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## Designing a Constitution-Drafting Process: Lessons from Kenya

**ABSTRACT.** This Note examines Kenya's recent constitution-writing experience as a case study for designing constitution-drafting processes in emerging democracies. Eight years after Kenya's constitutional review process began, and after a highly acrimonious drafting period, Kenyans roundly defeated a proposed new constitution in a national referendum. This Note describes Kenya's experience and considers six lessons on designing a constitution-drafting process. It then proposes how a constitution-drafting process in a country like Kenya might have been more effectively designed.

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## INTRODUCTION

Democratization and constitution-writing are frequent bedfellows, and the rise of democratic reform movements throughout the world has often been accompanied by pressure for constitutional reform.<sup>1</sup> More than half of the national constitutions in existence today were written or rewritten in the last thirty years.<sup>2</sup> This flurry of constitution-writing has generated a vast academic literature on the content of new constitutions. This scholarship recognizes that institutional choices such as separation of powers, the structure of the executive branch, and the centralization or devolution of power have implications for ethnic polarization and the risk of conflict, as well as for democracy promotion and economic development.<sup>3</sup>

But constitution-writing processes matter too. Procedural choices can affect the legitimacy of the final document as well as its content. As Bruce Ackerman has noted, “A workable constitution is worthless unless [the framers] can get it accepted . . . .”<sup>4</sup> Scholars have recognized this principle and have made empirical,<sup>5</sup> historical,<sup>6</sup> and philosophical<sup>7</sup> arguments for how best to design the

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1. See, e.g., Stephen N. Ndegwa & Ryan E. Letourneau, *Constitutional Reform*, in DEMOCRATIC TRANSITIONS IN EAST AFRICA 83, 83 (Paul J. Kaiser & F. Wafula Okumu eds., 2004) (“[A]s former monolithic regimes have persisted in power—barely making satisfying changes in rules and practices—opposition politicians and democracy activists have turned greater attention to constitutions and constitutionalism.”).
  2. See VIVIEN HART, DEMOCRATIC CONSTITUTION MAKING 2 (U.S. Inst. of Peace, Special Report No. 107, 2003).
  3. There is a vast political science literature regarding constitutional content, particularly in the context of emerging democracies. See, e.g., JOHN HATCHARD ET AL., COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 57-98, 184-207 (2004); Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 15, 20-22 (Andrew Reynolds ed., 2002); Arend Lijphart, *The Wave of Power-Sharing Democracy*, in THE ARCHITECTURE OF DEMOCRACY, *supra*, at 37, 38-54; Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT’L BLACK L.J. 70, 88-92 (1998-1999).
  4. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 673 (2000).
  5. See, e.g., Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L. 663 (2006); Jennifer Widner, *Constitution Writing and Conflict Resolution*, 94 ROUND TABLE 503 (2005).
  6. See, e.g., Horowitz, *supra* note 3, at 28-29.
  7. See, e.g., HART, *supra* note 2, at 5 (“[T]he formal endorsement of democracy does pack a moral punch and its diffusion in international conventions and new national constitutions supports expectations that it should be observed in constitution-making processes.”).

process of constitution-writing.<sup>8</sup> Most accounts place a premium on public participation and deliberation.<sup>9</sup> Strong versions argue that process is essentially dispositive of the success of the final product,<sup>10</sup> while moderate versions suggest that good process can at least mitigate ethnic tensions and the risk of violence by providing democratic legitimacy and by ensuring the “buy-in” of diverse communities.<sup>11</sup> Other commentators have taken a more pessimistic view, arguing that most constitution-drafting processes are doomed to failure because the compromises that drafters will be forced to make will undermine the final product.<sup>12</sup>

Despite this extensive theoretical literature, there is a dearth of “carefully targeted case studies”<sup>13</sup> on constitution-drafting processes, as well as a surprising lack of scholarly analysis of why particular constitution-writing

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8. The United States’ role in drafting Iraq’s interim constitution has also prompted scholarly interest, with reflections on Iraq’s drafting process and, more generally, on the role of outsiders in imposing constitutions in post-conflict nations. See, e.g., Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858-59 (2005); Note, *Democracy in Iraq: Representation Through Ratification*, 119 HARV. L. REV. 1201 (2006). For a discussion of the content of Iraq’s constitution, see Christopher S. Crago, *Rebuilding the Foundations of Iraq: Comparisons to the Revival of Democracy in Central Europe*, 18 REGENT U. L. REV. 157 (2005).
  9. See, e.g., HATCHARD ET AL., *supra* note 3, at 28-29; Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 530-31 (1999) (“Constitutions that are not firmly grounded in the cultural mores of the society in which they operate are destined to fail, become irrelevant, or be reshaped and adapted to meet the needs of the culture and society in which they are situated.”); Ndulo, *supra* note 3, at 92-93. The U.N. Human Rights Committee likewise found that Canada’s constitutional conference was a “conduct of public affairs” that implicated the right to political participation, although it did not find an “unconditional right to choose the modalities of participation.” Human Rights Comm., *Marshall v. Canada*, ¶¶ 5.3, .5, U.N. Doc. CCPR/C/43/D/205/1986 (1991), available at <http://www1.umn.edu/humanrts/undocs/html/dec205.htm>; see also U.N. Office of the High Comm’r for Human Rights, *General Comment No. 25: The Right To Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996) (“Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process . . .”).
  10. See, e.g., Leon Wessels, *Foreword to CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA*, at ix, xiii (Goran Hyden & Denis Venter eds., 2001).
  11. See Widner, *supra* note 5; see also HART, *supra* note 2, at 12 (“[H]ow the constitution is made, as well as what it says, matters.”).
  12. See, e.g., Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 253, 262 (Ian Shapiro & Stephen Macedo eds., 2000).
  13. Widner, *supra* note 5, at 517.

processes succeed or fail.<sup>14</sup> As political scientist Donald Horowitz has observed, “[T]he spillage rates [between drafting and adoption] are great, but our knowledge of them is thus far so primitive that we can only regard spillage as being close to random in its incidence and configuration.”<sup>15</sup> Most case studies of constitution-drafting experiences are purely descriptive,<sup>16</sup> and analyses that do use case studies to glean lessons about process typically focus on only a few examples: the experiences of North American and Western European nations (particularly the United States),<sup>17</sup> of societies emerging from conflict,<sup>18</sup> and of nations with constitutions imposed by outsiders, such as Japan (or, more recently, Iraq).<sup>19</sup> But many emerging democracies do not fit into any of these categories. Rather, many countries undergo popular democratic reform movements that involve lobbying existing governments for constitutional

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14. Most existing scholarship on constitution-writing processes offers very little detail on how exactly a successful process might be designed. Ruth Gordon, for example, has stated that “[c]onstitutions, laws, and institutions are best created from the bottom up rather than the top down,” and she has urged public participation through a referendum or a special assembly, but she has not detailed how these processes should actually be designed to encourage effective participation. Gordon, *supra* note 9, at 531-32. Likewise, Jamal Benomar has presented a set of “lessons” for constitution-drafting based on the experiences of post-conflict countries, but without specific recommendations. See Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, J. DEMOCRACY, Apr. 2004, at 81, 82. Muna Ndulo has presented a more detailed proposal calling for, among other things, expert drafters and a constitutional assembly. See Ndulo, *supra* note 3, at 95. However, Ndulo’s arguments are not directly linked to a case study and are not sensitive to many of the lessons that this Note highlights.
  15. Horowitz, *supra* note 3, at 35.
  16. See, e.g., CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA, *supra* note 10 (providing detailed case studies of the constitutional review processes in Eritrea, Ethiopia, South Africa, and Uganda); HATCHARD ET AL., *supra* note 3, at 28-42 (providing brief case studies of the constitutional review processes in South Africa, Uganda, Zambia, and Zimbabwe); Ndegwa & Letourneau, *supra* note 1 (providing brief case studies of the constitutional review processes in Kenya, Tanzania, and Uganda).
  17. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5-21 (2005); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 370 (1995) (discussing the constitution-drafting experiences of Europe and North America, but “ignor[ing]” the experiences of Asia, Africa, and Latin America); Sanford Levinson, “Imposed Constitutionalism”: *Some Reflections*, 37 CONN. L. REV. 921, 927 (2005).
  18. See, e.g., Benomar, *supra* note 14, at 82 (discussing “lessons” from the drafting of constitutions in several post-conflict countries); Samuels, *supra* note 5 (discussing constitution-making after conflicts).
  19. See, e.g., 2 DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* (2001); Feldman, *supra* note 8, at 858-59; Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT’L L. 3 (1996); Note, *supra* note 8.

change.<sup>20</sup> These countries face unique challenges. Most seriously, a successful drafting process must avoid capture by the current government yet remain politically palatable to those same leaders. Furthermore, the fact that constitution-drafting is part of a broader democratic reform movement may itself affect what kind of procedural choices are necessary for public legitimacy. Analyses of countries with constitutions imposed by outsiders, or of countries that rebuilt institutions devastated by war or nullified by revolution, can only provide limited guidance.<sup>21</sup>

This Note attempts to fill that gap by examining Kenya's recent constitution-writing experience as a case study for designing constitution-drafting processes in emerging democracies. Kenya is a particularly valuable case study because it represents the relatively unexamined experience of an emerging democracy undergoing a popular constitutional reform movement. Furthermore, no other scholarly work has provided a detailed description of Kenya's recent constitution-drafting experience.<sup>22</sup>

Kenya's constitutional review process grew from a broader democratic reform movement and was designed to be "people-driven,"<sup>23</sup> with broad

20. In Africa, for example, Kenya, Malawi, Tanzania, and Zambia have all had peaceful struggles for constitutional reform in the past decade. See HATCHARD ET AL., *supra* note 3, at 309. There have been no detailed analyses of any of these processes. Outside Africa, Argentina, Armenia, Chile, Mongolia, and Thailand, among others, have all had constitutional reform movements in the past fifteen years. See *Comparative Constitution Drafting Processes in the Philippines, Thailand and Burma: Drafting Process Plays Crucial Role for Contents*, LEGAL ISSUES ON BURMA J., Oct. 1997, at 20, 23-24 (Thailand); Alan J.K. Sanders, *Mongolia's New Constitution: Blueprint for Democracy*, 32 ASIAN SURV. 506 (1992) (Mongolia); Human & Constitutional Rights, More Information on . . . the Argentine Constitution of 1994, <http://www.hrcr.org/chart/annotations&references/Argentina.html> (last visited May 6, 2007) (Argentina); Haroutiun Khachatrian, *Change To Come for Armenia's Constitution?*, EURASIANET.ORG, July 5, 2005, <http://www.eurasianet.org/departments/insight/articles/eavo70505.shtml> (Armenia); *Political Forces*, ECONOMIST.COM, May 30, 2006, <http://www.economist.com/countries/Chile/profile.cfm?folder=Profile-Political%20Forces> (Chile).
21. Some elements of their experiences do remain quite informative. For example, the need for a process that produces a coherent constitutional design is a generally applicable lesson. See *infra* Section II.E.
22. For discussions of the early stages of Kenya's constitutional reform movement, see WILLY MUTUNGA, *CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997* (1999); P.L. AGWELI ONALO, *CONSTITUTION-MAKING IN KENYA 205* (2004), which documents Kenya's experience through the end of 2002; Lawrence Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*, 9 TULSA J. COMP. & INT'L L. 471 (2002), which describes Kenya's experience through mid-2001; and Ndegwa & Letourneau, *supra* note 1, at 83, which gives an account of Kenya's experience through the end of 2002.
23. ONALO, *supra* note 22, at 205.

consultation across the country and a representative constitution-drafting conference. Kenya was even cited as a model for the participatory approach to constitution-drafting.<sup>24</sup> Yet in November 2005, eight years after Kenya's drafting process officially began, Kenyans roundly defeated the proposed constitution in a national referendum: the constitution lost in seven of Kenya's eight provinces in an up-or-down vote, with 57% of voters choosing "No" overall.<sup>25</sup>

This Note details the history of Kenya's constitutional reform movement, discusses key lessons from Kenya's experience, and uses Kenya as a lens through which to consider how designers of other constitution-drafting processes might take these lessons into account. Among other things, it argues that Kenya's experience offers insight into the benefits and costs of highly participatory constitution-writing processes and that it illustrates the risk of capture by elites. This Note also makes concrete recommendations about how Kenya might have better structured its constitutional review process, including proposals about the size and composition of a drafting delegation, the role of existing governmental bodies, and the structure of a referendum.

## I. KENYA'S CONSTITUTION-WRITING PROCESS

### A. *The Movement for a New Constitution*

For many Kenyans, Kenya's current constitution is a symbol of both British colonialism and domestic political oppression.<sup>26</sup> Negotiated in London, the constitution dates to Kenya's independence from Great Britain in 1963. It is also a product of domestic political influence; Kenya's ruling party amended the constitution over thirty times,<sup>27</sup> for purposes that included centralizing power, strengthening executive authority, and, for a significant portion of Kenya's history, banning opposition parties.<sup>28</sup>

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24. See, e.g., HART, *supra* note 2, at 7; Widner, *supra* note 5, at 506.

25. Bård Anders Andreassen & Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution 5-6* (Chr. Michelsen Inst., Working Paper No. 2006:13, 2006), available at <http://www.cmi.no/pdf/?file=/publications/2006/wp/wp2006-13.pdf>.

26. See, e.g., ONALO, *supra* note 22, at xv, 22.

27. Ndegwa & Letourneau, *supra* note 1, at 85.

28. See ONALO, *supra* note 22, at 104, 168-91.

While Kenya has been at peace since achieving independence, it has been a repressive one-party state throughout most of its history.<sup>29</sup> Kenya's first president was Jomo Kenyatta, a hero from Kenya's liberation struggle, who ruled from 1963 until his death in 1978 and created a de facto one-party state in 1969.<sup>30</sup> Daniel arap Moi succeeded Kenyatta and introduced de jure one-party rule in 1982.<sup>31</sup> Both Kenyatta and Moi silenced opposition, sometimes through the use of torture and intimidation.<sup>32</sup> They also used their political power for patronage, often in support of their ethnic groups and home regions, fostering resentment and exacerbating ethnic and regional tensions.<sup>33</sup>

Agitation for constitutional reform in Kenya began in 1990-1991 and was accompanied by calls for multiparty elections, presidential term limits, and expanded political freedom under the highly repressive Moi regime.<sup>34</sup> The primary impetus for reform came from elites in Kenya's civil society, including religious and human rights groups, which mobilized opposition political parties and their supporters and which helped create a popular movement.<sup>35</sup> In 1991 Moi acceded to international and domestic pressure<sup>36</sup> and permitted a constitutional amendment reforming the presidential election process<sup>37</sup> and reinstating a multiparty political structure.<sup>38</sup> These reforms, however, failed to bring opposition leaders the gains they had anticipated, in part due to

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29. For a series of essays on Kenya's political and social history, see *DECOLONIZATION & INDEPENDENCE IN KENYA: 1940-93* (B.A. Ogot & W.R. Ochieng' eds., 1995).
30. See ONALO, *supra* note 22, at 162-63; William R. Ochieng', *Structural & Political Changes, in DECOLONIZATION & INDEPENDENCE IN KENYA*, *supra* note 29, at 83, 100-06.
31. See ONALO, *supra* note 22, at 163.
32. See Stephen Mburu, *Detention: Huge Toll on Humanity*, NATION (Nairobi), Apr. 30, 2000, <http://allafrica.com/stories/200004300040.html> (subscription required) (on file with author).
33. See Edward Miguel, *Tribe or Nation? Nation Building and Public Goods in Kenya Versus Tanzania*, 56 *WORLD POL.* 327, 337-38 (2004).
34. See Ndegwa & Letourneau, *supra* note 1, at 85-89.
35. See E-mail from Willy Mutunga, Former Executive Dir., Kenya Human Rights Comm'n, to author (Jan. 16, 2007, 04:21 EST) (on file with author).
36. See ONALO, *supra* note 22, at 193.
37. CONSTITUTION, Art. 5 (1998) (Kenya), *amended by* Constitution of Kenya Amendment Act, No. 6 (1992) (requiring that the President garner at least 25% of the votes in at least five of eight provinces).
38. Constitution of Kenya Amendment Act, No. 12 (1991) (repealing section 2A of the constitution and reintroducing a multiparty political structure).



continued structural disadvantages in the political system.<sup>39</sup> By 1994, democratic agitation in Kenya had become linked with the call for a new constitution<sup>40</sup>: “Constitution-making became the sole vehicle through which democratization, promotion and protection of human rights and social justice were robustly agitated.”<sup>41</sup> This agitation led to additional moderate constitutional reforms in 1997 and to the enactment of the Constitution of Kenya Review Act (“Review Act”),<sup>42</sup> which was amended in 2001 to provide for a comprehensive review of the constitution and the option to draft a new document.

### B. *The Review Act*

The Review Act outlined a three-step constitutional review process for Kenya: (1) public consultation and initial drafting by a small review commission, (2) revisions to the draft by a national convention, and (3) ratification by Parliament. Strikingly, the Act seemed consistent with many of the preconditions that scholars have argued are necessary for successful constitution-writing: it included several measures to ensure that the document was “home-grown”<sup>43</sup> and would create “a sense of ownership,”<sup>44</sup> and it included checks to ensure that “the government [w]ould neither control nor

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39. For example, opposition parties were undermined by sedition laws, laws that restricted free assembly, and executive-controlled party registration mechanisms. Ndegwa & Letourneau, *supra* note 1, at 85.

40. *Id.*

41. E-mail from Willy Mutunga to author, *supra* note 35.

42. (2001) Cap. 3A. There were intense political struggles in 1997-2001 over the design of the review process, particularly over the operation of the Review Commission and the role of the President. Members of civil society and many opposition leaders and MPs called for a popular convention, while the ruling regime demanded a presidential commission. After bitter debate and political tension, as well as two simultaneous review processes by Parliament and civil society groups, a compromise bill was passed in 2001 amending the Review Act and beginning the process of constitution-writing. See Ndegwa & Letourneau, *supra* note 1, at 87-88; Samwel Rambaya, *From Street Battles to Conference Rooms*, E. AFR. STANDARD (Nairobi), Jan. 12, 2004, <http://allafrica.com/stories/200401120447.html> (subscription required) (on file with author).

43. Wessels, *supra* note 10, at xiii; see also Gordon, *supra* note 9, at 530 (“Constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy. Thus, growing constitutions embodies the not so novel idea that constitutions and laws should reflect and be derived from the cultural norms in which they must endure.”).

44. Ndulo, *supra* note 3, at 83.

unduly influence” the process.<sup>45</sup> In particular, the Act emphasized consultation with ordinary Kenyans and extensive deliberation among drafters, and it attempted to sidestep interference in the process by the President or by Parliament.

First, the Act created a Review Commission<sup>46</sup> that was empowered to “collect and collate the views of the people of Kenya” on proposals to amend or rewrite the constitution, and to draft a bill to alter the constitution for presentation to Parliament.<sup>47</sup> The Act required the Commission to visit every constituency in Kenya to collect citizens’ views and to disseminate the draft constitution widely among the public.<sup>48</sup>

Next, the Act required the Commission to convene a National Constitutional Conference for “discussion, debate, amendment and adoption” of the Commission report and draft constitution.<sup>49</sup> This National Conference consisted of 629 delegates,<sup>50</sup> including the commissioners as nonvoting members, every MP, and representatives from each district and political party in Kenya, as well as from religious, professional, and other civil organizations.<sup>51</sup> The Act mandated that the National Conference agree to the draft constitution by “consensus” and required a two-thirds majority for amendments.<sup>52</sup> Contentious amendments, which were neither supported by two-thirds of delegates nor opposed by a third of delegates or more, could be submitted to a national referendum.<sup>53</sup> Finally, under the Act, the Commission had to submit the revised draft to Parliament, which could accept or reject the proposed constitution, without amendment, in an up-or-down vote.<sup>54</sup>

Thus, the Review Act emphasized broad public participation at every stage of the drafting process and deliberately mitigated the influence of Parliament

45. HATCHARD ET AL., *supra* note 3, at 28.

46. The Review Commission comprised twenty-seven commissioners nominated by Parliament and appointed by the President; the Review Act included requirements for regional and gender diversity, as well as a requirement that commissioners cease active party activity upon appointment. *See* The Constitution of Kenya Review Act § 6-8.

47. *Id.* § 17(b).

48. *Id.* §§ 18(1)(a), 27(1)(a).

49. *Id.* § 27(1)(b).

50. The Review Act specified criteria for who would qualify as a delegate to the National Conference, and 629 delegates qualified. THE FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION 49 (2005) (on file with author).

51. The Constitution of Kenya Review Act § 27(2).

52. *Id.* § 27(5).

53. *Id.*

54. *Id.* § 28.

and the President in constitution-writing. The President could not participate in the Review Commission or in the National Conference, and MPs composed less than a majority of the Conference and could only approve the draft constitution in an up-or-down vote, without subsequent amendment. But while Kenya's process was designed to avoid partisan capture and to reflect the will of the populace, numerous *ex post* revisions undermined those ambitions.

### C. *The Constitutional Review Process*

#### 1. *The 2002 Elections and the Review Process*

Kenya's review process began in late 2001,<sup>55</sup> and the Review Commission completed the Act's first stage of information-gathering, public education, and initial drafting by mid-2002. The Commission planned to start the second stage of the process, the National Conference, in October 2002, and to have the entire process completed before December 2002 so that a new constitution could be in place before Kenya's presidential and parliamentary elections.<sup>56</sup> However, the process's interaction with Kenya's December 2002 elections fundamentally altered its terms.

President Moi dealt the first blow to the review process by dissolving Parliament in October 2002 and ending the terms of Kenya's MPs (a power he had as President under the existing constitution). This eliminated any possibility that the review process would be completed before the December elections; by truncating the terms of the MPs, Moi moved them outside the scope of the Review Act, so that no MPs would be represented in the Conference. Holding a Conference without the MPs was arguably inconsistent with the Review Act and was clearly politically untenable. The Chairman of the Review Commission was therefore forced to postpone the Conference until after the elections.<sup>57</sup> Moi, a fierce opponent of constitutional reform, had ensured that the 2002 elections would take place under the old constitution.<sup>58</sup>

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55. For a brief overview of Kenya's drafting process, see Andreassen & Tostensen, *supra* note 25, at 2-3.

56. See *Ghai Team Sticks to Plans for Law Talks*, NATION (Nairobi), Oct. 27, 2002, <http://allafrica.com/stories/printable/200210280096.html> (subscription required) (on file with author).

57. See Francis Openda, *Ghai Stops Review Talks Indefinitely*, E. AFR. STANDARD (Nairobi), Oct. 28, 2002, <http://allafrica.com/stories/printable/200210280719.html> (subscription required) (on file with author).

58. There are a number of possible reasons why Moi chose to dissolve Parliament. First, Moi had been hostile to constitutional reform throughout his tenure, as it threatened his power as President. Although Moi's political tenure was ending, he may have feared that a new

The second blow to the review process came from the National Rainbow Coalition (NARC), the opposition coalition to the ruling Kenya African National Union (KANU)<sup>59</sup> during the 2002 elections. In previous multiparty elections, opposition to KANU had fragmented.<sup>60</sup> NARC thus chose to solidify its alliance by drafting a “Memorandum of Understanding” that promised key leaders new positions created by the as-yet-unratified draft constitution. In particular, opposition leader Raila Odinga, whose support was particularly critical for NARC’s electoral survival,<sup>61</sup> agreed to join NARC and to throw his weight behind coalition leader Mwai Kibaki rather than to vie independently for the presidency, in exchange for a promise that he would become Prime Minister when the new constitution creating this position was ratified.<sup>62</sup> NARC announced this agreement publicly, and it was widely discussed in the media.<sup>63</sup> At the same time, Kibaki promised to have a new constitution in place within a hundred days of assuming power.<sup>64</sup>

The Memorandum of Understanding succeeded in keeping NARC unified before the elections and thereby facilitated Kenya’s peaceful democratic

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constitution would fail to protect him when he became a private citizen. By slowing down the review process, he made it more likely that a new constitution would never be ratified, or that if it were ratified, it would have terms favorable to him. Second, Moi likely thought that his party, the Kenya African National Union (KANU), would enjoy electoral advantages under the old constitution, which had a winner-take-all system that disadvantaged coalitions. Finally, it is likely that Moi wanted to demonstrate his power and relevance even as his presidential tenure was concluding; by halting the constitutional review process, he brought attention back to himself rather than to the candidates for his succession.

59. KANU had been the ruling party since independence. See Reuben Olita, *Kibaki Takes Over Office*, NEW VISION (Kampala), Dec. 31, 2002, <http://allafrica.com/stories/200301010049.html> (subscription required) (on file with author).
60. See Stephen Orvis, *Moral Ethnicity and Political Tribalism in Kenya’s “Virtual Democracy,”* 29 AFR. ISSUES 8, 9-10 (2001).
61. Odinga is the son of a prominent independence leader and enjoys great power within his Luo ethnic community, the second largest in Kenya. NARC was a coalition made up of the National Alliance of Kenya (NAK), a group of opposition parties that included Mwai Kibaki among its leadership, and the Liberal Democratic Party (LDP), which broke away from KANU under Odinga’s leadership after several leaders were denied the opportunity to vie for the presidential nomination. See Emman Omari, *Super Alliance To Unveil Poll Line-Up Today*, NATION (Nairobi), Oct. 21, 2002, <http://allafrica.com/stories/printable/200210210636.html> (subscription required) (on file with author).
62. The existing constitution did not provide for a Prime Minister, but the Review Commission had proposed it in a draft.
63. See David Mugonyi, *The Super Alliance Line-Up for Election*, NATION (Nairobi), Oct. 22, 2002, <http://allafrica.com/stories/printable/200210220272.html> (subscription required) (on file with author).
64. Rambaya, *supra* note 42.

transition from KANU rule. Bucking expectations, NARC won control of Parliament from KANU in a free and fair election, and Kibaki defeated Moi's chosen successor to win the presidency.<sup>65</sup>

Despite its role in Kenya's political transition, however, the Memorandum of Understanding also helped make the subsequent Constitutional Conference highly divisive and acrimonious, prompting ex post alterations to the constitutional review process by Parliament and leading to a number of competing drafts. The Memorandum of Understanding had allowed Kibaki to ride the coattails of the idea of the new constitution without facing divisive debates about its content. When constitutional negotiations recommenced after the election, however, such debates quickly emerged.

## 2. *The Constitutional Conference at Bomas*

Almost immediately after his election in late December 2002, Kibaki pushed back his promise of a new constitution to June 2003. The second stage of the Review Act, the Constitutional Conference, began in late April 2003.<sup>66</sup> The Conference took place at the Bomas of Kenya theater facility and was widely referred to simply as "Bomas." Talks quickly became acrimonious, and the Conference ultimately required three rounds of negotiations ending in March 2004.<sup>67</sup> The Bomas process did produce a draft constitution, but it also led to lawsuits, the withdrawal of the Kibaki government from negotiations, parliamentary bills to alter both the Act and the existing constitution, and alternative drafts. Despite almost a year of negotiations, the Bomas draft was never enacted by Parliament or presented to the public for a referendum.

Three major issues dominated Bomas: (1) the structure of the executive (whether there should be a Prime Minister in addition to the President, and if so, what powers the position should enjoy); (2) devolution (whether Kenya

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65. See John Kakande, *Kenya Achieves a Major Political Feat*, NEW VISION (Kampala), Jan. 1, 2003, <http://allafrica.com/stories/printable/200301020401.html> (subscription required) (on file with author). Moi had declined to seek reelection under pressure to obey a previous constitutional amendment limiting his term. See Thomas P. Wolf et al., *A New Dawn? Popular Optimism in Kenya After the Transition* 3 (Afrobarometer, Working Paper No. 33, 2004), available at <http://www.afrobarometer.org/papers/AfropaperNo33.pdf>.

66. See David Mugonyi, *Constitution Review: How Delegates Will Write New Laws*, NATION (Nairobi), Apr. 28, 2003, <http://allafrica.com/stories/printable/200304280021.html> (subscription required) (on file with author).

67. See Dennis Onyango, *Anxiety Rises over Law Reforms*, E. AFR. STANDARD (Nairobi), Mar. 17, 2004, <http://allafrica.com/stories/printable/200403170019.html> (subscription required) (on file with author) (discussing the government's acrimonious withdrawal from the review process).

should have a federal system with significant lawmaking powers at the local level); and (3) Khadis courts (whether Kenya should codify separate civil courts for Muslims). However, the issue of executive power was by far the most publicized issue and the most divisive among delegates.<sup>68</sup>

During the Bomas negotiations, Odinga led a coalition that called for a powerful executive Prime Minister, while President Kibaki's supporters strongly opposed an executive Prime Minister, arguing that executive power should be concentrated and that checks and balances through other branches could be used to balance the President's power.<sup>69</sup> The Bomas debate made explicit reference to the coalition's preelection agreement and identified Odinga as the would-be Prime Minister.<sup>70</sup>

While the first two rounds of Bomas were tense, the process completely broke down in the third and final round of negotiations. Key NGO representatives pulled out of the Conference in January 2004.<sup>71</sup> Meanwhile,

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68. See, e.g., Muriithi Muriuki, *Bomas Talks Could Be Extended to Next Year*, NATION (Nairobi), Sept. 17, 2003, <http://allafrica.com/stories/printable/200309170121.html> (subscription required) (on file with author) ("The [Conference] meeting agreed that the issue of what kind of governance system the country should adopt – either Parliamentary, presidential or a mixture of both – was the single biggest factor that may lead to the process dragging.").
69. Interestingly, Odinga retained a cabinet position throughout this process, despite his vocal criticism of Kibaki's leadership. Kibaki ultimately fired Odinga after the defeat of the draft constitution in the national referendum. See Saitabao Ole Kanchory, *President's Drastic Action Within the Law*, NATION (Nairobi), Dec. 5, 2005, <http://allafrica.com/stories/printable/200512050979.html> (subscription required) (on file with author).
70. See Anderson Ojwang', *19 MPs Back Raila for Premier's Post*, E. AFR. STANDARD (Nairobi), Aug. 3, 2003, <http://allafrica.com/stories/printable/200308040332.html> (subscription required) (on file with author).
71. Specifically, the Ufungamano Initiative pulled out of the Conference and released a parallel draft constitution. Ufungamano, which had been a leader in Kenya's constitutional reform movement and which had close ties to President Kibaki, argued that power should be concentrated in the executive and demanded that its draft be presented to voters through a referendum. See Fred Oluoch, *Is NAK Using Ufungamano To Derail Bomas?*, E. AFR. (Nairobi), Jan. 19, 2004, <http://allafrica.com/stories/printable/200401201285.html> (subscription required) (on file with author); Njeri Rugene, *Churches Plot a Constitution Takeover*, NATION (Nairobi), Jan. 16, 2004, <http://allafrica.com/stories/printable/200401160513.html> (subscription required) (on file with author). In addition, in February 2004 a group of MPs proposed amending the Review Act to give Parliament the power to amend the draft constitution before voting on it. See Ben Agina, *147 MPs Rally To Recall Parliament*, E. AFR. STANDARD (Nairobi), Feb. 4, 2004, <http://allafrica.com/stories/printable/200402040121.html> (subscription required) (on file with author). These MPs also moved to amend the existing constitution, arguing that it did not give Parliament the right to enact a new constitution. See *id.* Kibaki approved two bills to this effect in early March, to be presented to Parliament for approval. See David Mugonyi, *New Constitution Delayed as MPs Take Over Draft*, NATION (Nairobi), Mar. 9, 2004, <http://allafrica.com/stories/200403090482.html> (subscription required) (on file with author).

negotiations at Bomas continued, and a consensus team drafted a set of proposals that included a mixed executive system with a strong President. However, when brought to a full vote, Bomas delegates rejected the consensus document and voted for a constitution with a strong Prime Minister (as well as devolution of political powers).<sup>72</sup> President Kibaki's allies proceeded to walk out of Bomas,<sup>73</sup> and the following day the Kibaki government announced its withdrawal altogether from the National Conference.<sup>74</sup>

The remaining members of the Conference continued their work without the government or its representatives and subsequently passed a draft constitution—which included a strong Prime Minister—to be submitted to Parliament under the Review Act.<sup>75</sup>

### 3. *Revisions to the Draft*

With the Bomas Conference completed, parliamentary proponents and opponents of the draft constitution entered bitter negotiations over how to move forward. Complicating matters, just as Bomas was completing its work, Kenya's High Court issued a ruling that any new constitution ultimately needed to be ratified through a national referendum.<sup>76</sup> Parliament amended the Review Act in response to the High Court's ruling, adding a provision for a referendum subsequent to Parliament's ratification of the draft constitution.<sup>77</sup> However, Kibaki's supporters further demanded that Parliament amend the Act to enable itself to alter the Bomas draft before presenting it to the public, instead of having to accept or reject the draft in an up-or-down vote. Kibaki

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72. See Kwendo Opanga, *Kibaki Blow as Bomas Passes Draft Stripping President of Powers*, E. AFR. STANDARD (Nairobi), Mar. 16, 2004, <http://allafrica.com/stories/printable/200403160021.html> (subscription required) (on file with author).

73. See *id.*

74. See Moody Awori, *Government "Pulls out" of Bomas Process*, NATION (Nairobi), Mar. 16, 2004, <http://allafrica.com/stories/printable/200403160422.html> (subscription required) (on file with author).

75. See Njeri Rugene & Tony Kago, *At Last, Here's the Draft Constitution*, NATION (Nairobi), Mar. 24, 2004, <http://allafrica.com/stories/printable/200403240143.html> (subscription required) (on file with author); see also DRAFT CONSTITUTION OF KENYA 2004, art. 172 (Nat'l Constitutional Conference 2004) [hereinafter Bomas Draft].

76. See Jillo Kadida, *Constitution Review: Fresh Setback for Bomas Draft*, NATION (Nairobi), Mar. 26, 2004, <http://allafrica.com/stories/printable/200403260035.html> (subscription required) (on file with author).

77. See *Kanu Seeks Referendum on Draft Constitution*, E. AFR. STANDARD (Nairobi), Apr. 13, 2004, <http://allafrica.com/stories/printable/200404130070.html> (subscription required) (on file with author).

argued that given the disputes over the Bomas draft, “consensus” among MPs—particularly on the issue of executive power—was the only way forward.<sup>78</sup>

Critics charged that the proposed constitutional consensus-building was nothing more than dealmaking among MPs,<sup>79</sup> and prominent leaders such as Odinga refused to participate, arguing that any parliamentary alteration to the draft constitution would be illegitimate.<sup>80</sup> The “consensus group” nonetheless agreed to a proposal to give Parliament power to amend the Bomas draft before voting on it.<sup>81</sup> This revision to the Review Act passed Parliament despite strong resistance from Odinga and opposition parties, including the former ruling party KANU.<sup>82</sup> Disputes over the draft constitution also spilled over into other aspects of governing; for example, dissenting MPs left Parliament to prevent a quorum during important votes in order to protest the government’s handling of the review.<sup>83</sup>

With new power to make amendments, MPs participated in a series of retreats to rework the Bomas draft in light of the ruling government’s concerns, particularly over the scope of executive power.<sup>84</sup> Odinga’s followers and the opposition party boycotted these retreats, accusing the government of “mutilating” the Bomas draft.<sup>85</sup> However, the retreats went on, and the drafters finalized a revised constitution in July 2005,<sup>86</sup> promising a referendum for

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78. Njeri Rugene & David Mugonyi, *Kibaki in Countdown to June 30 Deadline*, NATION (Nairobi), June 2, 2004, <http://allafrica.com/stories/printable/200406020014.html> (subscription required) (on file with author).

79. Kibe Mungai, *Consensus Initiatives and the Politics of Constitution Making*, E. AFR. STANDARD (Nairobi), June 6, 2004, <http://allafrica.com/stories/printable/200406070362.html> (subscription required) (on file with author).

80. Argwings Odera, *Raila: Kibaki Has To Keep Promise*, E. AFR. STANDARD (Nairobi), June 4, 2004, <http://allafrica.com/stories/printable/200406040081.html> (subscription required) (on file with author).

81. Julius Bosire & David Mugonyi, *LDP and KANU Plan To Fight New Review Bill*, NATION (Nairobi), June 10, 2004, <http://allafrica.com/stories/printable/200406100034.html> (subscription required) (on file with author).

82. *See id.*

83. Odhiambo Orlale, *Quorum Snag as Debate on Trade Starts*, NATION (Nairobi), June 4, 2004, <http://allafrica.com/stories/printable/200406040424.html> (subscription required) (on file with author).

84. *See Resign, Kibaki Told*, E. AFR. STANDARD (Nairobi), July 19, 2005, <http://allafrica.com/stories/printable/200507181719.html> (subscription required) (on file with author).

85. *Id.*

86. *We’ll Have New Law by Dec 12, Says Kiraitu*, NATION (Nairobi), July 18, 2005, <http://allafrica.com/stories/printable/200507180629.html> (subscription required) (on file with author).



November.<sup>87</sup> The new draft mandated, among other changes, a Prime Minister who was appointed by and reported to the President.<sup>88</sup> Odinga's followers and KANU opposed the new draft, arguing that it failed to reflect the will of the people regarding essential reforms and that it ignored the "views expressed through the [Commission] and . . . Bomas . . . for a Parliamentary system of government and a devolved participatory form of local government."<sup>89</sup>

#### 4. *The Referendum*

The lead-up to the referendum was marked by a moderate level of violence, including riots in Western Kenya, an area dominated by Odinga's Luo ethnic group.<sup>90</sup> The Kibaki government also openly made promises of patronage and resources in return for electoral support—offering pay raises to civil servants and distributing land titles and food relief in exchange for support.<sup>91</sup> Kibaki also threatened to fire cabinet members and civil servants who did not support the draft constitution,<sup>92</sup> and he used a televised address to encourage passage of the constitution, without providing the opposition with a similar opportunity to address the country.<sup>93</sup> Odinga and other opposition politicians, for their

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87. See *Kenya Votes in Historic Referendum*, NATION (Nairobi), Nov. 21, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=61928](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=61928) (subscription required) (on file with author).
88. Compare *The Proposed New Constitution of Kenya (2005)*, KENYA GAZETTE SUPPLEMENT No. 63 art. 163 ("The Prime Minister shall be accountable to the President . . . ."), with *Bomas Draft*, *supra* note 75, art. 172 ("There shall be a Prime Minister of the Republic, who shall be the Head of Government.").
89. ORANGE NO CAMPAIGN, OUR CASE AGAINST THE WAKO DRAFT (2005) (on file with author).
90. See John Oywa & Benson Amadala, *55 Face Court over Campaign Violence*, NATION (Nairobi), Nov. 1, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=60545](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=60545) (subscription required) (on file with author).
91. See Lucas Barasa, *Chiefs Pay Doubled as Draft Row Rages*, NATION (Nairobi), Nov. 9, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=61105](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=61105) (subscription required) (on file with author).
92. Kibaki reportedly stated during an address to district leaders, "If you are part of Government and you do not toe the line, and you think your colleagues are dreaming, that is useless. We will sack some people." Bernard Namunane, *We Will Sack Some People, Warns Kibaki*, NATION (Nairobi), Nov. 18, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=2&newsid=61714](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=2&newsid=61714) (subscription required) (on file with author).
93. See *Kenyans Vote on New Constitution*, BBC NEWS, Nov. 21, 2005 (on file with author).

part, stoked ethnic tensions and at times misrepresented the content of the proposed draft.<sup>94</sup>

Despite concerns that violence would escalate in anticipation of the polls, the days immediately preceding the elections were calm.<sup>95</sup> But in what was perhaps more a contest along ethnic lines and a referendum on Kibaki's leadership than a vote on the draft's content, approximately 57% of voters rejected the proposed constitution.<sup>96</sup> After over ten years of public agitation, Kenya's efforts to write a new constitution had failed.

Strikingly, there continues to be a strong desire among many Kenyans for a new constitution, designed by Kenyans and protective of democratic rights. In fact, both supporters and opponents of the draft constitution have continued to call for replacing the existing constitution.<sup>97</sup> As one newspaper editorialized: "It seems difficult to imagine that the people will want to continue with the [current] constitution – one imposed on them by the outgoing colonial regime in its own exploitative interests and then systematically ruined by the post-independence governments in their own tyrannical interests."<sup>98</sup> Yet despite a general desire to adopt a new constitution, the Review Act was unable to deliver a document that was both palatable to entrenched political interests and capable of receiving wide public support.

## II. LESSONS LEARNED

Kenya's experience is important not just as an illustration of Kenyan political machinations, but also as a case study for the design of constitutional

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94. I am grateful to Makau Mutua for pointing this out. See E-mail from Makau Mutua, Chairman, Kenya Human Rights Comm'n, to author (Dec. 28, 2006, 16:18 EST) (on file with author).
95. See *Kenya Rallies Pass Off Peacefully*, BBC NEWS, Nov. 19, 2005, <http://news.bbc.co.uk/1/hi/world/africa/4451806.stm>.
96. Andreassen & Tostensen, *supra* note 25.
97. See Mugo Njeru & Jeff Otieno, *Kibaki Promises New Talks on Constitution*, NATION (Nairobi), Dec. 13, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=63310](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=63310) (subscription required) (on file with author). For example, in late 2006, Parliament considered rival bills proposing new constitutional reforms before the presidential election in the winter of 2007. See Tony Kago, *Tug-of-War over Minimum Reforms*, NATION (Nairobi), Sept. 16, 2006, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=81487](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=81487) (subscription required) (on file with author).
98. Editorial, *Heed the People's Wishes*, NATION (Nairobi), Nov. 23, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=24&newsid=62039](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=24&newsid=62039) (subscription required) (on file with author).

review processes. While every country's political, historical, and cultural context is different, there are a number of lessons to be learned from Kenya's constitution-writing process, particularly for emerging democracies. Part II outlines general lessons from Kenya's experience, and Part III develops concrete proposals for how a constitution-drafting process might be designed in light of these lessons.

Kenya's experience suggests six main lessons: (1) avoiding prohibitive costs while promoting participation; (2) mitigating the risk of capture by political, ethnic, and other elites; (3) creating a veil of ignorance; (4) reducing the risk of engendering ethnic conflict; (5) maximizing the chance of producing a constitution with a coherent institutional design; and (6) maintaining incentives in the face of political shifts. Some lessons, such as the need for a veil of ignorance, are consistent with observations made in existing scholarship on constitutional design. However, this Note argues that Kenya's experience also highlights lessons that have not been recognized by other commentators and that raise particular concerns for countries where constitutional reform is motivated by a popular democratic movement. In particular, Kenya's experience offers insight into when public participation is necessary for drafting a constitution, and how such participation should be structured so as to mitigate costs. It also suggests that the risk of capture is heightened when constitutional reform requires ongoing negotiation with an entrenched government.

#### *A. Lesson 1: The Benefits and Costs of a Participatory Review Process*

One key lesson from Kenya is that public participation is a more equivocal value than many commentators have recognized. In Kenya's political context, broad participation was necessary for legitimacy; yet under different political circumstances such participation would have been less valuable. Furthermore, even in Kenya, participation generated significant economic costs and social disruption. Designers of review processes should consider a country's cultural and political context to evaluate whether broad participation is a practical necessity and to structure public participation to minimize costs.

##### *1. The Participation Myth*

Many commentators have understated the costs of broad participation and have failed to recognize the extent to which its value depends on specific social

and political contexts.<sup>99</sup> For example, the Commonwealth of Nations and the U.S. Institute of Peace have urged best practice guidelines that support participation in generalized terms, urging countries to develop a process that “constructively engages the majority of the population” and that empowers ordinary people “to make effective contributions,”<sup>100</sup> without specifying why or how to structure that participation. Political scientist Muna Ndulo has made a similarly broad argument for the need for consultation in constitution-drafting:

A constitution should be the product of the integration of ideas from all the major stake-holders in a country (i.e., all political parties both within and outside parliament, organized civil society and individuals in the society). . . . A constitution perceived as having been imposed on a large segment of the population or having been adopted through the manipulation of the process by some of the stake-holders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.<sup>101</sup>

Indeed, highly participatory processes have had legitimating effects in some countries, such as South Africa.<sup>102</sup>

However, those who argue that highly participatory constitutional review processes are prerequisites to legitimacy face some embarrassing counterexamples. Perhaps most notably, Japan’s constitution has enjoyed long-term legitimacy despite the fact that it was written by approximately two dozen Americans during Japan’s postwar occupation, with relatively minor revisions made by Japanese government officials and virtually no public consultation.<sup>103</sup> Likewise, while there is some empirical evidence that participation can deter conflict, the correlation is far from perfect.<sup>104</sup> More seriously, highly participatory processes have also had delegitimizing effects in some countries.

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99. Even Donald Horowitz, who is generally critical of participatory constitution-drafting processes, has noted that participation “may give rise at least to a sense of local ownership of the product, even if the institutions fall short of what is required to mitigate conflict.” Horowitz, *supra* note 3, at 36 (footnote omitted).

100. Widner, *supra* note 5, at 504.

101. Ndulo, *supra* note 3, at 93.

102. See EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 27 (2006).

103. See 2 HELLEGERS, *supra* note 19, at 518-44.

104. See Widner, *supra* note 5, at 516-17 (“[D]ifferences in the representativeness or participatoriness of the drafting process have no major effect on post-ratification levels of violence in some parts of the world, such as Europe, but do make a difference in Africa, the Americas and the Pacific Islands.”).

For example, Chad's participatory constitutional conference in 1996 increased Francophone-Arab tensions, due in part to the slowness of deliberations.<sup>105</sup> Similarly, Nicaragua's 1987 constitutional review process led to fairness concerns regarding the methods of canvassing local opinion.<sup>106</sup>

Kenya's experience is useful in drawing out some of the specific conditions that make broad participation either helpful or undesirable in light of an individual country's circumstances. It illustrates that a country's history of democratic reform, its level of ethnic tension, its degree of development, and the strength of its existing institutions are all essential to understanding the costs and benefits of participatory processes.

## 2. *The Benefits of Broad Participation in Kenya*

Perhaps most importantly, Kenya's history made consultation important to legitimacy in a way that it may not be in countries where constitutionalism is not associated with a popular democratic reform movement. Kenya's existing constitution is strongly associated with colonialism and political oppression under the Kenyatta and Moi governments,<sup>107</sup> and the reform movement emphasized the need for "a home-made and home-grown constitution."<sup>108</sup> Kenya's constitutional reform movement was itself an outgrowth of a broader democratization movement, and the rhetoric of participation thus played an essential part in the debate over the draft constitution.<sup>109</sup> As Foreign Minister Chirau Ali Mwakwere, a supporter of the constitution, observed, "It is . . . painful that we shall continue being ruled under the current Constitution which most Kenyans never participated in making."<sup>110</sup> Indeed, opponents of the draft constitution that was revised by Parliament attacked its deviation from the Bomas draft on the ground that the latter was a more direct product of public consultation. As Odinga put it, "Kenyans have already spoken and their views have been known and condensed into a document."<sup>111</sup> Kenya's

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105. See *id.* at 504, 507.

106. See *id.* at 507.

107. See, e.g., ONALO, *supra* note 22, at xv, 22; see also *supra* text accompanying note 98.

108. ONALO, *supra* note 22, at 22.

109. See *supra* notes 34-42 and accompanying text.

110. *We Accept Defeat, Say Yes Ministers*, NATION (Nairobi), Nov. 23, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=2&newsid=62015](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=2&newsid=62015) (subscription required) (on file with author).

111. Stephen Mburu, *How Differences in Narc Play Up the Issue of Putting Draft to Vote*, NATION (Nairobi), Oct. 12, 2003, <http://allafrica.com/stories/printable/200310130319.html> (subscription required) (on file with author).

political history therefore made it especially important for legitimacy that the new constitution be democratic in its creation as well as its content.<sup>112</sup>

Of course, participatory processes may have other beneficial effects in countries with different histories and political contexts, including providing drafters with input about citizens' needs and values and promoting public interest and buy-in regarding the final product. However, while Kenya's particular history suggested a need for broad participation, in countries where constitutionalism is not synonymous with democratization, it is less likely that participants will see public input as a logical necessity or as imperative for legitimacy.

In addition to providing legitimacy, Kenya's process—particularly its referendum—helped consolidate democratic institutions.<sup>113</sup> For example, despite the Kibaki government's attempts to “buy” support with patronage and public works projects, Kenyans still rejected the proposed constitution. This maturation of Kenyan democracy was noted in the Kenyan press: “This society is democratising quietly but in very fundamental ways. . . . They will accept your money and relief food, but vote with their conscience.”<sup>114</sup> Even more significantly, Kenya's referendum itself was relatively free and fair,<sup>115</sup> and the government—which had campaigned vigorously for the new constitution—accepted the legitimacy of its opponents' victory. The consolidation of democracy as a political tool for elites is a significant development for Kenya. As Noah Feldman has noted, “Once elites have adopted a particular constitutional right, and it has been respected in practice, it can grow into a powerfully effective weapon, capable of withstanding even very significant pressure under crisis conditions.”<sup>116</sup>

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112. The same reasoning would apply to South Africa, where the constitutional reform movement grew out of the anti-apartheid movement.

113. Cf. Barry R. Weingast, *Designing Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY* 343, 347 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (“I provide a twofold definition of democratic consolidation: First, no significant group of citizens or parties out of power is willing to attempt to subvert power or secede. Second, those in power follow the constitutional rules (e.g., they obey election results and eschew transgressing the rights of their opponents).” (citation omitted)).

114. Jaindi Kiseru, *Vital Lessons from the Orange Win*, *NATION* (Nairobi), Nov. 23, 2005, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=25&newsid=62040](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=25&newsid=62040) (subscription required) (on file with author).

115. See Andreassen & Tostensen, *supra* note 25, at 4 (“The polling process . . . was generally calm and orderly throughout the country. In many polling centres the atmosphere was even dignified.”).

116. Feldman, *supra* note 8, at 885-86.

Furthermore, the referendum led to extensive multiethnic coalition-building on both sides of the constitution debate—an important development for an ethnically divided country like Kenya. Thus, while ethnic loyalty still played a prominent role in voting, “the group that manage[d] to put together the widest multi-ethnic coalition with leading lights from all regions, especially where you have a fair mix of the young and the old, . . . [was able to] carry the day.”<sup>117</sup> However, this democratic consolidation was itself a product of Kenya’s political and social context: elections played this role because Kenya had an adequate foundation of democratic institutions and a level of ethnic division that still lent itself to coalition-building and general fair play.<sup>118</sup>

Moreover, Kenya’s referendum was by no means a panacea for Kenyan democracy. For example, despite the referendum’s “success,” electoral observers noted that the “campaign in the run-up to the referendum gave decreasing attention to the substance of the matter and focused increasingly on ethnicity.”<sup>119</sup> While Kenya’s referendum reflected a new level of democratic maturity, previous elections had degenerated into violence and intimidation, undermining rather than promoting democratization.<sup>120</sup> Again, the value of Kenya’s participatory process was closely rooted in its politics and culture: a referendum would have been less valuable had Kenya’s baseline institutions been weaker or its ethnic cleavages stronger.<sup>121</sup>

### 3. *The Costs of Broad Participation in Kenya*

While Kenya’s participatory procedures were important in legitimizing the process and consolidating democracy, they also generated severe costs in terms of expense, time, and the opportunity cost of other legislative initiatives. Outreach, education, and negotiation among delegates took time; the review

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117. Kiser, *supra* note 114.

118. For instance, these kinds of developments might not have been possible in Iraq.

119. Andreassen & Tostensen, *supra* note 25, at 6.

120. See Walter O. Oyugi, *Politicised Ethnic Conflict in Kenya: A Periodic Phenomenon 7-8* (2000), <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN010963.pdf>.

121. Afghanistan provides one example of when international pressure arguably led to more public participation than the populace was ready to accept. In response to U.N. pressure, Afghanistan’s constitution-drafting commission consulted Afghans “in every province, in the refugee communities of Pakistan and Iran, and through tens of thousands of written questionnaires.” Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. DEMOCRACY, July 2004, at 5, 10. However, after undertaking such broad consultations, the government and United Nations “thought it best to keep the content of deliberations confidential until the commission could make public a thoroughly vetted text,” because of the volatility of the situation and the risk of violence. *Id.*

process dominated Kenya's attention and the legislative calendar for over three years. The "participatory" elements of Kenya's process, including the referendum, the Bomas Conference, and outreach efforts, were also expensive. Official government statistics report that the review process cost approximately \$88 million<sup>122</sup> (or roughly \$2.57 per person<sup>123</sup>), and unofficial estimates are as high as \$138 million.<sup>124</sup> This is a significant cost for a nation with a per capita GDP of only \$525.<sup>125</sup> Even using the conservative estimate, the review's cost over five years was about 0.5% of Kenya's entire GDP in 2005.<sup>126</sup> Many of these costs were actually exacerbated by Kenya's poverty. Weak communication and transportation infrastructure made personal outreach costly, and low literacy rates<sup>127</sup> required alternative outreach methods, often in an individual's tribal language.<sup>128</sup> Commissions and conferences with large delegations—all of whom expected generous salaries—were an additional drain on the fisc,<sup>129</sup> as was the national referendum.<sup>130</sup> Given Kenya's limited resources and great

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122. According to an official statement, the total cost of the review process was approximately 6.5 billion Kenyan shillings. Press Release, Kenya Office of Pub. Commc'ns, The Government's Continued Role in the Constitutional Review Process (Sept. 21, 2005), *available at* <http://www.communication.go.ke/media.asp?id=70>. On the day the statement was published, this figure was equivalent to \$88 million, based on an exchange rate of \$1 = Sh73.60. See OANDA, FXHistory: Historical Currency Exchange Rates, <http://www.oanda.com/convert/fxhistory> (search for the Interbank USD-KES rate on Sept. 21, 2005) (last visited May 2, 2007).
123. In 2005, Kenya's population was estimated at 34,255,720. World Bank, World Development Indicators (2005), <http://devdata.worldbank.org/dataonline> (subscription required).
124. *Kibaki To Name Team To Replace Review Commission*, NATION (Nairobi), Jan. 3, 2006, <http://allafrica.com/stories/200601031272.html> (subscription required) (on file with author) (estimating the total cost at Sh10 billion); see OANDA, *supra* note 122 (search for the Interbank USD-KES rate on Jan. 3, 2006) (providing a rate of \$1 = Sh72.55).
125. See World Bank, *supra* note 123 (estimating Kenya's 2005 GDP in current U.S. dollars at \$17,977,327,616 and its total population at 34,255,720).
126. See *supra* notes 122, 125.
127. Approximately 26% of adults in Kenya are illiterate. World Bank, *supra* note 123.
128. English and Swahili are Kenya's official languages, but there are sixty-one languages spoken in total. See Ethnologue.com, Languages of Kenya, [http://www.ethnologue.com/show\\_country.asp?name=KE](http://www.ethnologue.com/show_country.asp?name=KE) (last visited Apr. 3, 2007).
129. See Biketi Kikechi, *Review Commissioners To Earn Sh50m Each*, E. AFR. STANDARD (Nairobi), May 29, 2004, <http://allafrica.com/stories/printable/200406010103.html> (subscription required) (on file with author).
130. To give a sense of the order of magnitude of election costs in Kenya, according to one 2002 estimate, Kenya spent approximately Sh4 billion on general elections. Nzamba Kitonga, *Can Party Nominations Be Done in a Better Way?*, NATION (Nairobi), Dec. 9, 2002, <http://allafrica.com/stories/printable/200212090584.html> (subscription required) (on file with author). At the time, this was equivalent to \$50 million. See OANDA, *supra* note 122



needs, these economic and opportunity costs posed a significant burden for an already weak government.

Kenya's review process also resulted in a number of nonpecuniary costs. Despite its success in helping to consolidate democracy, Kenya's referendum on the constitution was still quite divisive. It was accompanied by moderate violence<sup>131</sup> and led to ethnic pandering and polarization.<sup>132</sup> Seemingly participatory elements of Kenya's process, such as the broad representation in Bomas, were captured by powerful elites from Kenya's major parties and ethnic groups, leading to ethnic caucuses and undemocratic machinations.<sup>133</sup> The review process also put pressure on Kenya's democratic institutions through the government's use of patronage and other tactics to garner votes, and it distracted the government from necessary reforms. In addition, Kenya's use of a large number of delegates reduced individual accountability; during the Conference, cabinet minister Charity Ngilu made accusations of outright bribery.<sup>134</sup>

The lesson, then, is mixed. Broad participation lent legitimacy to Kenya's review process and helped strengthen Kenya's democratic institutions. However, participation was not an unconditional good: it was expensive, time-consuming, and brought with it risks of violence and corruption. On balance, Kenya's highly participatory process was likely "worth" the cost. This particular balancing is closely linked to Kenya's history, however; had Kenya's democratic reformers not been the moving force behind the call for a new constitution, or had Kenya's level of ethnic tension been more severe, the balance might have tipped against certain participatory elements, such as a referendum, that were particularly costly and likely to stoke ethnic violence. Likewise, many elements of the process would be less costly in a richer country with stronger existing institutions.

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(search for the Interbank USD-KES rate on Dec. 9, 2002) (providing a rate of \$1 = Sh80.10).

131. At one pre-referendum rally, four people were killed and thirty others suffered gunshot wounds. See Oywa & Amadala, *supra* note 90. In the lead-up to the referendum, each side blamed the other for fomenting violence. See *Kenya Rallies Pass Off Peacefully*, *supra* note 95.
132. See *Kenya: Controversy Mars Countdown to Constitutional Referendum*, INTEGRATED REGIONAL INFO. NETWORKS, Nov. 18, 2005, <http://www.irinnews.org/report.asp?ReportID=50170> (observing that the election pitted two major ethnic communities against each other, with the Kikuyu largely supporting the "Yes" vote and the Luo largely supporting the "No" vote).
133. See E-mail from Makau Mutua to author, *supra* note 94.
134. See Kwendo Oponga, *I Saw Cash Change Hands, Claims Ngilu*, E. AFR. STANDARD (Nairobi), Mar. 16, 2004, <http://allafrica.com/stories/printable/200403160060.html> (subscription required) (on file with author).

In Part III, this Note discusses concrete ways in which would-be reformers might address these costs and benefits. In particular, it is important to recognize that “participation” is not a monolith—not all forms of public participation are equally costly, and Kenya could have designed its process to better reduce both pecuniary and nonpecuniary costs. For example, Kenya’s multistage drafting process introduced significant redundancies; a more streamlined process might have been preferable. Would-be constitutional reformers should consciously choose structures that are appropriate to country context and that minimize economic, social, and political costs.

*B. Lesson 2: The Risk of Capture*

Kenya’s experience also powerfully illustrates how elites can revise a constitutional review process *ex post*, depending on whether the drafting has been to their advantage. While many different elites—from business interests to human rights groups—were involved in Kenya’s review process, Kenya’s experience is particularly useful in highlighting the capture that can occur when constitutional negotiations take place in the shadow of an entrenched government.

Kenya’s constitutional reformers knew that Parliament and the President would not necessarily be committed to the success of the review process, and the Review Act consciously minimized their role<sup>135</sup>: “When Kenyans spoke of a people-driven constitution, it meant they did not trust Parliament to give them a document that captures their interests, needs and aspirations.”<sup>136</sup> However, when the carefully designed checks on the ruling party’s influence ran against its interests, the party simply changed the rules. Thus, Parliament and Kibaki altered the review process mid-stream in the face of proposed reforms that the government saw as potentially weakening its power.<sup>137</sup> The Bomas draft was never voted upon by Parliament or by the public; rather, Parliament put forward its own draft for the national referendum that deleted or altered those aspects of the Bomas draft that it opposed.<sup>138</sup>

Scholars who tend to focus on perfecting *ex ante* procedures—to ensure representativeness, transparency, and consultation—often ignore such dynamic elements of constitutional review processes and fail to consider the mechanics

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135. See *supra* text accompanying note 46-54.

136. Editorial, *New Bills Are a Betrayal*, NATION (Nairobi), Mar. 9, 2004, <http://allafrica.com/stories/printable/200403090483.html> (subscription required) (on file with author).

137. See *supra* notes 71-74 and accompanying text.

138. See *supra* notes 76-89 and accompanying text.

of how to structure a process to ensure that these noble aims are not thwarted *ex post* by rent-seeking government officials.<sup>139</sup> Kenya's experience teaches that concerns about capture must be directly addressed in the design of constitutional review procedures. A seemingly well-designed process can fail if elites do not follow the rules, and incumbent politicians are particularly well situated to change procedures *ex post*.

The risk of capture is certainly not unique to Kenya or to other emerging democracies; ethnic, commercial, or military elites might hold significant influence within any country and successfully scuttle seemingly well-designed procedures. But emerging democracies like Kenya face an additional dilemma: a review process that is not structured by outsiders but rather managed by the very government whose powers are being altered. While Kenya's review process was consciously designed to limit the influence of Parliament and the President, there was no system of incentives in place to keep the ruling party from altering the Bomas draft's checks on its power after the fact. Indeed, given that the design of the constitution directly affected their interests, MPs and the President had every incentive to intervene with amending legislation.

While there is no magic formula for designing such incentives, too often the question of how to create incentives is not even asked. There will always be a risk of capture, but well-designed procedural rules can increase the cost of altering the status quo and thereby constrain behavior. For example, a review process should limit elites' control over drafting, while also providing them with meaningful opportunities to influence substantive choices (thereby reducing the benefits of capture) and including mechanisms for transparency and publicity (thereby increasing the costs of capture).<sup>140</sup> Such measures would help ensure that politically motivated deviations from the rules were public and could not be justified on pretextual grounds. More generally, any proposal for constitutional review must be realistic about the interests of elites and must include mechanisms for placating (or buying off) powerful factions with the potential to derail the process.

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139. John Hatchard's analysis of the experiences of South Africa, Uganda, Zambia, and Zimbabwe is illustrative: "The lessons are clear. A constitutional commission . . . must be fully representative of society, must take into account the concerns of the widest possible segment of the population, must be transparent in its work, and . . . must properly structure its methods of consultation." HATCHARD ET AL., *supra* note 3, at 34. For another example of scholarship that focuses on *ex ante* procedures, see Gordon, *supra* note 9, at 531-32, 542-44.

140. For concrete proposals on how to mitigate the risk of capture, see *infra* Part III.

*C. Lesson 3: The Need for a Veil of Ignorance*

Turning to more broadly applicable lessons, Kenya's experience also illustrates that there is a severe risk of self-dealing when it is clear how individual parties will benefit from the new constitution, and it highlights the importance of designing processes to promote a "veil of ignorance."<sup>141</sup> The veil of ignorance concern is broader than the risk of capture because it exists whenever self-interested parties sit at a negotiating table, even when they are not in a position to change procedures *ex post*. For example, negotiations overseen by an occupying force could still face veil of ignorance concerns because interested parties might negotiate with personal benefit in mind. Several scholars have noted the importance of having a veil of ignorance during constitution-drafting, arguing that uncertainty about how constitutional provisions will affect specific parties makes it more likely that the final product will be fair and include appropriate checks.<sup>142</sup> In the case of Kenya, the perception of self-dealing by the drafters played an important role in the final draft's ultimate defeat.<sup>143</sup> Kenya's experience thus stands as a dramatic and concrete example of how the absence of a veil of ignorance can undermine constitution-drafting.

Most vividly, NARC's Memorandum of Understanding, which promised Odinga the future Prime Minister seat, played a prominent role in constitutional negotiations. The establishment of the Prime Minister position was debated explicitly in the context of support for or opposition to Odinga,

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141. See JOHN RAWLS, *A THEORY OF JUSTICE* 118-23 (rev. ed. 1999); see also Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399 (2001) (analyzing how constitutional rules might create a veil of ignorance, and arguing that the U.S. Constitution contains a number of rules that might be analyzed as "veil rules").

142. See, e.g., Horowitz, *supra* note 3, at 28-29 (arguing that the existence of a veil of ignorance makes it more likely that a constitution-drafting process will produce innovative reforms and not merely reproduce the status quo); Dennis C. Mueller, *On Writing a Constitution*, in *RULES AND REASON: PERSPECTIVES ON CONSTITUTIONAL POLITICAL ECONOMY* 9, 22-23 (Ram Mudambi et al. eds., 2001) (noting the lack of a veil of ignorance in designing the Spanish Constitution).

143. The "Orange" opposition campaign that defeated the government's draft focused on the procedural breakdown in the review process: "According to the [Constitution of Kenya Review] Act your Members of Parliament could accept or reject the Bomas Draft but they could not amend it. The politicians who now front the Yes-Banana camp forced the National Assembly to do precisely what it could not do . . ." *ORANGE NO CAMPAIGN*, *supra* note 89. An orange was used to symbolize opposition to the draft constitution, and a banana was used to symbolize support. These symbols appeared on the referendum ballots and were created by election officials to assist in voting in light of high illiteracy rates. See Karen Allen, *'Fruity' Campaigning in Kenya*, *BBC NEWS*, Nov. 18, 2005, <http://news.bbc.co.uk/2/hi/africa/4449046.stm>.

rather than on its merits.<sup>144</sup> As one commentator noted, “[L]et’s face it: Some of the emotions pouring forth in various public forums have little to do with Kenya’s future and everything to do with power and succession politics.”<sup>145</sup>

More generally, Kenya’s MPs and ruling government eventually balked at the Bomas draft in part because they knew that it would weaken *their own* powers, not the powers of uncertain future parties. It is likely not coincidental that Kibaki’s supporters were the strongest proponents of a powerful President in the new constitution. As one newspaper account observed, “Apart from allowing Mr. Kibaki to enjoy the executive powers for two terms, some opposition legislators . . . argue that [his supporters’] biggest duty seems to be protecting the President’s current tenure.”<sup>146</sup> Indeed, many individuals’ positions on constitutional reform changed dramatically when they moved from the opposition to the ruling party.<sup>147</sup>

Kenya’s lack of a veil of ignorance thus encouraged self-dealing among elites rather than support for good institutions. It also made compromise difficult, as participants pursued personal interest rather than the common good. Indeed, the lack of a veil of ignorance makes it particularly difficult for emerging democracies like Kenya to amend their constitutions successfully; the stakes are lower because there is already a functioning constitution.

It is rare, of course, for a constitutional review process to enjoy a true veil of ignorance, whereby negotiators are completely unaware of which individuals or groups will benefit from the proposed institutions.<sup>148</sup> Kenya’s experience,

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144. See Ojwang’, *supra* note 70; see also Maina Muiruri & Njonjo Kihuria, *The Inside Story*, E. AFR. STANDARD (Nairobi), Aug. 10, 2003, <http://allafrica.com/stories/printable/200308110194.html> (subscription required) (on file with author) (“There was an arrangement between LDP and Nak that when the position of Prime Minister is created, Hon Raila would occupy it in a power-sharing arrangement within the coalition.” (quoting MP Otieno Kajwang’)).

145. Magesha Ngwiri, *Too Much Noise and Scant Logic in Constitutional Review*, NATION (Nairobi), Aug. 10, 2003, <http://allafrica.com/stories/printable/200308110381.html> (subscription required) (on file with author).

146. Oscar Obonyo, *Executive Remains Major Bone of Contention in Consensus Team Report*, NATION (Nairobi), Mar. 14, 2004, <http://allafrica.com/stories/printable/200403150504.html> (subscription required) (on file with author).

147. See, e.g., Kwendo Opanga, *Changing Times That Turned Political Allies into Bitter Foes*, E. AFR. STANDARD (Nairobi), Mar. 17, 2004, <http://allafrica.com/stories/printable/200403170028.html> (subscription required) (on file with author).

148. Nigeria arguably enjoyed such a veil of ignorance in 1978, when “groups found it impossible to foresee the pattern of ethnic political advantage and disadvantage.” Horowitz, *supra* note 3, at 28-29. Horowitz has argued that “[f]aced with the veil of ignorance, they set out to choose institutions they could live with regardless of future position. Among these were a separately elected president, so that control of parliament by a single ethnic group would

however, attests to the debilitating effects of the *lack* of a veil of ignorance and highlights the value of creating procedural designs that try to approximate a veil of ignorance to the extent possible. For example, rules limiting drafters' eligibility for future public office could help, as would attempts to time drafting around periods of political uncertainty, such as near the end of an election cycle.

#### *D. Lesson 4: Mitigating Ethnic Tensions*

Kenya's experience also highlights a general risk in multiethnic societies that constitutional review could lead to violence or ethnic pandering, undermining the legitimacy of the final product.<sup>149</sup> Because ethnicity will likely be a significant undercurrent in constitutional negotiations in societies with salient ethnic divisions, a review process must be consciously designed to mitigate ethnic tensions and to avoid possibilities for capture along ethnic lines.

Given that ordinary political contests generally tend to increase ethnic salience,<sup>150</sup> it is predictable that debates over the design of basic political institutions will promote stronger ethnic association, and scholarship suggests that constitutional review has the potential to stoke ethnic violence.<sup>151</sup> In the Kenyan context, ethnic divisions are sharp,<sup>152</sup> and political conflict has engendered ethnic violence in the past.<sup>153</sup> While Kenya's constitution-drafting process did not lead to large-scale ethnic clashes, the process did increase

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not be sufficient to exclude the rest." *Id.* at 29. But Horowitz has also argued that the design they selected did not adequately create the necessary incentives: "Epiphanies do not compensate for all the defects of the human condition, such as failures of information, foresight, and thoroughness." *Id.*

149. *Cf. supra* text accompanying note 105.

150. See Alicia Bannon et al., *Sources of Ethnic Identification in Africa* 8-12 (Afrobarometer, Working Paper No. 44, 2004), available at <http://www.afrobarometer.org/papers/AfropaperNo44.pdf>.

151. See, e.g., SCHNEIER, *supra* note 102, at 29.

152. Kenya has over seventy ethnic groups, which generally follow regional lines. See Afr. Studies Ctr., Univ. of Pa., Kenya—Ethnic Groups, <http://www.africa.upenn.edu/NEH/kethnic.htm> (last visited Apr. 21, 2007). Ethnicity traditionally has played an important role in Kenyan elections and patronage. See Rok Ajulu, *Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective*, 61 AFR. STUD. 251, 259-65 (2002).

153. Kenya experienced ethnic clashes in 1992, 1997, and 1998, corresponding with its elections. Ndegwa & Letourneau, *supra* note 1, at 89.

ethnic tensions throughout the negotiations.<sup>154</sup> Mere perceptions of ethnic favoritism may also have helped to undermine the legitimacy of the final product; one of the criticisms of the draft constitution was that it favored the President's ethnic group in the process of drawing election lines.<sup>155</sup> Moreover, the constitutional referendum itself was ethnically charged. One account of the referendum process noted, "A large number of voters probably had little knowledge about constitutional affairs but responded to the appeals of their ethnic leaders."<sup>156</sup> Kenya's drafting process, then, had a real risk of promoting violence and did seem to exacerbate ethnic division.

Of course, ethnic divisions run deeply in many societies, and no constitution-drafting procedure can fully mitigate ethnic tensions. Some societies may be so ethnically divided that procedural choices will make little difference. It is nevertheless important that the constitution-writing process avoid giving one ethnic group or coalition the ability (or the appearance of the ability) to give itself monopoly power or to disempower another ethnic group. Kenya's experience suggests that would-be reformers must be mindful of opportunities for ethnic capture and the risk of stoking ethnic tensions when designing membership rules for drafting committees and review conferences, as well as when designing voting procedures. Likewise, the risk of heightening ethnic tensions is a significant cost of highly participatory processes such as elections and must be weighed accordingly.

*E. Lesson 5: The Need for a Process That Produces a Coherent Design*

Another general lesson from Kenya's experience is that process choices, such as the number of participants and the structure of the drafting process, can affect the coherence of the final product. Kenya's constitution-writing

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154. See, e.g., ONALO, *supra* note 22, at 248 ("In the case of President Kibaki, . . . he is the patron of a group of Kikuyu investors. And, indeed, some of these investors belong to the 'Mount Kenya Mafia.' . . . Historically, this brotherhood is known to suffer from a superiority complex . . . . Now their man is at the helm and they are not interested in this nonsense called 'change.'" (quoting Mutahi Ngunyi, a political analyst from Consult Africa)); Maina Muiruri & Njonjo Kihuria, *Bomas III: It Is a Steep Slope to the Grande Finale*, E. AFR. STANDARD (Nairobi), Oct. 5, 2003, <http://allafrica.com/stories/printable/200310050032.html> (subscription required) (on file with author) (reporting allegations that "some delegates of the Mt Kenya persuasion [i.e., members of President Kibaki's Kikuyu ethnic group] have not fully given up the agenda of slowing down or stalling the process").

155. See ORANGE NO CAMPAIGN, *supra* note 89. Even if the document was actually fair to all ethnic groups, the appearance of ethnic gamesmanship could be enough to cast doubt on its legitimacy. For example, delays in translation sowed distrust in Chad's national constitutional conference in 1996. See Widner, *supra* note 5, at 507.

156. Andreassen & Tostensen, *supra* note 25, at 6.

process, with its multiple drafting stages and myriad participants, did not lend itself to creating a set of institutions carefully designed to protect clearly articulated values.

Kenya faced two main challenges to producing a coherent draft: logistical difficulties due to the number of drafters—over 600—involved in the process, and difficulties stemming from the need to bargain in order to accommodate interests that were fundamentally at odds and not necessarily concerned with the greater good. As Makau Mutua has observed, the Review Commission “was too unwieldy and packed with far too many incompetents, political lackeys who were in it simply to ‘eat.’ The [Commission] was paralysed by internecine political and personal struggles and vendettas.”<sup>157</sup> Indeed, even if the participants were acting in good faith, negotiation and the need for compromise undermined constitutional coherence: “With negotiation, one may contrast planning, a process intended to produce internally consistent solutions to problems. . . . Bargaining has much to commend it, but coherence is not among its virtues.”<sup>158</sup>

The end result did lack coherence, with many of the draft constitution’s elements in tension with each other. For example, Kenya’s draft made “districts” the basic unit for devolution of political power from the central government<sup>159</sup> and required the President to receive at least 25% of the votes cast in more than half of the districts.<sup>160</sup> But despite the central importance of districts to the institutional design manifested in the draft, Parliament was left with the power to determine the districts’ size, shape, and number.<sup>161</sup> This created a serious risk of political and ethnic gerrymandering and political patronage, and it undermined the goal of ensuring governmental representation of multiple ethnic communities.<sup>162</sup>

Similarly, the draft provisions on executive power, which created a weak Prime Minister and maintained a strong President, blurred the lines of

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157. Makau Mutua, Editorial, *The Bomas Constitutional Talks Were One Big Farce*, NATION (Nairobi), Oct. 5, 2003, <http://allafrica.com/stories/printable/200310060148.html> (subscription required) (on file with author).

158. Horowitz, *supra* note 12, at 270.

159. The Proposed New Constitution of Kenya (2005), KENYA GAZETTE SUPPLEMENT No. 63 art. 199.

160. *Id.* art. 149(4).

161. *Id.* art. 5(2) (“Kenya comprises such districts and other units as may be prescribed by an Act of Parliament.”).

162. As the Orange No Campaign noted, “An Act of Parliament creating districts can favour the perpetual presidency of one community or unduly oppress others in terms of the sharing of resources. This is a fundamental change whose implications are not clearly thought through.” ORANGE NO CAMPAIGN, *supra* note 89.



executive authority while failing to check the power of the President in any meaningful way. The initial constitutional review process was motivated in large part by a desire to curb excessive presidential power.<sup>163</sup> While the proper scope of presidential power was highly contested during the review process,<sup>164</sup> the draft constitution's compromise was no compromise at all. The draft created a Prime Minister with no power independent of the President. While the draft assumed that the Prime Minister would represent the majority or coalition party in Parliament,<sup>165</sup> it also permitted the President to appoint a Prime Minister of his choice if Parliament rejected two of his nominees.<sup>166</sup> Furthermore, even if the Prime Minister were supported by the majority in Parliament, he or she would be appointed by the President, be accountable to the President, act "under the general direction of the President," and be removable by the President.<sup>167</sup> Thus, the draft created the appearance, but not the reality, of diffuse executive power, confusing lines of authority without bringing any concomitant reduction in presidential power.

Coherence is important, both to design an appropriate system of checks and balances and to avoid offices' and institutions' undercutting each other. Of course, compromise can also potentially strengthen a constitution by promoting buy-in by diverse interests. Indeed, many "successful" constitutions, including the U.S. Constitution, have involved significant compromise—although, as Sanford Levinson has argued, the United States' 1787 Constitution was not an "unequivocal success."<sup>168</sup> Coherence may be particularly important in the context of emerging democracies, like Kenya,

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163. As one reformer noted, "Parliament exists and operates at the whim of the Presidency." ONALO, *supra* note 22, at 158.

164. See, e.g., Muriuki, *supra* note 68 ("The meeting agreed that the issue of what kind of governance system the country should adopt—either Parliamentary, presidential or a mixture of both—was the single biggest factor that may lead to the process dragging.").

165. See, e.g., The Proposed New Constitution of Kenya art. 123(2)(c) (giving the leader of the opposition the right of second reply, after the Prime Minister, to a parliamentary address by the President).

166. See *id.* art. 164(6); see also ORANGE NO CAMPAIGN, *supra* note 89 ("Who is actually the leader of [the] majority party in Parliament? Who speaks on behalf of the government in Parliament if the Prime Minister is neither involved in the formation of the government nor in the coordination of government operations?").

167. The Proposed New Constitution of Kenya arts. 163(2), 167.

168. Levinson, *supra* note 17, at 927. Rather, as Levinson has noted, "it lasted less than three-quarters of a century, at which point occurred, in significant part because of defects within the Constitution itself, a remarkably bloody war that killed two percent of the entire population of the United States." *Id.*

with weak democratic traditions and an absence of parallel governing institutions in the form of states or other local governing units.

Regardless, it is not possible to do away with bargaining and negotiation in constitution-drafting. However, procedural choices can help address the logistical challenges that lead to incoherence: Kenya's experience suggests that an effective review process should involve a relatively small number of drafters and be insulated from willy-nilly revisions by stakeholders with no commitment to the coherence of the document as a whole. Procedural choices may also help promote better compromises; for example, "expert" drafters might be more sensitive to the value of coherence.

*F. Lesson 6: The Dynamism of Political Environments*

Kenya's experience also shows that the political environment in a country can sometimes change quickly and dramatically, altering the power dynamics among elites and shifting support for and opposition to meaningful constitutional review. A final lesson, then, is that a review process should aim to create generally applicable incentives, rather than to mitigate the influence of a particular person, party, or interest group.

Many opposition leaders who had pushed for specific amendments to Kenya's constitution changed their views as delegates after landing a seat in government in the 2002 elections. Likewise, many allies in civil society also changed the scope of their proposed reforms to match the new political environment. An opinion piece in *The East African Standard* made this point forcefully, discussing the debate over creating a powerful executive Prime Minister in the draft constitution:

The view of government, forcefully articulated by [then-Justice Minister] Kiraitu [Murungi], is that the creation of a powerful premier bodes ill for the country because two centres of power are a recipe for political instability and turbulence.

That is, indeed, true, but therein, also lies the problem and the reason for the showdown at Bomas. Kiraitu the opposition leader . . . and Mr Mwai Kibaki, the Leader of the Official Opposition, were not singing from this hymn book as recently as March 2002.

The argument by [opposition leaders] and, indeed, the entire country and which the opposition used to carry the electorate with it, was that the power vested in the Presidency is excessive.

The popular view at the time was that the Constitution needed to be changed to curtail the powers of the Presidency and create the office of an executive prime minister. . . .

....

In the minds of the majority of the delegates sitting at Bomas, [the] government has reneged on this principle that was so potent in the struggle against the former regime and for a new Constitution.<sup>169</sup>

In addition to changing the attitudes of delegates chosen in a different era, a political sea change can also shift ethnic alliances, as illustrated by the dramatic shift in the status of the Kikuyu ethnic group, which went from being primarily in opposition to primarily supporting the ruling party under Kibaki. Even carefully balanced representative bodies can quickly become outdated. Thus, would-be reformers should therefore recognize that opportunities for capture are not static, and they should avoid designing procedures that merely target a specific ethnic group or political party.

### III. DESIGNING CONSTITUTIONAL REVIEW PROCEDURES

It is often easier to identify lessons than to apply them. Furthermore, Kenya's lessons illustrate that ideal choices regarding constitution-drafting procedures depend on country-specific features such as history, political and ethnic dynamics, and level of development, making general recommendations vague and frequently unhelpful.<sup>170</sup> Seemingly minor details, such as the structure of a referendum or the size of a review commission, can have a significant impact on issues like the opportunity for capture or the risk of ethnic tension.

This Part therefore uses Kenya as an example of how reformers might begin thinking about the application of Part II's lessons in a particular country context. It does not provide a forward-looking proposal for Kenya—Kenya's process is currently too far along to justify restarting from scratch.<sup>171</sup> Rather, this Part applies the six general lessons outlined in Part II to the specific political context in Kenya and offers detailed recommendations for how Kenya's process could have been more effectively designed. When possible, it also flags how other country environments may require different institutional

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169. Opanga, *supra* note 147.

170. For example, one main reason for South Africa's use of a two-phase constitution-writing process was that due to apartheid, those who drafted the interim constitution were not chosen in a free and fair election. This would obviously not be an issue in countries with different historical conditions. See HATCHARD ET AL., *supra* note 3, at 37.

171. Willy Mutunga has suggested that given the existing drafts, if there were sufficient political will, it would be possible to finalize a compromise document in a matter of weeks. See E-mail from Willy Mutunga to author, *supra* note 35.

solutions. It therefore attempts to develop, concretely, what the application of abstract lessons such as avoiding capture could mean in practice.

Of course, Kenya's experience also powerfully illustrates how difficult it can be to establish any kind of constitutional review process at all, much less a well-designed one.<sup>172</sup> However, while the design of constitutional review processes will always depend on political dynamics at a given moment, would-be reformers have a choice about where their political capital is best spent, and there is significant room for shaping the review process based on their priorities. For example, in the late 1990s, debate in Kenya on the design of the constitutional review process focused on the degree to which the President should have final say on the choice of commissioners, rather than on incentives to avoid *ex post* meddling by Parliament.<sup>173</sup> Had reformers put their energy into different battles, it is possible that Kenya's process would have been designed quite differently. Furthermore, external actors such as multilateral and bilateral donors may exert significant influence; for example, the International Monetary Fund and the World Bank played a major role in pressuring the Moi government to amend the constitution and reintroduce multiparty elections in 1991.<sup>174</sup>

Given that there will likely be at least some room to shape a constitution-drafting process in light of Kenya's lessons, this Part makes recommendations regarding the procedural issues that future constitutional reformers or donors should prioritize.

#### A. A Limited Number of Drafters with Broad Consultation Duties

Kenya's Review Act essentially tried to ensure that the constitutional drafters represented every aspect of Kenyan society, and it sought broad public input both directly and through national delegates.<sup>175</sup> While this highly participatory model made the process more "democratic" and helped promote

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172. Moi and his party were vehemently opposed to the constitutional review movement because they felt it threatened their power, and it took more than five years for opposition and civil society leaders to successfully negotiate the Bomas process. See Ndegwa & Letourneau, *supra* note 1, at 87-89; Mutua, *supra* note 157.

173. See Ndegwa & Letourneau, *supra* note 1, at 87-88.

174. See, e.g., ONALO, *supra* note 22, at 193 ("The World Bank and the International Monetary Fund (IMF) with their conditionalities for aid based on good governance had much to do with the loosening of the political situation in Kenya and elsewhere in Africa. . . . Capitalizing on the crusade for change[,] . . . organized civil society in Kenya, which was by then totally dependent on foreign funds, decided that all methods were justified, even a temporary dependence on external donors . . .").

175. See *supra* text accompanying note 51.

legitimacy, the use of hundreds of delegates and two sets of constitution-drafting bodies (both a Review Commission and a National Conference) was both cumbersome and costly: it undermined coherence in the final document, ratcheted up expenses,<sup>176</sup> weakened lines of accountability, and led to clashes among delegates who essentially replicated national political lines. There were likely better ways both to garner public participation—a necessary value in light of Kenya’s political history—and to promote efficiency and coherence in drafting. For example, a single drafting process with a small committee (on the order of tens, not hundreds),<sup>177</sup> coupled with broad duties of consultation and a national referendum, might have been more effective.

A small set of drafters would provide a variety of benefits. In addition to keeping down costs and promoting coherence, a small drafting team would promote accountability<sup>178</sup> because the decision-makers would be clearly identifiable and likely to become significant public figures.<sup>179</sup> Furthermore, the desire to have a “representative” commission does not itself justify using a large drafting committee. Even with hundreds of delegates, it is not possible for a committee to truly represent every aspect of a society, and the selection of a large number of representatives may involve troubling power dynamics and

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176. Bomas was plagued with delegates’ calls for salary increases; salaries were raised from Sh2000 (\$26) per day to Sh3500 (\$45) per day due to these complaints, and there were further demands for increases up to Sh15,000 (\$194) per day. See Francis Openda, Constitution of Kenya Review Comm’n, Delegates Want More Money (Aug. 22, 2003), <http://web.archive.org/web/20040818055621/http://www.kenyaconstitution.org/docs/news17.htm>. Dollar amounts were calculated using the August 22, 2003 exchange rate of \$1 = Sh77.2090. See OANDA, *supra* note 122 (search for the Interbank USD-KES rate on Aug. 22, 2003).

177. Yash Pal Ghai, the former chairman of the Review Commission, argued that the number of delegates chosen by Kenya (over 600) was too large, and he noted that Uganda and South Africa had succeeded with approximately 300. See Dennis Onyango, *Ghai: Why I Would Not Accept To Chair Review Again*, E. AFR. STANDARD (Nairobi), Mar. 28, 2004, <http://allafrica.com/stories/printable/200403290312.html> (subscription required) (on file with author). For the reasons discussed below, in my view, 300 commissioners would still yield overly high costs without promoting accountability or guaranteeing broad participation in practice.

178. Accountability is particularly important in light of Kenya’s high level of corruption. See *supra* note 134 and accompanying text.

179. Ghai did become a public figure in Kenya. He was frequently quoted in newspaper articles and regularly gave updates on the drafting process. See, e.g., Njeri Rugene, *Constitutional Conference: Ghai Is Upbeat on Meeting’s Progress*, NATION (Nairobi), May 17, 2003, <http://allafrica.com/stories/200305190576.html> (subscription required) (on file with author). In May 2003 his name appeared forty-three times in *The Nation*. See allAfrica.com, <http://allafrica.com/search/adv-search.html> (subscription required) (search for “Yash Pal Ghai”).

create a risk that minority interests will be marginalized.<sup>180</sup> Group representation is therefore likely not a good proxy for representing diverse interests. Charging a small delegation with broad consultation duties, both regionally and with stakeholder groups, may more closely approximate a process in which all voices are considered.

Consultation itself has two purposes: educating the population on the constitution-drafting process and soliciting input on specific proposals and concrete goals. The education component is critical both for legitimizing the drafting exercise and for sparking useful suggestions on content.<sup>181</sup> Educational activities could include radio shows and pamphlets in local languages discussing the meaning of a constitution as well as specific issues that the commission plans to consider. It could also include presentations from commissioners and their staff. Some of these outreach efforts were in fact used by Kenya's Review Commission<sup>182</sup>—and while it is hard to make causal conclusions, it is notable that there was strong public interest in Kenya's constitution-drafting activities throughout the five-year review process, with the process consistently enjoying front-page status in national newspapers.

Soliciting public input is equally valuable, at least in the Kenyan context. As this Note has argued,<sup>183</sup> the historical backdrop to Kenya's constitutional reform movement made public participation essential to the constitution's legitimacy. Public input is important as a means of identifying public values and gauging popular comfort with reform proposals. For example, while ordinary citizens would likely lack the background to speak knowledgeably on specific institutional questions, such as the relative advantages of a President or Prime Minister, requesting public input would prepare the public for institutional changes and offer guidance as to whether a specific reform ran so deeply against citizens' cultural or political values that it could delegitimize the final product. It would also provide some check against capture in that strong popular disagreement with a particular proposal would be documented and made public. Furthermore, with the smaller commission that this Note proposes, it is likely that public consultation across regions and with

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<sup>180</sup>. This problem has been highlighted in several comparative studies of constitution-writing processes. *See, e.g.*, Ndulo, *supra* note 3, at 93-94.

<sup>181</sup>. Of course, not all suggestions will be useful. Anecdotes abound of African constitution-drafting experiences in which individuals called for the resolution of private disputes or other inappropriate issues through the new constitution. *Cf. id.*

<sup>182</sup>. For example, the Review Act mandates that Commissioners "shall visit every constituency in Kenya to receive the views of the people on the Constitution." The Constitution of Kenya Review Act, (2001) Cap. 3A § 18(1)(a).

<sup>183</sup>. *See supra* Section II.A.

individuals of diverse backgrounds would highlight concerns that the commissioners may have overlooked.

One way to ensure that the commission actually took public input into account would be to require that it actively seek input, record suggestions, and give reasons for why particular suggestions were accepted or rejected. With respect to seeking input, given the low level of literacy in Kenya, public hearings with opportunities for oral presentations would be essential for meaningful public participation. Furthermore, because the public hearing format may systematically disadvantage some groups or viewpoints, such as women or ethnic minorities, the commission should also accept individual petitions (and provide the option of submitting written petitions or recording concerns orally with commission staff). Commissioners might also schedule meetings with tribal and clan leaders, NGOs and businesspersons, religious leaders, civil service workers, school committees, and women's groups, to further ensure diverse viewpoints. The commissioners should also be required to seek input from the President and MPs, as well as the leaders of Kenya's political parties.

Because open-ended sessions are likely to lead to highly generalized conversations, the commissioners might want to frame the discussion in terms of some of the options the commission is considering, with reference to other nations' constitutions. For example, a commissioner might explain that the commission is considering creating a new Prime Minister position and might point out that France has a strong executive Prime Minister, while Tanzania has a weak Prime Minister, and Ghana does not have a Prime Minister at all. The commissioner could then ask members of the public whether Kenya needs to establish this position. She could ask whether they think government works better when there is one person in charge, or when there are two people who check each other's power. She might inquire whether France's, Tanzania's, or Ghana's model would work best for Kenya. Although many people might not have strong feelings, that fact alone would be valuable information for the commission. Other questions might focus on identifying rights or public concerns that the constitution should address.<sup>184</sup> The commissioner might also discuss the concept of "rights" and ask what rights all Kenyans should enjoy.

It is almost certain that many of the views expressed in these public consultations would be in conflict with one another and that many proposals would be inappropriate or undesirable. However, to promote good-faith consideration of a diversity of views, the delegates could be required to give

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184. The commissioner might ask for specific examples of when the government has failed to do its job. Responses in Kenya would likely identify concerns such as corruption, political persecution, food insecurity, and insufficient land rights.

reasons for why they discounted some views in favor of others. This could take the form of a report that summarized and responded to public input, and that was made public along with the draft constitution. The referendum would serve as a final check on the delegates, particularly if it were designed to require consensus across regions and interest groups.<sup>185</sup>

It is important to reiterate that this proposal reflects, among other things, Kenya's particular level of development, its experience with democracy, and the history of its constitutional reform movement. It therefore might not apply equally to other countries. Education and public input would, for example, be less costly in a country with higher literacy rates, such as South Africa, while participation might have less legitimizing power in a country with no democratic history, such as Iraq. Thus, countries with different backgrounds and experiences would likely strike a different balance among participation, coherence, and cost-effectiveness.

*B. Including Nonnationals as Delegates and Excluding National Politicians*

Another critical issue is the membership of the commission or conference that actually drafts the constitution. The identity of those who draft—and those who are excluded from drafting—affects the likelihood that the drafting process will be captured *ex post* by self-interested parties and the degree to which the drafters will negotiate behind a veil of ignorance, where there is uncertainty about whether they will be advantaged or disadvantaged by the resulting design. It may also affect whether the process is perceived as fair, participatory, and broadly representative. The ethnic composition of the drafters is also relevant in countries like Kenya where politics is closely related to ethnic affiliation.

One relatively straightforward procedure for promoting a veil of ignorance and discouraging self-interested behavior among drafters is to prohibit drafters from seeking political office within five years after the new constitution's ratification.<sup>186</sup> This option substantially dampens the opportunities for drafters to personally gain from particular institutional choices, although they would still have opportunities to promote a political party or ethnic group, among other interests. One large concern, however, is the opportunity for *ex post* revisions to such a rule. As Kenya's experience illustrates, carefully negotiated rules can be quickly abandoned, and individuals have a strong incentive to maintain options for political power. As Jon Elster has noted, "[A] constraint

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<sup>185</sup>. See *infra* notes 204-207 and accompanying text.

<sup>186</sup>. For a proposal along these lines, see Mueller, *supra* note 142, at 24 n.18.



that can be ignored is no constraint."<sup>187</sup> While this proposal has some utility, then, more creative and atypical procedures are also worth considering. In particular, there is a strong case for both excluding national politicians from the drafting process and including nonnationals (although not as a majority of drafters).<sup>188</sup>

While the participation of nonnationals in constitution-drafting has a mixed history, limited use of outsiders does offer many benefits.<sup>189</sup> The most serious risk in using nonnationals as drafters is that they will not be familiar with local culture and politics and will therefore impose inappropriate political institutions based on their own experiences. Furthermore, because outside drafters will not live under the constitution they are drafting, they may not fully internalize the costs of their decisions, making it more likely that ideological and other commitments will trump political necessities. For example, many African and Latin American countries had their first constitutions drafted by former colonial powers that made no "serious attempt to connect the process to the social and political conditions in the countries concerned."<sup>190</sup> More recently, some scholars have criticized the foreign-influenced Iraqi constitution as overemphasizing formal guarantees of religious freedom while ignoring the disproportionate political power that the constitution's structure gives to Shiite Muslims. This approach undermines

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187. Elster, *supra* note 17, at 375.

188. There are, of course, many other potential procedural models. For example, in South Africa the judiciary played a prominent role in preventing *ex post* capture. After initial negotiations, the main political factions agreed to thirty-four constitutional principles that would underlie the future constitution. These principles were to be guaranteed by judicial review of the proposed constitution, which was to be drafted after the first multiracial election. After the constitution was drafted, the Constitutional Court in fact held that several of the draft's provisions did not comply with the constitutional principles. The drafting assembly quickly amended the draft. See Richard Simeon, *Considerations on the Design of Federations: The South African Constitution in Comparative Perspective* 1-2 (Inst. of Intergovernmental Relations, Working Paper No. 1998(2), 1998). This is a provocative model for checking abuses of power among the drafters, and it seems to have contributed to legitimizing South Africa's final document. My biggest concern with this model in the Kenyan context is that the Kenyan judiciary is notoriously corrupt and is unlikely either to provide an unbiased review of the constitution or to be perceived as independent. Cf. Eric Shimoli, *Sh15m Is What It Costs To Bribe an Appeals Court Judge*, NATION (Nairobi), Oct. 3, 2003, <http://allafrica.com/stories/printable/200310030527.html> (subscription required) (on file with author) (citing a report that half of Kenya's judges are corrupt).

189. Note that it is rare for a country to voluntarily include outside drafters in a constitution-writing process. Cf. Feldman, *supra* note 8, at 858-59 (discussing the involvement of outside drafters in Afghanistan, East Timor, Iraq, and the former Yugoslavia).

190. Ndulo, *supra* note 3, at 81.

“[t]he primary task . . . [of] construct[ing] a political system that [would] pull the country back from civil war and bloody conflict.”<sup>191</sup>

However, several countries with outside drafters who were attentive to local conditions have been successful; postwar Japan and Germany are two such examples.<sup>192</sup> In Japan, the U.S. drafters were familiar with Japan’s existing constitution, and they created institutions, such as a parliamentary system, that were alien to the U.S. political system but more consistent with Japan’s existing institutions.<sup>193</sup> Thus, countries may benefit from outside drafters who are able to evaluate local conditions and institutional needs without the bias of opportunities for personal gain.

Using a mix of national and nonnational drafters would bring many of the benefits of outside drafters with fewer costs. On the one hand, having a majority of national drafters would ensure that the process was seen as “home-grown,” would bring important expertise about unique national needs and challenges, and would avoid troubling accusations of neocolonialism.<sup>194</sup> On the other hand, outside drafters might offer a useful counterbalance to the influence of national drafters; they would be less likely to be politically connected to local interest groups and less likely to be self-interested or bought off, for the simple reason that they could not hold national political office and would be unlikely to be members of national ethnic groups or parties. This composition would help simulate a veil of ignorance because the drafters would not have a stake in how benefits and burdens were distributed. Likewise, they would be less likely to try to change agreed-upon procedures *ex post* because they could not internalize the benefits of such revisions.

Employing nonnationals would also allow for outside expertise in constitution-writing, which is an important consideration for a developing country like Kenya with a small professional class. Including a mix of nationals and nonnationals would allow for different qualifications for the two categories, allowing nonnationals with political backgrounds to participate in the drafting process without the risk that they would be self-interested. And while it is unlikely that a team made up entirely of outsiders would be politically acceptable—particularly in countries like Kenya that are still acutely conscious of colonial histories—there is some indication that Kenya would have

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191. Nathan J. Brown, *Constitution Drafting Update* (Aug. 8, 2005), <http://www.carnegieendowment.org/files/constitutiondraftingupdate.pdf>.

192. See SCHNEIER, *supra* note 102, at 20.

193. See 2 HELLEGERS, *supra* note 19, at 524 (explaining that to the drafters, the British principle of parliamentary supremacy seemed preferable because it was closer to Japan’s extant system).

194. Cf. Horowitz, *supra* note 12, at 268-69 (noting that international “experts” often lack necessary country-specific knowledge).

been open to including some nonnationals in its drafting committee. For example, after the draft constitution's defeat, members of the Kenyan government consulted with South African experts on how to amend the draft and asked for specific recommendations on content and process.<sup>195</sup>

To be effective, these outsiders should ideally be known and respected within the country drafting the constitution, and at least some of them should be from the same general region, although not from a neighboring state. For example, South African judges and political leaders who participated in South Africa's constitutional review process in the 1990s would likely have been respected and viewed as neutral in Kenya.<sup>196</sup> Today, Kofi Annan would be another good candidate, as would, perhaps, Bill Clinton.<sup>197</sup> And by including politicians and judges from other countries, the commission could gain insight into how political institutions can and should work, without the corresponding risk of capture.

Kenya's experience also suggests that no current MPs or other national politicians (including members of the opposition) should be permitted to serve as constitutional drafters—their interests are too closely intertwined with the institutional choices being made.<sup>198</sup> Politicians in Kenya repeatedly used the Bomas process to protect their personal and institutional prerogatives and to hash out partisan conflicts at the expense of the common good. Well-respected apolitical leaders—including academics (particularly those with experience in constitution-writing), respected career civil servants, journalists, accountants, doctors, representatives from the bar and other professional associations, and representatives from NGOs—would be safer options. In light of ethnic

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195. See Patrick Nzioka, *Kiplagat Team Calls in Experts*, NATION (Nairobi), Apr. 19, 2006, [http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=71346](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=71346)(subscription required) (on file with author).

196. South African experts were in fact consulted in Kenya after the failed referendum. See *id.*

197. Bill Clinton is well respected in Kenya (and in most of Africa), as is the United States' political system. While there is a risk that his inclusion would lead to backlash or conspiracy theories, I would expect that it would instead be seen as an honor, as long as the other commissioners were African and the majority were Kenyan. An opinion piece in *The Nation* even proposed that a team of "eminent persons," including Bill Clinton, help mediate Kenya's constitutional negotiations. Maina Kiai, *A Team of Eminent Persons Could Unite Us*, NATION (Nairobi), July 29, 2005, <http://allafrica.com/stories/printable/200507280944.html> (subscription required) (on file with author).

198. Judges are likewise too interested in the process. Furthermore, while it might be desirable to include advocates from the constitutional reform movement, it would likely be politically infeasible to include them without also including representatives from government, and it would also undoubtedly lead to accusations of partisanship. In Kenya, many of the leaders from the constitutional reform movement have become political leaders with their own partisan affiliations.

tensions and as a way to preserve minority representation, regional diversity within the commission should also be required.

There are two significant concerns with excluding national politicians from the review process. First, constitutions that do not reflect political realities and existing power dynamics are at risk of being ignored or even overthrown.<sup>199</sup> It is therefore imperative that politicians' voices be heard and taken seriously, and mere reason-giving requirements<sup>200</sup> may not adequately address this need. Second, excluding politicians from the process is exactly the kind of procedure that lends itself to ex post revisions if it appears that the new constitution will be challenging powerful interests.

To some extent, of course, these kinds of extralegal actions are outside the control of reformers. But it is also possible to design procedures that increase the costs and reduce the benefits of ex post interference. For example, making the drafting commission more clearly apolitical by prohibiting the participation of MPs and other politicians would likely make it more difficult for Parliament or other political interests to co-opt the process ex post, as they would be perceived as blatantly partisan. For example, President Kibaki and his supporters justified changing the review process in Kenya in part because *other politicians* (i.e., Odinga and his political supporters) were hijacking the drafting process.<sup>201</sup> Had neither ruling nor opposition politicians been permitted to participate, Kibaki would have had a more difficult time justifying his interference.

The drafting process could also include incentives to make intervention by politicians less advantageous and to ensure that politicians' views are taken seriously. This is particularly important in a country like Kenya where Parliament must pass the initial statute designing the review process. For example, the process could allow Parliament to propose an alternative draft constitution to be considered alongside the commission's draft in a referendum, if Parliament was dissatisfied with the drafters' proposal. This would both incentivize the drafters to take Parliament's recommendations seriously and provide assurance to Parliament that it would have the opportunity to protect its interests. Such a provision would likewise increase the political fall-out if—as during Kenya's process—Parliament were to amend or revise the commission's proposed draft ex post. Given that Parliament would already have had an opportunity to put forward its own draft

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199. See SCHNEIER, *supra* note 102, at 29.

200. See *supra* text accompanying note 185.

201. See Awori, *supra* note 74.

constitution, it would be difficult to justify subsequent interference with the drafting process.

### *C. Adopting the New Constitution After the General Election*

The statute or regulation enacting the review process should also require that the new constitution only come into force after a general election. This is a simple way to further promote a veil of ignorance during the drafting process because politicians and other interest groups will not know exactly how they will benefit from the new provisions. For example, in Kenya, Odinga would not have known whether he would become Prime Minister if he had had to wait until the next round of elections for the constitution to take effect.

Of course, this rule would be problematic if a new constitution were passed near the beginning of an election cycle, particularly when, as in Kenya, general elections occur only once every five years.<sup>202</sup> To avoid excessive delay in enacting the new constitution, there could be a provision that the passage of a new constitution itself triggers an election within six months.<sup>203</sup> To ensure that the newly elected government remains faithful to the compromises manifested in the new constitution, this election should be governed by the election rules dictated by the new constitution, and candidates should likewise compete for whatever positions are provided for in the new constitution. After the election, the remaining provisions of the new constitution could take full effect.

### *D. Checks and Balances in the Choice of Delegates*

Even with these strict terms of reference, however, the constitution-drafting process could still be at risk of capture based on how the delegates are chosen. Indeed, the system for choosing delegates was one of the most divisive issues during the negotiations for the Kenyan Review Act,<sup>204</sup> and Kenyan critics have suggested that Moi's influence in selecting the Bomas delegates likely contributed to its failure.<sup>205</sup> Just as it is undesirable to have politicians control the review process, it is risky to have them choose the delegates. They may choose people who are overly partisan or otherwise in debt to the ruling

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202. It would also be problematic for countries where elections are staggered over time.

203. This proposal does bring its own risk of capture, however. Incumbents would clearly prefer the certainty of the status quo to a new constitution triggering a new election that they might lose, and they would likely try to delay the review process or stop the new election altogether.

204. See Ndegwa & Letourneau, *supra* note 1, at 87-88.

205. See Mutua, *supra* note 157.

party, leading to opportunities for capture. Countries with constitutions imposed by outsiders do not face this dilemma. However, in a country like Kenya where the constitutional reform movement had to petition a sitting government for change, it is unlikely that the President or Parliament would countenance relinquishing all control over the selection of delegates.

There is no easy solution to this dilemma. However, would-be reformers or donors exerting influence on the process should think about giving several sets of institutions a role in selecting delegates, in an attempt to promote checks and balances. For example, a number of well-established civil society groups in Kenya had advocated for a new constitution. These groups could be given the power to create an initial list of fifty experts who fell within the terms of reference described above. Parliament could be empowered to whittle down this list, with the President having the final authority to choose from the shortened list. Under this system, Parliament and the President would enjoy significant control over the final choice of commissioners, within constraints defined by opposing interests.

Countries without such interest groups would need other checks on the government's ability to select drafters. For example, religious leaders might be a good option in a country like Kenya where churches have traditionally called for checks on abusive government power and where religious leaders enjoy a great deal of respect and moral legitimacy. This would of course be unacceptable under the United States' model of separation of church and state, but in countries with different traditions it may both be legitimizing and offer a valuable check on government power.

This framework, of course, is by no means ideal. The opposition of interests in choosing experts would likely lead to moderate figures who might be reluctant to make radical changes to the structure of existing institutions and to create a truly "visionary" constitution. But it is unlikely that such a set of drafters would be accepted by entrenched powers under any circumstance. A more realistic solution would be a set of non-entrenched and non-self-interested parties who would thoughtfully consider the input from all of a country's communities. While neither the ruling powers nor the reform movement would be fully satisfied by the proposed compromise, it is possible that all could accept it.

#### *E. The Value of a Referendum*

Finally, Kenya's experience shows both the value and the risk of a referendum. First, given that the public will not necessarily support any document put forward, even if it is eager for a new constitution, a referendum can offer a final check on elite capture by ensuring that the document is

palatable to a majority of citizens. Kenya's referendum also helped consolidate democratic institutions and promote the rule of law, even though it left Kenyans without a new constitution. Referenda do, however, have their own risks. In addition to their expense, in transitional democracies like Kenya they create the danger of corruption and violence, particularly along ethnic lines. The following process might help bring the benefits of a referendum while mitigating concerns.

In an ethnically divided country like Kenya, the referendum should not operate by a simply majority vote; rather, there should be regional requirements as a way to reduce the risk of ethnic tensions. In this way, the document would have to appeal not only to a majority of voters but also to a relatively wide swath of the country. Because Kenya's ethnic groups are regionally based, region is a good proxy for ethnicity, in addition to being more administratively manageable. In countries where region and ethnicity are not correlated, it may be necessary to include more direct group voting. It may also be important to account for the presence or absence of a federalist tradition.

There is precedent for regional voting in Kenya's current constitution, which requires that the President receive a minimum of 25% of the valid votes cast in at least five of Kenya's eight provinces.<sup>206</sup> Given the permanence of a new constitution and the need to ensure legitimacy, an even more stringent requirement may be appropriate for a constitutional ratification. One possibility would be to require the draft to receive a certain percentage of the votes in every province, in addition to the majority of votes overall. Kenya is not so divided as to make such a vote impossible, although some countries may be. For example, in the 2002 presidential election, Kibaki received over 30% of the votes in every province, in addition to receiving a majority of votes overall.<sup>207</sup>

This rule would, however, heighten the risk of election fraud, which is difficult to monitor and prevent in a highly corrupt country like Kenya. It might also lead to holdout problems, as citizens of one region could refuse to support the constitution without significant rents for their region.<sup>208</sup> A compromise might therefore require that the constitution receive a higher percentage of the votes in a supermajority of provinces. This would represent a higher standard than in a normal presidential election without requiring every province to support the document.

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<sup>206</sup> CONSTITUTION, Art. 5 § (3)(f) (1998) (Kenya).

<sup>207</sup> Adam Carr, Republic of Kenya Presidential Election of 27 December 2002, <http://psephos.adam-carr.net/countries/k/kenya/kenya2002.txt> (last visited May 2, 2007).

<sup>208</sup> This is a real risk in a country like Kenya, where leaders such as Odinga have tremendous power to "carry" the vote of their ethnic group. See Ajulu, *supra* note 152.

**CONCLUSION**

There is a large gulf between identifying lessons from Kenya's constitution-drafting experience and translating them into concrete prescriptions for designing future processes. Indeed, many of the above proposals may seem insufficient to address the risks and challenges that Kenya's experience highlights. For example, mitigating the risk of capture in a country like Kenya, where any constitutional review procedure must be approved by the very Parliament the constitution is trying to check, is deeply challenging. The easy answer, perhaps, is to reject the entire notion that emerging democracies like Kenya should undertake constitutional review. Edward Schneier has made this exact argument. Citing the advantages of the "science of muddling through," he has noted that while "[d]ramatic constitutional 'moments' can reveal and exacerbate deep divisions as commonly as they can heal them, . . . incremental changes may—through the process of change itself—show the way to future methods of problem-solving."<sup>209</sup>

But Kenya does not have the privilege of muddling through. As in many emerging democracies, constitutional review has been a critical part of a broader political movement in Kenya, and there is widespread political consensus on the need for a new document, as the existing constitution is inextricably linked to forty years of abuses.<sup>210</sup> Given that choices about procedures must be made, this Note has suggested how one might begin to think concretely about applying the lessons from Kenya's experience to the design of constitution-drafting processes. In offering these recommendations, this Note hopes to begin a conversation about the concrete procedural choices that emerging democracies should make.

Finally, while Kenya's constitution-writing process has in many ways "failed" to achieve its aim, it is important to recognize the ways in which it has succeeded. Kenya successfully held a free and fair constitutional referendum, and its government—which had invested significant prestige and resources into its proposed draft—readily accepted an embarrassing defeat. Cross-ethnic coalitions formed in support of and opposition to the draft, and serious violence did not erupt. This was only the second fair election that Kenya had ever held, and its success reflects significant progress in the development of Kenya's democratic institutions, despite a current constitution that is in many ways flawed. It also illustrates the valuable role that constitutional referenda

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<sup>209</sup>. SCHNEIER, *supra* note 102, at 29.

<sup>210</sup>. See *supra* notes 36-42 and accompanying text.



can play in both checking government abuse and promoting democratic culture.

Kenya's process also helped engender a culture of "constitutionalism" among Kenyans. There was a strong backlash in Kenya against the post-Bomas procedural irregularities; despite dissatisfaction with the existing constitution, Kenyans were not willing to accept a replacement that they deemed partisan. As Stephen Ndegwa and Ryan Letourneau have observed, "[C]onstitutional discourse has its own momentum that is difficult to subvert and is likely to inform discourse on transition politics."<sup>211</sup> Process matters deeply to citizens in legitimizing even a well-designed final product.

Kenya will quite likely eventually write a new constitution, given the broad consensus that reform is necessary. Likewise, constitution-writing will continue to be important throughout the world, as new democracies emerge and citizens demand institutions that match their aspirations. This Note has tried to show how procedural choices can play a critical role in determining the legitimacy and efficacy of a country's constitution. Kenya's experience should be a cautionary tale but, in its own way, also a source of inspiration.

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211. Ndegwa & Letourneau, *supra* note 1, at 85.