuing selfish and personal interests. The question that was in Bomas was a political question and mainly the sharing of Executive power. I also learnt we would have to listen to the politicians and that you cannot take their words at face value. Another lesson was that you cannot wish away the political questions. We have not done what was supposed to be done there; the task is still facing us, we are still in a political process. A group of delegates tried to run away from the reality. The downfall of the review process is the fact that we did not address the question of power sharing. The other thing that was quite obvious is that we were unable to build consensus. The land issue was not exhausted at Bomas. We dealt with the issue of devolution of power and within it, and the issue of resource allocation. We addressed the inequalities that exist as a result of bad management of the country’s resources but we did not manage to build consensus.” - Abida Ali Aroni

Conclusion

The aftermath of the constitutional review process was the creation of a series of review processes, most notably leading to the Naivasha Accord, the Kilifi Draft and finally the Wako Draft which was presented to Kenyans at the December 2005 referendum and overwhelmingly rejected.

There was renewed energy to jump-start the review process after the referendum. A number of initiatives emerged, of which perhaps the Multi-sectoral Forum made the most headway. However, it was also dogged by a myriad of challenges which once again pitted national interests against individual or political ones.

While looking at the various drafts produced during the review process, the Multi-sectoral Forum attempted to steer the review back on track through consensus-building to enable harmonisation of the drafts produced.

The subsequent breakdown of the Multi-sectoral Forum witnessed Kenyans heading into the 2007 General Elections with a flawed Constitution, the results of which were the 2008 post-election conflicts.

With hindsight, many of the emerging issues surrounding the post election conflict would have been arrested if the Bomas process had sailed through with the recommendations on critical issues such as land, devolution and distribution of resources.

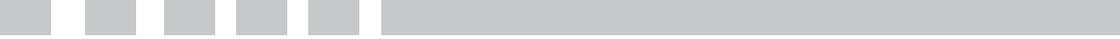
Sadly, too, is the fact that the gains made for women in the Bomas Draft have to date not been implemented and have been largely pushed to the periphery. This is obvious from the numerous failed attempts to safeguard these gains through engendering of the Political Parties Bill, The Constitutional Amendment Bill on Affirmative Action and most recently the unsuccessful attempts to engender the National Accord and Reconciliation Bill, which has since become an Act.

With the new Coalition Government barely managing to hold its own against emerging individual interests that threaten to undermine its existence, there is serious danger that the review process will remain in the periphery as Kenyans focus on efforts aimed at reconciliation and national healing.

With the status quo, Kenyans will have to do away with waiting for politicians to set the constitutional review agenda and begin to connect injustices, impunity for the rule of law and the recent post-election issues with a flawed Constitution.

It is only when Kenyans mobilize themselves as a Nation with the purpose to address constitutional review as a national priority will there be headway towards claiming our rights from duty bearers and addressing many of the injustices that we suffer as a Nation.

Affirmative Action is not an impossible ideal to actualise as much as it is improbable to achieve especially where there is no political will to realise the same. The political leadership in Kenya has always maintained that it supports women's development but has little to show for it in terms of tangible action. How then would one explain why a government 'committed to women's development' would refuse to give credence to the principle of Affirmative Action? The answer is as clear as day: because this would shake the much-coveted status quo. Women must be ready to disregard empty rhetoric from politicians who have for a long time hoodwinked them through politically-appeasing nominations. These have only served to silence women's clamour for participation in leadership and do not facilitate meaningful inclusion of women in terms of positions and numbers.





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