

# Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997, second edition, by Willy Mutunga

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There is a common counsel against judging a book by its cover, so we shall refrain, at least for now, from any commentary on the image of the five men and one woman in sartorial elegance, as the face of the clamour for a new constitution that was promulgated in August 2010. After all, the image on Willy Mutunga's book<sup>1</sup> bears familiar faces, almost all of them lawyers, intellectuals or civil society activists of some repute.

Instead, we shall make a deep dive into the text—whose second edition has been resurrected, literally—after two previous publishers, folded up. The new edition, published by Strathmore University Press, keeps the text in circulation at a critical juncture: it coincides with the tenth anniversary of the relatively 'new' Constitution of Kenya, 2010 (2010 Constitution).

The book also comes at a time of heightened political activity to amend the Constitution to introduce new laws fronted by President Uhuru Kenyatta and former Prime Minister Raila Odinga, working under the Building Bridges Initiative. Critics fear the proposed amendments could fundamentally alter power structures, as defined in the 2010 Constitution, and restore the imperial powers that were whittled down in 2010.

While Mutunga chronicles the 1992 to 1997 window, the struggle for political and legislative reform started in earnest soon after independence in 1963, when the Kenya People's Union was formed in 1966, and subsequently proscribed in 1969, as the founding Vice President Jaramogi Oginga Odinga

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<sup>1</sup> Willy Mutunga, *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997*, 2ed, Strathmore University Press, Nairobi, 2020.

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and his associates, including Bildad Kaggia, espoused a different vision for the country, away from rapacious capitalism that was taking root in Jomo Kenyatta's Kenya. A man eats man society, Tanzania's Julius Nyerere chided Kenya; then Attorney General Charles Njonjo retaliated: Tanzania was a man eat nothing society.<sup>2</sup>

Kenyatta was succeeded by Daniel arap Moi, following his death in August 1978. Moi, who had served as Kenyatta's Vice President for twelve years, committed to walk in Mzee Kenyatta's *nyayo* (footprints), which meant a perpetuation of policies that fostered prosperity for the young nation's modest population, but entrenched intolerance for dissent. Multiple high-profile assassinations, including Pio Gama Pinto (1965) and Tom Mboya (1969), were part of the painful legacies that Moi conserved with the unresolved murder of former Foreign Minister Robert Ouko in 1990.

Kenya practically remained a *de facto* one-party state since 1969, until a constitutional amendment was made in 1982, in the aftermath of the abortive military coup, making it a *de jure* state. This lasted until December 1991, when Section 2A of the (repealed) Constitution was lifted.

The 1990s may be considered a season of blood. Paranoid about losing power in the first multiparty general election in 1992, the independence party, the Kenya African National Union (KANU) power barons organised militias that overrun parts of the Rift Valley, flushing out communities perceived as opposition sympathisers, apparently to discourage them from voting. The violence in 1992 in the Rift Valley Province was replicated in the Coast Province in 1997, which precipitated calls for a national inquiry into the clashes. The release of the Akiwumi Commission Report—named after Justice Akilano Akiwumi, who chaired the state-sponsored inquiry into those clashes—was delayed significantly as it was made public in 2002, but his report was quoted in subsequent reports by other entities looking into Kenya's restive past. This was not totally unexpected: findings from other commissions of inquiry, like the 1975 probe into populist politician Josiah Mwangi Kariuki's murder, were never made public.

But the 1990s was a particularly difficult decade. The Bretton Woods Institutions had imposed Structural Adjustment Programmes on many African nations, triggering what Patrick Bond calls 'International Monetary Fund (IMF)

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<sup>2</sup> Paul Goldsmith, 'The man who brought Marxism back to Kenya' *The Elephant*, 3 October 2019, <<https://www.theelephant.info/culture/2019/10/03/the-man-who-brought-marxism-back-to-kenya/>> on 9 December 2020.

riots,<sup>3</sup> as state services, such as health and education, had fees imposed on citizens. Moreover, price controls were lifted and currency controls removed, among other measures, pushing millions to the margins of poverty. On the domestic front, Kenya's Treasury was looted of some 27 billion Kenyan shillings<sup>4</sup> under a fictitious compensatory scheme for gold exports, which triggered a super-inflation and a deep economic recession. More money was printed to fund KANU's re-election machine.

This confluence of economic hardships and shrinking democratic space found expression on 7 July 1990, when a roiling swirl of humanity descended on Kamukunji grounds, on the fringe of the city centre, and demanded political reforms. Civil society activist Irūngū Houghton, writing to mark the 30<sup>th</sup> anniversary of the day now memorialised as Saba Saba Day, observed that since half the nation's population was not born then, they might not fully appreciate this hallowed signpost, in which 20 people were killed, following protests that lasted three days, and spread across six towns.

'The role of Kenneth Matiba, Charles Rubia and the "young turks" Raila Odinga, Isaiah Ngotho, Kariuki Gathitu, George Anyona and Njeru Kathangu is well told. Less well connected is the decade of resistance to the autocratic one-party regime that preceded this moment,' Houghton went on, 'In 1986, five underground organisations formed the United Movement for Democracy in Kenya (Umoja) in London. All this energy built up to July 7, 1990.'<sup>5</sup>

The Saba Saba riots prologued the watershed December 1991 restoration of multiparty politics in Kenya, after nearly a decade of single-party dictatorship. Dissidents who had been exiled started streaming back. Stepping to the parapet was Willy Mutunga, who found himself at the vanguard of a burgeoning movement that was focused on political and constitutional reforms through a new outfit, the Kenya Human Rights Commission (KHRC), founded in the United States by exiles Makau Mutua and Kiraitu Murungi, and students Maina Kiai and Peter Kareithi.

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<sup>3</sup> Patrick Bond (ed), *Fanon's warning: A civil society reader on the New Partnership for Africa's Development*, Africa World Press, New Jersey, 2002, 84.

<sup>4</sup> Republic of Kenya, *Report of the Judicial Commission inquiry into the Goldenberg affair*, 2005, 301, available at <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf>> on 28 December 2020.

<sup>5</sup> Irūngū Houghton, 'Saba Saba at 30 and signs some things have changed' *The Standard*, 11 July 2020, <[https://www.standardmedia.co.ke/houghton-irungu/article/2001378349/saba-saba-at-30-and-signs-some-things-have-changed?fbclid=IwAR1Up-ajd2vqDOwzswgOm3TArwtf\\_UFW-qhVxojvTGElhjGWm-eTU4Sj\\_A](https://www.standardmedia.co.ke/houghton-irungu/article/2001378349/saba-saba-at-30-and-signs-some-things-have-changed?fbclid=IwAR1Up-ajd2vqDOwzswgOm3TArwtf_UFW-qhVxojvTGElhjGWm-eTU4Sj_A)> on 9 December 2020.

At the request of Mutua and Kiai, Mutunga writes, he joined KHRC from Canada, where he had been instrumental in the establishment of yet another lobby group, Committee for Democracy in Kenya. When KHRC was finally registered in Kenya, in 1992, its first proper home was a three-room outfit at the Police Cooperative Society, a Kafkaesque conundrum, given that KHRC's main task was to check police excesses!

*Constitution-making from the middle* chronicles that tumultuous journey, as witnessed by Mutunga, between 1992 and 1997. In that interlude, two general elections were held when a fractious opposition was outfoxed by Moi to retain power. The pressure for legislative reform intensified, as it became increasingly clear it was near impossible to wrest power from KANU, with a low threshold of a simple majority in five of the eight provinces of Kenya. In those two election cycles, Moi prevailed with a paltry 40% of the vote, the rest shared among a retinue of opposition politicians.

Mwai Kibaki succeeded Moi in 2002, ending KANU's 40-year reign, but he, too, dragged his feet on constitutional reform, now that his status had changed (from chief of opposition to head of state), he did not mind having too much power vested in the presidency. In that sense, 1997 to 2007 can be considered a lost decade, when political dithering and cynical manipulation of the process produced multiple drafts of the proposed constitution, under different players, and a bad-tempered referendum that left a badly divided nation, stoking social fissures that set the stage for the 2007/8 post-poll pogrom.

About 1,100 were killed and over 500,000 displaced, which necessitated yet another public inquiry, led by retired South African judge, Johann Kriegler. One of Kriegler's key recommendations was constitutional reform that would reify legal safeguards for the citizens. Finally, the hour of reckoning was nigh and Kenya's political leadership rallied behind the promulgation of a new constitution, the divine writ that would ensure peace and prosperity for all.

*Constitution-making from the middle* is a valuable text as it documents that arduous journey, and the ideological and philosophical underpinnings that guided its architects to ensure this was a 'people-driven' process.<sup>6</sup> It also highlights the political mischief that punctuated the process, the alliances that were forged and broken, the hijacking of the process by politicians but also the steely resolve by Mutunga & Co to stay the course and deliver a new constitution.

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<sup>6</sup> Willy Mutunga, *Constitution-making from the middle*, 33.

‘The 2010 Constitution is a beautiful baby that the people gave birth to,’ Mutunga said recently. ‘But we handed it over to child traffickers and traffickers in children’s body parts. What did we expect?’<sup>7</sup> Let’s use Mutunga’s colourful analogy to analyse, not the metaphorical ‘beauty’ of the 2010 Constitution, which is subjective, but the legitimacy of the offspring. After all, the ‘people’ that Mutunga invokes do not comprise the masses, but a select class of individuals who constitute Kenya’s middle class.

‘It is true that the constitutional reform project has been called a middle class or elitist initiative,’ Mutunga concedes. ‘And so what if it is,’ he scoffs, before concluding: ‘Cannot (sic) the middle class speak for itself and its material interests...When will the people truly speak for themselves?’<sup>8</sup> Good questions, only that these elicit even more questions.

Nearly four (out of the ten) chapters in the book narrate the different interest groups that joined or broke ranks in those formative stages of constitutional review, and the theoretical framework that informed the Proposal for a model constitution (*Model Constitution*) that was finally put together by Mutunga & Co, under the aegis of Citizens Coalition for Constitutional Change, better known as 4Cs. Their immediate task was to draft the *Model Constitution* that they hoped would springboard a national conversation and provide leadership, where none was available.<sup>9</sup>

There were many missteps: The Americans provided the seminal funds used to prepare the *Model Constitution*; the Germans provided resources for civic education. And the 4Cs fully embraced our former colonial masters and their neo-colonial institutions because: ‘4Cs perceived IMF, World Bank, Britain, France, and Japan as basically saying that ‘the devil they know’ could, and indeed did guarantee economic reforms in the interests of finance capital.’<sup>10</sup> Bond castigates such naivety, reminding: ‘To strive for an “equal” international partnership requires, first and foremost, an analysis of power relations and how to change them.’<sup>11</sup>

Lack of ideological clarity, even at individual level, was not any less harmful. Yash Ghai stops short of naming individuals who undermined his work, at the

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<sup>7</sup> Remarks made during the book launch of Ambreena Manji’s *The Struggle for Land and Justice in Kenya* hosted virtually by Strathmore University on 23 October 2020.

<sup>8</sup> Willy Mutunga, *Constitution-making from the middle*, 10-11.

<sup>9</sup> Willy Mutunga, *Constitution-making from the middle*, 98.

<sup>10</sup> Willy Mutunga, *Constitution-making from the middle*, 98-99.

<sup>11</sup> Paul Bond, *Fanon’s warning*, 87.

behest of their political masters, although his own 1997 appointment by Moi should have elicited a little more introspection. In the book's foreword to the second edition, he writes that he was hounded out of the country 25 years earlier, for reasons he 'never understood,' escaping detention by a whisker, following a tip-off by a former student.<sup>12</sup> Accepting to lead the Constitution Review Commission of Kenya, by the same administration that had pushed him into exile, echoed another high-profile appointment in 1991.

Then, Amos Wako, an international law expert, was plucked from the United Nations Human Rights Committee and appointed Attorney General of Kenya. And what better defence for the Moi regime than having a most decorated lawyer to hold brief for his government, which was roiled by claims of human rights abuses? Moi appears to have re-played this card with the appointment of Ghai, a world-renowned constitutional law expert. But he placed obstacles in his way to impede full execution of his work, as Ghai writes in the book's foreword to the second edition.

Mutunga's neoliberal turn was even more confounding. Detained without trial for 16 months, only days before the foiled August 1982 coup, Mutunga had served as secretary general of the University of Nairobi's academic staff union, whose last major campaign was to agitate for the reinstatement of Ngugi wa Thiong'o, following his December 1978 detention without trial. Mutunga outlines a 'radical component' to their campaign in *Constitution-making from the middle*. He evokes Kenya's history of struggle as the inspiration for a people-driven constitution, a key departure from the Lancaster Constitution Conference when the nation's political leadership acquiesced to colonial dictates. This long quote is replicated here to appreciate the key arguments:

This (constitution-making) project, however, had a radical component that aimed at inheriting the Mau Mau Movement. It called for fashioning the constitution-making as a mass movement with community roots all over the country. Radical restructuring of the status quo was the mission of this component. While invoking radical paradigms, a search was made to establish a framework for organic social independence, one respecting African cultural heritage... African culture was also seen as a framework within which constitutional reform could be effected.<sup>13</sup>

With such deep-sounding intellectual and philosophical underpinnings, where was the land question in the *Model Constitution*, given its centrality to the economic, cultural and spiritual life of its people? After all, Mau Mau's proper name, *Kiama kia Wiyathi na Githaka*— Land and Freedom Army—explicitly

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<sup>12</sup> Willy Mutunga, *Constitution-making from the middle*, xxv.

<sup>13</sup> Willy Mutunga, *Constitution-making from the middle*, 27-28.

stated its mission as regaining the lands that had been grabbed by the British settlers. In *Facing Mount Kenya*, Jomo Kenyatta outlines land—and the fight for its restitution—as the link between the past, present and future generations: ‘It supplies them with the material needs of life, through which spiritual and mental contentment is achieved. Communion with the ancestral spirits is perpetuated through contact with the soil in which the ancestors of the tribe lie buried...’<sup>14</sup> Mutunga writes that the land issue was initially overlooked in the *Model Constitution*, but was canvassed in the subsequent reviews.<sup>15</sup> He writes that a planned workshop to dispense with the issue of land was interrupted by police and deferred to mid-July 1995. Neither the reasons for police intervention nor the outcome of those deliberations were revealed in the book.

What we know for sure is that Mutunga & Co opted for a donor-driven process in constitution-making, and remained uncritical of what one might call ‘NGOnisation’ of the Kenyan society, thereby acquiescing to the dictates of Kenya’s former foreign masters in defining the nation’s future, and trading away the promises of a people-centred process. The hazards of this capitulation to international capital are encapsulated in Moi’s decision to repeal Section 2A of the (repealed) Constitution that restored multiparty politics in December 1991. It was preceded by a meeting, one month earlier, in Paris, where the World Bank deferred a decision on aid to Kenya for six months, as it reviewed the nation’s evidence of political and economic reform.<sup>16</sup> This shifted the balance of power from the people, in whom the sovereignty of a nation is vested, to foreigners.

Ironically, there were compelling, home-grown initiatives that offered credible models of what a people-driven process may have entailed. We shall pay attention to one particularly profound moment, which is reduced to a footnote in Mutunga’s book.<sup>17</sup> This episode captured the sort of vision espoused, at least on paper, by Mutunga and his team, linking the struggle for change to a proud history, imbued with cultural consciousness and political commitment.

On the last day of February 1992, a group of elderly, rural Gikuyu women arrived in Nairobi and sought audience with Attorney General Amos Wako. Most of the women had no formal education and they had no top lawyers holding their brief. They had one simple plea: Their sons were languishing in jail;

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<sup>14</sup> Jomo Kenyatta, *Facing Mount Kenya*, Vintage Books, London & New York, 1962, 22.

<sup>15</sup> Willy Mutunga, *Constitution-making from the middle*, 128-129.

<sup>16</sup> Steven Greenhouse, ‘Aid donors insist on Kenya reforms’ *New York Times*, 27 November 1991, <<https://www.nytimes.com/1991/11/27/world/aid-donors-insist-on-kenya-reforms.html>> on 9 December 2020.

<sup>17</sup> Willy Mutunga, *Constitution-making from the middle*, 36-37.



political prisoners whose singular offence was to agitate for political pluralism. If the arc of justice should bend, they argued, it should prise open the prison doors to set their sons free. After all, the crime that had consigned them to prison was no longer a crime, since 11 December 1991, when multipartyism was reintroduced. Backing the mothers was a newly-registered lobby group, Release Political Prisoners, which included former student leaders who had served time for agitating for political change. Wako reportedly told the mothers he would review their sons' cases in due course.

Although none of these women had been involved in national politics, their next move involved deft manoeuvres, catapulting them to international fame and galvanising the masses in unprecedented ways. Tapping into Gandhian and Martin King Luther Jnr's principles of passive resistance and non-violence, the mothers staged a hunger-strike at Nairobi's Uhuru Park, in what is now immortalised as the Freedom Corner. Other sympathisers pitched a tent for the elderly mothers to sleep in, but a police contingent arrived two days later, on 2 March 1992, to disperse them. The following day, an even bigger police contingent was deployed with a singular instruction: to evict the elderly women and their sympathisers out of the park, by any means.

Tear-gassed, then chased down with truncheons, the brutalised women unleashed their last line of defence: a display of their nakedness to institute the traditional female curse, as had been practised in Gikuyuland for generations. The policemen fled at the sight, instantly recognising the powerful gesture, for many Kenyan cultures were abhorrent of young men ever setting eyes on elderly women. Among those who joined the mothers in baring their all was the 2004 Nobel Laureate, Wangari Maathai.

Wangari was a woman of many firsts: she was the first Kenyan woman to earn a PhD and to head a Kenyan public university department. And, of course, she was the first African woman to win the Nobel Peace Prize. Yet, here she was 'grounding' with village women— to use the inventive term by Walter Rodney, the famous Guyanese author whose *How Europe underdeveloped Africa* is now a foundational treatise on post-colonial and development studies. Rodney spent his last years grounding with ordinary workers in his homeland, for they taught him, he said, what he had not learnt in school. Wangari, too, found something of value from the elderly, rural women who had exhibited great courage in the face of adversity.

In urging the protesting mothers of detainees to strip when threatened by security officers who were threatening to break up their protests, Maathai wove traditional beliefs on nudity and gender together with contemporary political



struggles to foment a decisive moment in the struggle that brought women into the centre of a political discourse in which they had only previously been included peripherally,' writes Nanjala Nyabola.<sup>18</sup>

It is worth noting that even the names of the protesting mothers are omitted in Mutunga's book, raising interesting questions about gender marginality in the construction of national narratives. So, let's correct the aberration and record the women warriors: Monica Wangu (mother to politician Koigi wa Wamwere), Milka Wanjiku Kinuthia (mother to lawyer Rumba Kinuthia), Gladys Thiitu Kariuki (mother to Mirugi Kariuki, lawyer and future politician), Ruth Wangari Thungu (mother to Harun Wakaba Thungu) and Leah Wanjiru Mungai (mother to Samuel Kang'ethe Mungai). Priscilla Mwara Kimani (mother to Hosea Gitau), joined the protest at a later stage.

The mothers sought refuge at the nearby All Saints Cathedral, where they pitched tent for one long year, buoyed by support from university students, preachers and ordinary Kenyans. Among those who called on the mothers were two daughters of Mau Mau fighters, symbolically foisting a link between the present and past struggles for freedom.<sup>19</sup> The protest grew organically to incorporate other efforts scattered around different towns of Kenya, including matatu touts and hawkers, who disrupted transport in solidarity with the mothers.

Alexandra Tibbetts, who spent March to June 1992 shadowing the protesting mothers to understand their motivations, writes: 'Meetings were held outside the cathedral; hundreds of people (mostly men) came daily to participate in the open forum where anyone who wished could speak or perform. Similar gatherings occurred in small grassy plots all over the city.'<sup>20</sup> Alternately, Alexandra goes on, the mothers distributed leaflets detailing their sons' cases at bus termini. On one such outing in mid-April 1992, the mothers reportedly distributed some 6,000 leaflets. Consequently, four of the imprisoned sons were released on 24 June 1992. The other four were set free on 19 January 1993.

Without a doubt, the protesting mothers provided a credible pathway for grassroots political mobilisation that may well have been replicated in the constitution-making process. Out of nothing, something new was created. And it grew organically, galvanising a network of other protesters in others towns in

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<sup>18</sup> Nanjala Nyabola, 'Wangari Maathai was not a good woman. Kenya needs many more of them' African Arguments, 6 October 2015, <<https://africanarguments.org/2015/10/06/wangari-maathai-was-not-a-good-woman-kenya-needs-many-more-of-them/>> on 9 December 2020.

<sup>19</sup> Alexandra Tibbetts, 'Mamas fighting for freedom in Kenya' 41(4) *Africa Today*, Indiana University Press, 1994, 37.

<sup>20</sup> Alexandra Tibbetts, 'Mamas fighting for freedom in Kenya', 33.

Kenya. Mutunga and his team had their own successes in mobilising the religious community, trade unionists, students and youth.<sup>21</sup> Their neglect of women, however, persists in the review of the draft manuscript that ultimately became *Constitution-making from the middle*. All the six peer pre-publication reviewers were men, almost all of them lawyers and political scientists.<sup>22</sup> This means the author missed out on the insights and the wisdom from women, calling to mind Barack Obama's rebuke of excluding women in socio-economic development. 'We're in a sports centre: imagine if you have a team and don't let half of the team play. That's stupid. That makes no sense,' Obama castigated during his 2015 trip to Kenya.<sup>23</sup>

Understandably, it will irritate the reader to find the doyenne of the 1922 Harry Thuku riots, Mary Muthoni Nyanjiru, who led a crowd of an estimated 7,000 protesters to demand the release of the trade unionist, from present-day Central Police Station, is erroneously identified in the book as Mary Wanjiku Nyanjiru. Readers might be familiar with yet another historical aberration: Harry Thuku, of course, is memorialised in the major city street, but not the woman who died to secure his freedom. It might seem churlish to excoriate Mutunga for missing Mary Nyanjiru's name, as even male names are misspelt. The political scientist, Musambayi Katumanga, is erroneously listed as Musambavi Katumanga; even the book editor is acknowledged as Chacha Mwita—it is Chaacha Mwita. But the book's egregious errors lie in the silences of other significant details that deservedly belong in this book. In his two prefaces, written nearly 20 years apart, Mutunga offers no assessment of his time in the Judiciary, where he took the helm in 2011 as Chief Justice and President of the Supreme Court of Kenya. This singular honour meant he not only participated in drafting the 2010 Constitution, but also served as its custodian.

In all fairness, Mutunga was reported in local Press revealing he would publish his memoir, provisionally titled, *In search of my humanity: Inspiring encounters*, as well as a book comprising his key rulings, including the 2013 presidential election petition. The books were scheduled for release before the 2017 general election.<sup>24</sup> That did not happen.

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<sup>21</sup> Willy Mutunga, *Constitution-making from the middle*, Chapter 5,6 and 7.

<sup>22</sup> Willy Mutunga, *Constitution-making from the middle*, Appendix A and B.

<sup>23</sup> David Smith, 'Barack Obama in Kenya: 'No excuse' for treating women as second-class citizens' *The Guardian*, 26 July 2015, <<https://www.theguardian.com/us-news/2015/jul/26/barack-obama-condemns-tradition-women-second-class-citizens-nairobi>. > on 4 January 2021.

<sup>24</sup> Judie Kaberia, 'Dr Mutunga to release two books before 2017 poll' *Capital News*, 27 June 2016, <<https://www.capitalfm.co.ke/news/2016/06/dr-mutunga-release-two-books-2017-poll/>> on 9 December 2020.

Let's end where we started: if we were to judge *Constitution-making from the middle* by its cover—women's narratives in the struggle for constitutional reform remain marginal. And as the past ten years have taught us, the sheer contempt for women embodied in Moi's dismissive rant of ordinary folk— encapsulated in the eponymous vegetable vendor, Wanjiku<sup>25</sup>—did not end with Moi. The implementation of the two-thirds gender rule remains a sticking point, as women are yet to receive their rightful share and representation in national politics and other public institutions. A proper documentation of their role in democratising Kenya is the first, natural step towards their restitution and national legitimacy.

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<sup>25</sup> Paul Goldsmith, 'Daniel arap Moi and the politics of Kenya's reorganisation' *The Elephant*, 14 February 2020, <<https://www.theelephant.info/features/2020/02/14/daniel-arap-moi-and-the-politics-of-kenyas-reorganisation/>> on 9 December 2020.