OKOTH THE DREAM KEEPER

EXPANDING THE BOUNDARIES OF LAW, WOMEN CONSTITUTION MAKING IN KENYA

Submitted
To
The School of Law, University of Nairobi

In Honour of Professor HWO-Okoth Ogendo

by
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1.0 Introduction

“It takes a long time to learn that courtroom is the last place in the world for learning the truth” Alice Koller (Women Know: p440)

“Truth is a theory that is constantly being disapproved only lies, it seems, go on forever” Earth Kitt (p440)

I start this paper with these two quotations from the two American writers because the constitution of Kenya review process created a site for women to create knowledge about themselves and to expand the boundaries of law among other boundaries. The process challenged even that which had been for centuries declared seen as truth by the courts, where a woman raped had to bear the burden of proof, where oppression, tradition, cultures were used to explain discrimination against women (Wambui Otieno, Kharia vs Kharia case), among other cases where courts sent women back to communities to solve problems of oppression and discrimination against them because they were based on cultural beliefs and where the lies of justification for male dominance continued to prevail. Through collective bargaining, women re-defined their place in society. They worked to show that there are aspects of history and historical “facts” are based on the male way of looking at the world. Women’s capacity to build networks and negotiate for their space became apparent as they did what had not happened before in this country. They created a movement that was steady for close to twenty years, the climax of which was the 2000-2005 period when the movement was felt in every village in this country and in all organs of the review process. They decided to tell their history, their desires, their experiences, as they know them and negotiate for truths about their experiences.

Women from the Nyanza region, a land of beautiful hills, , the land of Akoko, the daughter of chief Odero Gogni and Okoth Ogendo, to the land of the scotching sun which has been unable to conquer, the pains of Wagalla massacre, from the land of Koitalel where the land remains an ally of the women, the land of the Nandi’s, the Kipsigis, the Maasai, the Dorobos, the Ogiek and many other Kenyans who hold on to their dreams, to the land of the coast people, the land of Mekatilili, to the land of Wangari Maathai, from the land of people of the
East, the land of Ciokaraine the colonial chief who used her flapping breasts to plead with colonial powers to leave her people, the Ameru alone, the land of Rendiles, the Borana, the Akamba, the Ambere, Aembu and many other people and the women of Nairobi, the land of the people of unbwogabl e spirit of 2002 all came. So did the women from the west, the women of the land of the stones that look defiant and have weathered every storm like the weeping stones of Vihiga.

All these women came with their dreams and heart melodies to those entrusted with keeping them, “wrapped in blue-cloud-cloth” in the constitution. They had their leaders, their representatives in civil society, in the negotiating process, the constituency committees, in the commission and in harvesting the views. They had their representatives in the National constitutional conference and even in parliament. They brought their dreams and heart melodies as Langston Hughes, in his poem, *The Dream Keeper* says,

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Bring me all your dreams,
You dreamers
Bring me all of your
Heart melodies
That I may wrap them
In a blue- cloud- cloth
Away from the too- rough fingers
Of the world, (P2, Langston Hughes 1994)
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Prof Okoth Ogendo, the man from the lake, who had traversed the word presenting on issues very close to his hearts, the man of the saying, “every question has an answer: it depends” facilitated the “wrapping of the dreams” in a “blue- cloud-cloth away from the too-rough fingers of the world”. Okoth “the dream keeper” helped in wrapping women’s dreams in a “blue- cloud- cloth”, away from all those who would kill them, for Okoth was a broadminded scholar who did not confine himself to the boundaries of traditional law. He was a man who believed in the expansive nature of knowledge. His experience as a professor of law, a teacher, a poet, a researcher, an international scholar and traveler had made him a man who could name both global perspectives and bringing local relevance. His critical and philosophical approach to issues made him a thinker who saw in every man and woman the potential to learn and to contribute to knowledge and to the negotiations for co-existence. For women, it was negotiating for a double covenant. Okoth was someone who inspired trust, respect and admiration. You felt that your dreams, your secrets were safe with him. That is
why this paper honors him by reflecting on how the space for which he was a critical guardian made it possible for women to bring to the negotiation table their dreams, their secret hopes and aspirations as well as their public and private struggles.

Okoth, “the dream keeper” in his various roles, in the making of the constitution 2010 was one person who created the environment where women brought their dreams and hopes and aspirations, presented them to those who could wrap them and safeguard them. In the process women challenged the knowledge about them, knowledge that has been created by male institutions for centuries. Women named their problems and collectively started the process of creating new Knowledge about themselves, about law, expanding the boundaries of meaning so that democracy for instance no longer meant one man one vote, or first past the post, affirmative action for women and other marginalized groups become part of the definitions of “fairness” etc. Women brought new meanings to language, definitions and to governance institutions. This process driven by women influenced the outcome of the review of the highest law of the land and the making of a new one that established the 2nd republic; the Kenyan’ constitution 2010. The process in addition validated women’s experiences and dreams by getting them “wrapped” in a “blue-cloud-cloth” away from “the too-rough fingers of the world” as Langston Hughes would say. The last few years have seen dramatic attempts by institutions of governance such as parliament, the court of appeal and high court wishing they could amend article 97 of the constitution to remove the 47 women as well as wondering what to do with article 27 (8) on not more than 2/3rd rule, among other provisions.

Prof Okoth Ogendo delegate No 551 at the national constitutional conference at Bomas in May 2003 as he presented the report on Land and Property Rights to plenary noted that the process of reviewing the constitution of Kenya was very unique because constitutions were not made during peace time in Africa, for Kenya, he noted, there was broad consensus of the need for a new constitution after long battles in the streets. He pleaded that people seize the moment and complete the constitution (plenary proceeding 2003). Prof Okoth Ogendo for six years was guided by the belief that the constitution must be written by the people and had to be completed. He must be smiling down on us and saying “we made it, finally. Well done Kenya.”

Okoth’s role was mammoth in many ways, he was the man at the steering wheel for I knew from the moment that he took the leadership of the research and drafting committee, he was going to lead the process. I had worked in the gender and development world and I knew that this role of drafting the new constitution was going to be critical. Handling gender and
women’s issues in preparation of documents has always been a tricky affair. Taking gender issues on board begin relatively well. Everybody agrees you need to add women here and there and then stir (Dharmapuri: 2011). The women and gender issues are reduced at the next level of substantive editing and almost disappear completely by the time technical editing of that document is done.

In many cases, you have to make more noise than anybody else, carry out more research, have facts in your fingertips, be there all the time, anticipate the form of resistance that may arise and prepare for it, stay awake all the time, do not blink, and be a head of every one in all matters related to gender and have allies among those who are preparing those drafts. This is a process that must happen at all stages. Okoth Ogendo was a good ally at all stages on all matters concerning women. Our secrets were safe with him. That is why this paper is in memory of this dream keeper.

I was very aware of the importance of the research and drafting committee that was headed by Okoth. So when the team was being constituted, of course, of a team of Lawyers, I offered myself to be a member of the team. Okoth said without any hesitation “Wanjiku that’s fine” and that is how I became a member of the drafting committee. My main objective was in collaboration with other women commissioners and male allies to ensure that women’s issue appear and stay in the draft constitution.

1.1 Theoretical Framework

This paper is guided by feminist theoretical framework that argues that,

“It is necessary to grasp fundamental facts that women have had the power of naming (the world) taken away from them. We have not been free to name ourselves, the world and God”. (P160 For the Record).

For many years we have assumed that men included women, that is what historians, anthropologist, judges and lawyers and other scholars told us. Scholars have assumed that what men said of women is the truth but as Earth Kitt says, truth is a theory that is constantly being disapproved but obviously lies such as, women are weak, can go on forever because they are there for a purpose. They are there to maintain the myth that it is necessary for male to be there so that they can support the weak while the truth is they are to justify male control of the females. Men said women’s most important role is to be a mother, a nurturer, a protector of her family, a story teller, a singer of lullabies. She needs to cook and pray for the food. Women were supposed to be very happy and in agreement with this definition of who
they are and what they are and do. No one asked them what they think about those roles. This definition and assignment of roles was very useful for the men for it allowed them to have the stability they need to do “things of value” such as being Bishops, Lawyers, Philosophers and politicians. In *Perched Earth*, Joseph the painter and diplomat notes, “I associated Justine (his wife) with permanence….. She was the person who assured that my life was managed and running smoothly…..when she moved around me cooking, creating order, a sense of stability, my world felt wholesome” (p221). But that was all Justice was, a wife, a creator of order, a manager for the man so he can do the great work of painting, thinking, philosophizing. That is all she was until one day she quit. I am sure this sounds familiar to some of us.

In the meantime while men expressed their power over naming, labeling, the world women lost the power to name themselves and the world they live in and all that is in it and to have their views heard. In the process we peddled half truths as universal in the same way Europe peddled their history, their language, their norms, and their literature as universal. Aime Cesair in his *Return to My Native land* notes that when Europe declared it is the standard measure by which all of us should measure our performance, our job became that of trying to catch up with them until Africa began to retreat to its “Native land” and say ‘ I am’.

Naming the world for themselves is what women woke up to in the process of demanding for a new constitutional dispensation. They recognized that there is no neutrality in language, in telling the history of the people, in designing economic policies etc. “There is only greater or less awareness of one’s bias” (Phyllis Rouch, an American Essaist (P24) and as noted in the introduction to this paper, the concept of truth about who women are, what they think and what their views are, needed to be challenged. Culture and tradition in the context of patriarchy arrangements and systems has defined what is truth in relation to women and their lives, truths, women have identified them as “non” truth. That is why in defining the world of women, we must begin with them. They must regain the power to name themselves and their world.

In addition to this framework, this paper also borrows from Margaret Ogola’s thesis expressed in her novel “The River and the source”. In this novel, Ogola argues that the feminist pathway is located in the struggle for women’s rights in the context of social, cultural, economic and political context. She tells the story of Akoko a daughter of chief Gogni of Yimba and the wife of Owuor. She states in many ways that women cannot be blamed for not being able to give birth for it is “Were” who places the baby in her womb. The same Were places the baby in the wombs of thieves, murderers and witches. She refuses to
give in to male definition of womanhood, motherhood, marriage, polygamy, dowry etc. She has decided to define who she is and to name the world around her. Her theory is supported by the Senegalese author Mariama Ba in her works especially in *So Long a Letter*, where Ramatoulaye, the main character shares her life experiences with her friend Aissatou and wonders what marriage, love, motherhood etc mean for men. She too challenges the male view of these concepts and says that she celebrates when even one woman moves from the shadows, that is where they live. Similar reflections are provided by Elieshi the Tanzanian scholar who says all of us have to find our own pathways, women have to make choices which may be to adapt like her auntie Mai or rebel like her mother, a single mother who despite all odds decides to bring up her children by herself. Each of us has to look for our own pathways for life is about survival. She shows how what men think women look like for she is different from what women look for (p197). “Women are survivors. Justine was a good wife to me, a very good wife. She let me be. She never questioned much of what I did. After she left, I honestly did not know what to believe. She had prepared my meals, she washed my clothes, accompanied me to every party that required me as a diplomat to be with my partner….. She had no problems with sex……” and “a woman is a man’s home” (p193). One day however, Justine decided that she was a woman of dreams and she had enough trying to be what her husband had defined her to be a wife for him and the house.

Women are generating knowledge about themselves and looking at facts about their lives and experiences and reflecting on them they are making the seeds of knowledge grow. The feminist frameworks help us to look at how women name their world, their desires and aspirations through the process of constitution making in Kenya and by extension the rest of the region. Women in the review process became a reference group that claimed their right to name their world through looking for ways of making sense of the world, ways that are consistent with their experiences of the world. For them Democracy had to be re-defined to include them hence 30% critical mass theory of women’s representation. The struggle in the area of meaning and knowledge making is evident in this constitution. Looking closely at knowledge making and naming of our world helps us to recognize the dynamics of this process. We begin to appreciate that naming our world is the process of “putting together language, meanings and knowledge as a single entity”, (For the Record). This is what women in making of the Kenya constitution 2010 did. They challenged meaning of concepts, definitions of what is legal, right, acceptable, democratic etc. In many ways it was a humbling experience to sit in front of hundreds of people in halls, churches, schools etc or
even outside, listening particularly to those in the women only sessions where they occupied the space and spoke about their secrets, fears of rape, defilement of their children, among others.

During women only session in Nyanza, a woman notes;

“When I got married he was very good to me. He would come home every day with something for our child and me….. now he does not sleep in my house. He says, I smell, I am dirty. I don’t cook well and that I have grown old. I have four children now. The oldest is eight years and the youngest one year old… I have to go working in the garden, or fetching firewood. I have to go looking for food every day.” (Time for Harvest: 2012, p102), says a 24 year old woman.

At the age of twenty four, she is married, given birth to four children, another wife, who younger and beautiful has been brought to the homestead. She now has the “status” of the first wife, old and ignored.

At another session in Fafi, another woman says;

“You know in Fafi there is something that pains us a lot, it is about men. You find a man marries a woman and brings her to town where his family lives……he leaves the woman whom he soon forgets together with the children…. Islamic religion says a man can marry four wives but it does not say you can marry four wives then forget the first wife and her children…. Our men have that problem when you try to talk about it you are told you are against religion” (Time for Harvest: 2012, p124)

Women talked about their private lives and public lives. They helped us hear them, feel their pain, listen to their dreams of the social order that they have defined and contribute to construction of knowledge on the basis of their voices and experiences. In listening to ordinary Kenyans among them women, minority communities, young men and women, akorinos, traditional healers, among others and giving them the opportunity to name their problem, name the world they want to live needed people like Okoth who saw communities and individuals as resources in the creation of the new constitution. A resource that was to be respected and listened to with appreciation and recognition.

Let me give an example here and say we have lived with the concept of democracy as government of people, by the people for the people, for hundreds of years since the Greeks
defined for us. The meaning of this concept did not include women, slaves and other marginalized groups. Yet the definition acted like what was said was the truth. That is why as we introduce this paper we noted that “Truth is a theory that is constantly being disapproved” (p440). We have for centuries had institutions, where women, minority communities and other marginalized groups were excluded. Look at a meeting of heads of states of the AU and many other national and regional meetings where you have leadership of only men and you will understand what this is. We have had institutions whose leaders were all men and it appeared not to have a problem with them. The process of defining our world, our institutions our rights, in the making of the constitution saw women mobilize themselves and create knowledge that expanded our understanding of the law and that is the thesis of this paper. One of the major contributions to this process was the use of methodologies such as women only sessions that created sites for knowledge making. Here, women were able to tell their story, individually and collectively as they know it. This was a powerful tool that we have not fully appreciated and utilized. The women only sessions gave them an opportunity to talk about their experiences within marriage, as wives, as mothers, as daughters who can’t inherit as victims of rape, defilement, loveless marriages and many harmful traditional experiences. Many of them could agree with Elieshi when she says,

“Marriage is like walking in the rain, in the cold, wet season, without an umbrella. You get soaked through to the skin before you know what has happened. You get possessed by the rain, by the wet clothes which cling to your body, marking its curves out like a claimed territory. Then you are imprisoned in that state of the rain falling on you and the clothes possessing your body like a territory…. The choice open to you is one; walking on clothes and all. This way you at least meet the rain head on, meet it and leave some of it behind as you walk as you make the inevitable move forward” (p141).

The other method utilized by women in utilizing space for defining their double covenant is their immense organizational strategy for collective bargaining. All agreed that the women at national conference were the most organized, focused and informed about the issues they wanted to negotiate for. The result is therefore not surprising. The Kenyan constitution is very women friendly in spite of other problems such as implementation of article 27 (8), 81 (b) etc.
1.2 The Okoth Factor in Women and Constitution Making

Prof. Okoth Ogendo as the chair of the drafting committee closely shaped the process of constitution making through organizing the issues, development of guiding questions for collecting the views of Kenyans, leading the team in research analysis and preparation of reports and finally coming up with the draft, that was tabled at the National Constitutional Conference and later at the 2005 referendum.

There are many ways by which Okoth showed his focus on the direction that the review of the constitution would take and how the focus on what Kenyans said remained at the center of the process. In 2002 for instance when C.K.R.C was still collecting the views from Kenyans and soon after the burial of Dr. Ooki Ooko Ombaka, the first vice-chair of the commission, a draft constitution appeared in the commission. The commissioners were called for an urgent meeting; a foreign and dubious draft of the Kenyan constitution had appeared and was to be tabled. The meeting was being chaired by Prof Ghai. Okoth looked at the draft and said

“There cannot be a draft constitution, no draft can be a draft of the commission unless my committee (the research and drafting committee) has tabled it in plenary, debated by and adopted by the same plenary. The Draft would have the seal of the commission. When the draft constitution of Kenya will be completed, it will be tabled here and these commissioners will be there to decide. End of story” (Kabira:2012, p55)

Okoth would not waste time on the foreign draft. He became very protective about the views of the Kenyans, the voices of the people. The issue of foreign draft did not end there, there was another draft at the National constitutional conference. Once again Prof Okoth Ogendo and Prof Idha Salim called a press conference and rejected the draft. At the final stage of preparing the commissions draft, Okoth kept a very close watch over the drafting processes and swore not to take a single drink the night before the draft constitution was released to the public. He wanted to ensure what went to the public was the people’s draft. He was indeed “The Dream Keeper.”

It is important for me to refer to these incidences because Prof Okoth Ogendo believed and saw to it that the draft constitution truly reflected the wishes of Kenyans both men and women, different ethnic communities big and small, Kenyans of different occupations, pastoralists, farmers etc. This belief and commitment to the Kenyan people created space
even for women to expand the boundaries of knowledge of what law is and what it can be. Okoth became a dream keeper for many groups and for women too.

In another incident the women at the National Conference had a hard time trying to retain the gender commission on the general list of commissions. As is often the case in putting gender in the mainstream, the gender commission kept making a disappearing act. Today it would be in, tomorrow it would be out, yet gender commission had been proposed by women, thanks to the great work of the women’s movement, in fact over seventeen thousand (17000) submissions were presented by women and most of these submissions were from women’s groups, organizations and networks. In other words, if one wanted to look at the women represented in the process they would be in millions. Many had proposed the gender commission to be a constitutional commission. At Bomas the sub-committee on “commissions and management of constitutionality “approved the commission and proposed three commissioners while other commissioners a membership of nine commissioners. Okoth rejected the proposal at a conveners meeting and said the gender commission must be treated like all other commissions. When the committee tabled this report, gender commission once again disappeared, but women never closed their eyes, they drew the attention of Okoth and he made sure it was re-instated. (Kabira: 248).

In preparing the draft and at the National constitutional conference, the drafting committee of the commission took the lead in all matters related to preparation of the reports, constitution of the different committees and guidance of the committees through analysis of the views and identification of constitutional matters and those that were to be left out to policy recommendations. The C.K.RC also prepared the National report whose short version was called “The people’s voice”. After the draft report and constitutional proposals were developed, the commission shared the same with the public, with all constituencies through the media, through local Languages on KBC, Citizen as well as a second visit to the constituencies where the process validated and made comments on the proposals and the report. People’s views on the draft were again collected and collated and an addendum prepared for the National Conference. This process gave Kenyans as a whole the opportunity to decide what the highest Law of the Land would look like. In leading the process in such an intensive and people friendly manner and ensuring that the people, women included, gave their feedback and determined the shape, the size and the language of the highest Law of the Land, Okoth and the commission expanded the concept of knowledge and meaning by include the voice of different groups in society in this most intensive and participatory
process. The different groups, women included were able to give their opinions on meaning and language of law making, institutions and their essence, among other issues.

2.0 WOMEN EXPANDING THE BOUNDARIES OF LAW

This section looks at women’s efforts in expanding the boundaries of law through defining their place in society and bringing to the negotiating table issues that had been initially considered as normal, traditional and cultural and not of legal significance. Arguments such as you cannot legislate against culture have been clearly challenged. This section identifies some critical areas where women focused on and influenced the new constitution and expanded our definition of what is legal and what are good or bad institution of governance. The discussion includes re-defining women’s place in the private sphere, re-defining institutions among others.

Women collectively generated knowledge about themselves through sharing, recording and submitting to the various organs of the review. They began to name their problems in society and to define and generate solutions to these problems. They brought their experiences with everyday life and knowledge acquired to bear on the new Law. They re-defined institutions. They upheld the view that a parliament that had no women was not a good parliament; it is incomplete if women are not there it cannot be a good institution and the process of constituting it cannot be a democratic process. They gave new meanings to interpretation of good democratic institutions. Women rejected the proposals such as creation of senate of 74 senators one from each district. Yes it would have been a small senate, less expensive and therefore would be acceptable to the public and parliamentarians. Women however, argued that if we had one person from each district, we know what would happen. For reasons that are well known; culture, tradition, lack of resources, societal myths about women and leadership, it would be a senate of men only, so in their view, the senate could not pass for the concept of small, beautiful and less expensive. Yes it would be small, male and ugly for women. The women were accused of spoiling the process of constitution because it was argued that they did not understand what making of a constitution meant. They were distracting the process by bringing women’s issues every time there was an issue for discussion. Women refused to bulge. They continued to insist that good, beautiful and reasonable institutions must reflect women and even go beyond to include other marginalized groups and communities. This was the beginning of creating new knowledge and new meanings for institutions and even aesthetics. What is beautiful? What is legal? What is
democratic? All these were being re-defined through women’s participation in the process of making the 2010 Kenya constitution.

I am glad to note that the current senate is small, manageable, less expensive and has both men and women. Prof Okoth Ogendo had created the environment we needed and appreciation of a broadened constitution making knowledge base that gave Wanjiku the opportunity to have her values and views of institutions taken on board. Opportunities for women to say a senate as an institution that excludes women is not a good institution, it is not inclusive, it is not democratic, it does not promote values that we expect institutions to promote was a very radical view. Okoth gave the women the support, the confidence, the belief in themselves. He often asked the women “tell me what you think we should say” “How you think what you say will be implemented and we shall take it from there” (Personal notes: 2002).

The freedom and confidence with which women participated in this process is best seen in their negotiations at the National Constitutional Conference where they strategically lobbied in the committees on Devolution, Representation, Bill of Rights and Legislature. The choices of these committees were not adhoc. For years women had walked the path of affirmative action for representation in leadership in both appointive and elective positions. This had created movements represented by organisations such as Women Political Caucus, Women Political Alliance, League of Women Voters, among others whose main focus was representation, legislature, Senate, Devolution. Other organisations such as FIDA, Coalition on Violence Against Women, among others had focused on women’s rights, gender based violence, etc hence, the focus on the bill of rights while Maendeleo ya Wanawake among other organisations had focused on basic needs which also form the socio-economic rights. In this process, women set the agenda for themselves, determined priorities, asked the questions they considered important and validated their processes and results

2.1 Expanding the definition of law making

One of the most successful ventures during the constitution review process was to facilitate the development of the law to review the constitution. In 1998, the collaborative Centre for Gender and Development organized the 1st meeting for women’s organisations to discuss how they could be involved in the constitution making process. The very well attended meeting took place at Silver Springs Hotel. The key presenters for this meeting were none other than Prof Okoth Ogendo and Wachira Maina another constitutional lawyer. Prof
Ogendo was very broad minded in his approach. He presented the process of constitution making, the process of getting there and the role of women within it in a way that women understood. Most of these women were leaders of women’s organisation. They were women who were passionate about entrenching their dreams and heart melodies in the constitution.

Prof Okoth Ogendo made women realize the need to equip themselves with relevant knowledge which was necessary for their participation in the constitution. He made them feel confident that this process was not for lawyers that it was for Kenyans to negotiate their co-existence, to agree together on how they want to manage themselves and their resources and how to ensure that people retain the power to make decisions even on how they wanted to be governed. For him it provided an opportunity to deal with those issues that affect them as individuals, communities and as a nation. This meeting was a landmark meeting for women’s organisations and leaders and they formed teams that would negotiate their place in the review law. Women managed to negotiate their space in the law that was to guide the review of the constitution and the making of a new one. The struggle to do this belongs to another story for it was a truly an uphill task. It used to be said that constitutions are made by experts and Wanjiku has no business in this game. Women however, knew that gender was not the only game in town. There were many other games and they strategized to deal with those other games as well in order to achieve their objectives.

Being in the review law was one of the greatest success women have had in decades of the national struggle for a democratic nation. They were able to hold a series of meetings, identify the kind of process they thought would be most people friendly and how they would be at the centre of the negotiation the of constitution. Women managed to lobby at various stakeholders meetings and got five out of twelve seats in the initial team chaired by Bishop Sulumenti. The rest is history. Women participated in negotiations of the process, proposed other review organs they thought would be best for maximum participation of Kenyans, made proposals on how they needed to be represented utilizing the critical mass theory and asked for 30% representation which worked in some of the organs of the review such as the 3Cs, the district representation and almost realized in other organs such as the C.K.R.C and the National Constitutional Conference. They even managed to negotiate that women’s organisations nominate their own representatives and managed to retain this own representatives in law in spite of court cases, motions in parliament and many efforts to divide the women. The following quote from the parliamentary Hansard 24th 1998 reflects the
kind of battles that women had to go through to decide who should represent them in the review process.

“Sir, I can see that they have created space for women’s organisations in the review process which is fine. But many of women’s organisations represented here in this bill are urban based. They speak one language. They all reside in urban areas and yet the bulk of Kenyan women reside in rural areas. All I am trying to say is that, as we restructure representation of the various actors and interest groups like Kenyan Women Political Caucus, League of Kenya Women Voters……four out of five places should go to Maendeleo ya Wanawake which has grassroots support. Therefore, they (women’s organisations) have no right to take places which should really be due to groups which are in the rural areas.”

Men have often been the source of public knowledge about women and often have created theories about women and advised them on how they should live their lives. For centuries, women hardly spoke for themselves and that is why this process has changed the boundaries of meaning and law. The Hansard words quoted above were from Amukoa Anangwe, the then Minister for Co-operative Development. Many men felt that they were better placed to speak on behalf of women like they have done for centuries. After all, they had represented them in the same parliament for almost forty years and they had taken their interests into consideration. They had not “discriminated against them”. They knew “what women wanted”. There was a lot of “sympathy” for rural women and resentment by parliamentarians for “elite” women. Days had however gone, when women agreed to be divided into “elite” and “rural” camps. Women had also made sure their counterparts in rural areas and urban centres had space in the 3Cs and in district representation and at the national conference. Through this process of negotiations women expanded the law process that made it possible for them to be at the centre of constitution making and in addition expand the knowledge of law making to include non lawyers, women and marginalized groups but not without their day in court.

The women commissioners nominated by the women’s organisations through a process designed by themselves were taken to court. Women lawyers led by FIDA defended the commissioners in court where the team of lawyers had a field day. They were in a world they knew and understood. The male lawyer for National Council and Mendeleo ya Wanawake
who took the women commissioners to court hardly understood the complex relationships of women’s organisations, groups and networks.

“The lawyer referred to a procedure related to some cricket match, somewhere in Latin America. Those Caucus members who were not lawyers could not figure out what a cricket match had to do with them. Fortunately, the judge Aganyanya did not seem to be impressed either…. (Kabira: 2012)”

Nevertheless, the judge ruled that women were properly nominated. This process of bringing women’s issues that are normally rejected outside legal processes expanded the boundaries of law by bring in women’s experiences and understanding of their world, their structures and declared them legitimate structures. Some of these structures, such as women’s groups, community based organisation were just relegated to social services even in terms of legislation. The process of identifying these networks as institutions that can have procedures and process to nominate women to work in the highest law of the land was not a mean achievement.

In forming women’s political caucus, they had not indicated that this was an organisation that could be sued or could sue. They used the network to suit women’s interests. When women needed great representation we presented the individual women’s organisations who were members of the network as independent entities. When they needed a powerful voice at Bomas and Safari Park women went in as one network. In court, women used the power of the many organisations, representing women to create a powerful voice. Even the then president Daniel Arap Moi had dismissed these women commissioners as “elite” and having no capacity to represent rural women. Negotiating for women’s representation in the law to map out the road to review the constitution was one of the major successes.

2.2 Expanding definition of good institutions

By expanding the definition of law making through introduction of the different perspectives, women were able to ensure creation of a legislative framework that set a procedure of ensuring that women’s representation is embedded in the institutions. This framework opened an opportunity for women to negotiate representation in all other institutions including National Assembly, Article (97), The Senate (98), County Assemblies (177) and county governments, National Government, all constitutional commissions, all institutions that are opportunities (article 27 (8)) of the Bill of Rights among others. In addition, by putting article 27 in the Bill of Rights, it meant that parliament would not be able to amend this article
except through a referendum. Clearly, the order of things has changed. Man no longer means woman, institutions are not proper unless they have women’s presence. We are defining the nature of the institutions through introduction of the critical mass theory. It is no longer acceptable to see a house full of men and no women. We have redefined in law what a good institution looks like, at least in terms of representation. We need to go further and think beyond representation to other elements, values and philosophies that define good and acceptable institutions. We have expanded our legal definition of representation. It was acceptable before this that it was enough to cast your ballot in a “free” and “fair” election. Women were not considered in defining fair and free voting. This definition has changed. It is not free if culture, tradition, resources etc keep you from participating. The definitions are expanding to include social, economic, cultural, historical and gender realities in the definition. Now, elections are not “free” and “fair” if there are no women in those institutions. Women have began to name the institutions, their definition of an acceptable senate was one where election procedures have been followed by re-defining those procedures and saying that some will be voted through open elections, a number of women will be nominated to the Senate (98), there will also be women only seats in parliament in addition to persons with disabilities and youth etc, we are expanding the boundaries of law, we are bringing new interpretation to law.

2.3 Women’s only sessions and law

One of the best experiences in constitutional review process organized by C.K.R.C was creation of space for women only sessions. Considering this space as a knowledge making space was very critical in accessing women’s views and experiences. At these sessions, women spoke about their fears, particularly those related to their private space, at the domestic level, at family level, in the context of marriage, as mothers of girls etc. This became sites of knowledge making where women told their story about marriage, rape, defilement, oppression, polygamy, sexual harassment, being overburdened and motherhood, among other concerns. The process allowed women to tell collective stories of poverty, abandonment by husbands, being old at the age of 24 because you have three children and your husband already has a second wife, teenage pregnancies, inheritance issues, equality between men and women, children with disability, among others. Women told their story like they lived in one village. This was the case of women from all over Kenya. The story was the same. It is therefore not surprising that the constitution has clearly stipulated the rights of
women, protection of female and male children, rights of the elderly, persons with disability, social economic rights, citizenship issues, among others in this constitution.

2.4 Women expanding boundaries of law through negotiations at the conferences

Women properly utilized the space provided by the national constitutional conference. After being in the review process and negotiating the road map and organs of the review and having created spaces for women at the 3Cs and other spaces, the women were now ready for the report and the proposals made to amend the constitution. They identified their best negotiators consolidated their expertise and took their place at the negotiating tables in all the committees. Thanks to prior negotiations and establishing the culture of women must now be seen, which was beginning to take root, they also took leadership in a number of critical committees including representation of the people and the Bill of Rights. They also focused on what they considered the critical committees, namely: Bill of Rights, Devolution, legislature and representation of the people as well as committee on the constitutional commissions.

For the bill of rights, women had been working and sensitizing women at the county level, facilitating preparation of memoranda, listening to them on all issues. They were aware of all the crimes committed in private and public spaces and organisations like FIDA, Coalition on Violence Against Women, CREW, among others had been dealing with cases of gender based violence e.g. domestic violence, rape, defilement, wife beating, torture, including psychological torture, violence within marriage, including marital rape, refusal by men to pay for upkeep of children outside marriage,. teenage marriages, date rapes, harmful practices such as female circumcision. They had dealt with these cases and followed up with the police and courts. They wanted to negotiate the rights of women and girls in private spaces as well as decision making positions. It was therefore a strategic choice to focus on the bill of rights and as noted earlier in this paper, the benefits for women are evident. Once again, the women expanded our boundaries of knowledge in law. For the police for instance, who did not take the cases of gender violence as a case that needed their attention, the issues are now in the constitution. We can always go to the constitution and these rights which depended on the good heart of a police officer or police woman to investigate are now in the constitution. The constitution has legislated against what traditionally was referred to as culture and therefore acceptable. The constitution expanded the boundaries of law as we knew it to include equality, equity, inclusiveness, non-discrimination and protection of the marginalized, so says article 10 of the national goals and values. The boundaries of law as we knew it has expanded
and women have contributed significantly to this process. They did this through ensuring that the bill of rights opens space and includes rights that were more related to women and marginalized groups and social economic rights of food, water, social security, health, education and housing (Article 43-1) which women presented to the commissions in all the constitutional constituency fora. In addition, many other rights include article 26, 27, 28, 29 (c)&(d)(f) 38, 41 on labour relations, fair remuneration etc, article 43, 44 on language and culture, 45 on family, 53 on children, 54 persons with disability, 55 on youth, minorities and marginalized groups, article 56, 57 on older members of society. Many women in private sessions presented on these issues. The Bill of Rights and its expanded rights to include third generation rights was greatly influenced by women’s participation in the process as well as other marginalized groups and communities.

What is significant is how many of these rights including article 27 on equality and freedom from discrimination, indicates that “women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres” No one can now say that a Meru woman cannot sit in a Njuri-Ncheke cultural space. In addition, women cannot be discriminated again on the basis of sex, pregnancy, marital status, dress etc. the boundaries of law have expanded. Women have contributed significantly to this expansion and the state has been obligated to ensure this happens (article 27, sub-article 6).

2.5 On expanding representation

While specific women’s organisations were organizing, pushing and expanding the boundaries of law in the area of women’s rights in the private space, other organisations such as Women’s Political Caucus, Women’s Political Alliance, The League of Women Voters, Maendeleo ya Wanawake, among others were busy struggling to explain to the relevant stakeholders that women had the right for equal representation in elective and appointive positions. Women movement had been united by affirmative action struggle to such an extent that they spoke in one voice across the country. Sometimes even men asked for affirmative action for women. Women had from 1991 identified affirmative action of at least 1/3rd women’s representation particularly in political decision making positions. They had studied Maria Nzomo’s paper on Women in Politics, an AWARD publication which had expounded on the critical mass theory as the minimum that was required for women to influence institutions and for their voices to be heard. This became a national debate for almost twenty years before the 2010 constitution was promulgated. The affirmative action struggle was not just for Kenya and women, it has been a struggle predominantly in Africa South of the
Sahara. Women realized that to wait for culture to change was not a very wise thing to do. Too many resources had been spent on civic education programmes for women. Women candidates were being taught how to speak, to address the public etc. The strategies adopted assumed that women were the problem. Women leaders and their organisations decided that it was foolish to continue doing the same things repeatedly and expecting different results. It was time to try social engineering. The arguments had been clear as noted in the parliamentary Hansard of 1997 debate on affirmative action.

“There are many women in this country; not all of them wearing high heeled shoes. But those who are not wearing high heeled shoes happen to be the majority and they cannot entrust their lives to people just because they are women. The Maasai word for ‘woman’ means the great one and the Maasai community really exalts their women. They are the ones who own the houses, cattle; in fact the man has no authority going into the cattle boma to sell a cow that belongs to his wife.”

It sounds very nice but let the Maasai women speak for themselves for they know. They have and continue to be with other women on the affirmative action struggles. They never opposed affirmative action for women’s representation in political and other positions. C.K.R.C reports have all that the women said on these issues and Maasai women were at the forefront with other women asking for affirmative action. They spoke for themselves. They know whether the house or the cattle are theirs. They know when they want to be led by women wearing high heels.

The affirmative action struggle gave birth to many articles in the constitution including the most contentious provision article 27 (8) which states that “…the state shall take legislative and other measures to implement the principle that not more than two thirds of members of elective or appointive bodies shall be of the same gender.” This provision is giving a lot of headache to the three arms of government including the judiciary whose supreme court has no legitimacy to decide on issues related to this provision as the court itself has failed to reach the threshold. On the same issue, high court judges told the women to send their feminist missiles elsewhere!

The process of constitution making in Kenya allowed women to bring their views and perspectives about their private and public life into national debate and negotiations. It gave them the right to encode their knowledge, negotiate and affirm their existence and then
proceed to construct their existence. In doing this, women expanded the boundaries of knowledge and law and that is why the institutions of governance e.g. parliament and judiciary are stuck with the not more than two-thirds rule and even in redefining concepts such as marriage. Parliament is in breach of article 27 (8) of the bill of rights as we know and we do not have the courage or the political will to dissolve parliament because it does not meet the constitutional threshold. But the solution must be found, Bwana AG.

3.0 Conclusion

The traditional makers of knowledge and meaning in the field of law, the judges, the lawyers, magistrates, members of parliament had created knowledge about law that had not taken into consideration women’s realities. So, we have lived with the official view of law and knowledge of law. Realities of women’s experiences with law have for a long time not been part of our mainstream knowledge about law and what this means for them. Neither have we heard the women’s perspectives on all matters of law that have affected them. Men and the institutions have been the sources of public knowledge about women and law. Constitution making process has helped in constructing knowledge about law and expanding the boundaries of law. Many aspects of culture, gender and tradition that were considered non-discriminative have now found their place in law and one can be sued on the basis of their place in constitutional provisions. Women have contributed to expanding the boundaries of law and to bringing new meaning to definition of good institutions and concepts of free and fair elections etc.

There are historical experiences that we need to continue reminding ourselves when we think about expanding the boundaries of law and creating feminist knowledge as well as considering new sites of knowledge making. We can remind ourselves of the fact that during slavery, blacks in America were forbidden by law from reading and writing. It was illegal for a black man, adult or child, male or female to learn to read. Alex Hailey in his book and the movie Roots, shows how blacks could only read in secret and if it was found out you could read, the consequences were very severe as in the case of little Kizzy in Roots who was sold to a cruel master. Henry Louis Gates in his Book, Race, Writing and Difference notes that “blacks were as a race constitutionally unable to read and write” (p93) Invisible Blues.

This paper hopes that as the AG follows up on the implementation of Articles 81, 27 (4), 27 (6 & 8), 96, 98, 177 (1)(b), 116, among others of which he sought an opinion from the Supreme Court (2012), he will in his wisdom enhance the expanded space in law for women
and other marginalized groups. We know from the study that law as a discipline has expanded its space, interpretation and meaning, the challenges of implementation remains but it will happen.

I trust that there are other men and women, who will, like Okoth Ogendo, continue to be the dream keepers not only for women but also for those others in society who have been traditionally marginalized. We have to continue to re-define truth from the different perspectives and find ways of breaking the cycle of lies around women and marginalized that helps deny their rights in societies. Law must help us create better communities, where concepts such as fairness, equality etc embrace all in society.
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