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Constitution Making and Democratization in Kenya (2000–2005)

JILL COTTRELL and YASH GHAI

The article analyses the most intense phase of a process of constitutional review in Kenya that has been ongoing since about 1990: that stage began in 2000 and is, perhaps, not yet completed, there being as yet no new constitution. The article describes the reasons for the review and the process. It offers an account of the role of the media and various sectors of society including women and previously marginalized ethnic groups, in shaping the agenda, the process and the outcome. It argues that although civil society, with much popular support, was prominent in pushing for change, when an official process of review began, the vested interests of government and even of those trusted with the review frustrated a quick outcome, and especially any outcome that meant curtailing the powers of government. Even high levels of popular involvement were unable to guarantee a new constitution against manipulation by government and other vested interests involved in review, including the law and the courts. However, a new constitution may yet emerge, and in any case the process may prove to have made an ineradicable impact on the shape of the nation's politics and the consciousness of the ordinary citizen.

Key words: Kenya; constitutional review; popular participation; political resistance

Introduction

This article tells the story of an attempt to transform, by democratizing, the political system of one country in Africa, namely Kenya. This was to be done through a wide-ranging reform of its constitution. The process for the review and reform of the constitution was itself to be highly democratic and participatory. When the pressures for reform began, there was a remarkable consensus among political and civil society organizations on the method of review, and indeed the outcome. Save, that is, for the president of the country, Daniel arap Moi, who had run the country in an autocratic and authoritarian style for over 20 years, for a substantial part of that period as a *de jure* one-party state. Moi had no time for reform or participation. But his hand was forced by internal and external forces. The ensuing review process was highly participatory and aimed to establish a new culture of democracy. The process, which started in November 2000, was intended to conclude in two years. Instead, it went on for five full years – and has so far failed to produce a new constitution. In November 2005 the people resoundingly rejected a draft constitution offered to them by the government of President Mwai Kibaki. This draft was in key respects very different from an earlier (2002) draft which was biased towards democracy, rights and social justice, and seemed – to judge by press reaction and

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casual conversation at the time – to be overwhelmingly endorsed by the people. Kibaki had vigorously defended this earlier draft when in opposition. Since then however, there had been general elections, and a shift in power from Moi's party to the united opposition coalition led by Kibaki in January 2003. This shift in power was accompanied by a shift in attitudes, and President Kibaki began to oppose the draft constitution that he had so enthusiastically supported. His minister for justice, well known for his advocacy of democracy and human rights in an earlier era, led the move to sabotage the constitution.

The tale has many morals, some of which we explore. Perhaps the most critical and also the most obvious, is that constitution making is highly political, with high stakes for those who make a living out of politics, the politicians. The constitution is important for them primarily as the gateway to state power, and personal considerations dominate the national interest. Yet civil society finds it exceedingly hard to achieve much purchase on the outcome, even if the process can only start with their initiative, or certainly not without their support. The Kenyan process was similar to a handful of other recent constitution making exercises in Africa (such as Uganda, Eritrea, Ethiopia and South Africa) which have been highly participatory, in countries which have little tradition of democracy or organized political activity, and no commitment on the part of political leaders to democracy. This represents a truly remarkable paradox – Africa without modern traditions or institutions of democracy engages its people, in towns and villages throughout the country, in extensive deliberations on constitutional values and future of the country, and Europe with a great tradition of democracy, draws up its charter in the proverbial smoke-filled rooms.

But what is one to make of such participation in Africa and elsewhere? Is it a presage of, and a great leap forward to, democracy? Or does it represent no more than a cynical manipulation of the public, an attempt to purchase legitimacy with forged currency which cannot be cashed (as in Museveni's Uganda)? What are the dynamics of such processes, which seem to lead to outcomes favoured by those in authority? What are the perils of a participatory procedure which may seem to marginalize elites and experts? Why do civil society organizations lose out in the end in so many instances, mostly to politicians? Is the participatory high-water mark at the conclusion of the process, the future being regression from it as the constitution is, all too often, systematically manipulated, amended or disregarded (as in Eritrea, Ethiopia, and Uganda)? How can the gains of a participatory process be consolidated in more enduring forms, in countries without effective institutions mediating between the state and the peasant or the worker? Is an attempt which does not lead to a new constitution necessarily wasted? What is the test of a good process? What do the vicissitudes of the constitution-making manoeuvres tell us about the relevance and importance of constitutions in contemporary Africa? This article does not pretend to answer all these complex issues, but we hope that our narrative suggests some hypotheses.

Context and Background

The Kenyan independence constitution of 1963, bitterly negotiated and designed to promote democracy, human rights (including specially the rights of minorities),

devolution of powers and checks and balances, was emasculated by amendment over a period of only a few years. The amendments dismantled freedoms and democracy, replaced the system for devolution of powers by a highly centralized administration, modified the parliamentary system by a presidential system with an enormous concentration of power in one person, established one-party rule, and enacted draconian laws including preventive detention. Thus emerged a highly personalized system of rule, with heavy reliance on patronage. The resources of the state (and to some extent of the private sector) were plundered by threats and corruption. Instead of protecting the public, the police became their oppressors. Those who criticized the government were routinely detained or victimized by the perversion of law and abuse of legal process – and were in due course silenced. The tenure of judges and other constitutional officers was subjected to the whim of the president, and the judiciary subordinated to the executive. Many social groups and communities suffered discrimination and were marginalized, while others suffered privation because they were seen to be opposed to the government, threatening national unity.¹

The institutions of the government and economy decayed under the shadow of a powerful president and his inner circle. These institutions became merely instruments of support to the ruling party, and even electoral process was twisted to serve it. There was no effective separation of powers. Parliament became ineffective. There were few institutions for accountability, such as an ombudsman, and such institutions as existed, like the auditor-general, were rendered toothless. Merit as the criterion for appointment or promotion in public services was replaced by political or ethnic connections, or monetary payments. There was a sharp decline in the economy and the breakdown of the infrastructure; decreasing levels of production and export; illegal acquisition by the politically well-connected of huge tracts of land without putting it to productive use; and massive unemployment. People increasingly lost access to the basic necessities of life, while a few lived in unimaginable affluence. Guarantees of the security of person or business disappeared. Consequently there was a massive retreat from public life, an inward lookingness, a lack of openness and trust; and pervasive fear which drove many into exile.

Agitation for reform, led principally by intellectuals and human rights activists, began in the late 1980s.² It was extraordinarily hard to agree on and start the process of constitutional review. Over 40 years of authoritarian rule most people had become alienated from the state. The movement took the form of constitutional reform because the country's problems were seen to arise from bad and oppressive governance, and lack of respect for the separation of powers and the rule of law. The agenda was defined in terms of democratization, protection of human rights of individuals and groups, devolution of powers, and social justice. The country had had no coups or civil war which might have necessitated complicated negotiations and a complex agenda to return life to some normality. In relatively settled circumstances, it was possible to envisage a focused review project with this agenda.

However, not all supporters of reform had similar motives. While many were committed to democracy and human rights, others saw in reform an opportunity to get rid of President Moi and his cronies. Many non-governmental organizations (NGOs) had strong tribal bases, and were used by the opposition to fight the

government. Politicians seemed to have an agenda all of their own, that of capturing and exercising state power, but had to mask their ambitions in order to attract support from civil society and the international community. The unanimity that seemed to characterize the reform groups and to bring them together around a common agenda was deceptive.

The government, too, especially the then president, Daniel arap Moi, and his close political associates, perceived the agenda as essentially one of removing the government. Over the years the government had fortified the means of dominance and the manipulation of rules to ensure its survival. Fearful of losing power and of being harassed for their past misdeeds, the ruling group were determined to resist and, if necessary, sabotage reform.

During years of political oppression and especially the period of one-party rule, 'political' activity was largely conducted through NGOs and think tanks. The latter particularly produced a number of studies – on topics such as electoral reform, land distribution, mechanisms to fight corruption, advancement of women, children and the disabled – which proved extremely useful to those charged with the responsibility to draft the new constitution. They had also conducted some civic education which was beginning to sensitize the people to constitutional issues. However, although the impetus for reform came from civil society which led it through the critical years and had a major influence on the goals and design of the review, the process was eventually taken over by political parties (who had both common and divergent interests – but reform for the sake of a better constitution was not among them). Over the long duration of the process, the fluctuating fortunes of different groups had a major impact on its outcomes.

The reform movement intensified its campaign and in a short period starting in 1992, it won the support of religious groups, opposition political parties, professional associations, trade unions, and a broad spectrum of civil society.

The international context was also favourable, and within Africa itself constitutions had played an important role in restoring democracy, stability and national unity, most notably the constitutions of Uganda, Ethiopia, and South Africa (which had ambitious objectives and participatory elements). There were considerable pressures from international financial institutions and donors on the government for constitutional reform to ensure 'good governance'. The reform movement secured support and financial assistance from the international diplomatic community which tried to mediate between the government and the leaders of the reform movement, putting considerable pressure on President Moi to agree to a review of the constitution. The diplomats were reflecting a changed international situation precipitated by a new wave of democracy, and in particular the fall of the Berlin Wall and the collapse of European communist regimes. The end of the cold war meant that the West no longer felt compelled to support dictatorial regimes in Asia or Africa – support that had been crucial to the survival of President Moi.

The president was unable to resist the pressures for long (the people's overthrow of President Ferdinand Marcos in the Philippines had, it is reported, a sobering impact on Moi). He agreed to meet the leaders of the reform movement and to a review of the process. After a false start, and even civil mass action, leading to violence and deaths,

opposition political parties (supported by religious leaders) abandoned the civil society efforts and negotiated a deal with the government, creating a new forum (Inter-Parties Parliamentary Group ('IPPG')) for constitutional discussions. IPPG agreed to implement a few reforms before the general elections of 1997 – these included the independence of the electoral commission, repeal of a number of laws restricting civil and political rights, including freedoms of association and expression, and the annulment of the offence of sedition, which had been used extensively for a number of years to arrest and imprison people who agitated for reform. After the general elections, a wide-ranging review would take place, for which the Constitution of Kenya Review Act (1997) was passed.

The Act was promoted by the government (always anxious to control the process and minimize popular participation) without adequate consultation with the opposition parties or 'civil society' (understood for this purpose in Kenya as including NGOs, associations of professions, trade unions, social movements – such as of women, the disabled, minorities, and youth – and think tanks). Negotiations to identify an acceptable procedure took place between a large number of stakeholders³ at a series of national conferences between June and October 1998.⁴ The Act was amended to reflect the agreement, which placed people's participation at the centre of the review process. However, its implementation ran into difficulties as the political parties were unable to agree how to go about nominating members of the constitution review commission (at the end the gap between the parties that led to breakdown was over one seat only).

This fiasco led civic groups to start a review process of their own, under the leadership of major religious groups, known as the Ufungamano Initiative. A People's Commission of Kenya closely paralleling the provisions of the Review Act, despite limited financial resources and lack of parliamentary support, proceeded to collect the views of the public on reform. Alarmed, the government promoted yet another Review Act to start an 'official' process. This provided for the goals of review (carried over from earlier acts which reflected the consensus developed at the national conferences) and for wide popular participation. It provided for an independent review commission to consult the people and to draft a constitution based on their views as well as on the goals of reform. However, a boycott by the opposition members of Parliament and civil society enabled the government to hand-pick the commission members.

Yash Ghai accepted the invitation to chair the commission on the understanding that he would be given the chance to bring the two sides (and their commissions) together before formally assuming office. He was troubled by the deepening of divisions about the process, a process which he considered was essential to reinforce national unity and to move the country forward. So long as these divisions continued there was no prospect of a new constitution, as both groups had a veto in Parliament. Fortunately his efforts at reconciliation, backed by strong public pressure, succeeded in March 2001. After appropriate amendments to the Review Act, ten members from the People's Commission and two from government-supported parties were added to the original 15 (in addition to the Attorney General and the secretary of the commission as ex officio members). The review was conducted under the 2000 Review Act as

amended in 2001. Before we turn to the goals of the reform and the procedure for the review, we sketch the context and the background.

The Process: The Constitution of Kenya Review Act

The Review Act⁵ was an unusually detailed document, giving a road map with clear directions and timetable.

The goals set out in the Act laid much emphasis on Kenya as a nation of great diversity – of ethnic origins, religion, culture, traditions and geography. And it reflected a vision emanating from its origins: of a nation at peace with itself and its neighbours, a caring society in which the basic needs of all were provided for. It laid stress on national unity, participation, an active citizenry, active democracy, and accountability.

The dominant objective was a ‘people driven’ process – a phrase that inspired many, though prompting ridicule from a few. The exercise was to be inclusive – accommodating all: ‘socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged’ (s. 5(b)). The people must be given opportunities to ‘actively, freely and meaningfully participate in generating and debating proposals to alter the constitution’ (s. 5(c)(i)) and the process was to ensure that the ‘final outcome of the review process faithfully reflects the wishes of the people of Kenya’ (s. 5(d)). As far as possible, decisions were to be by consensus.

The process was to be started by the Constitution of Kenya Review Commission (‘CKRC’), appointed by the president on the nomination of Parliament. It was intended to be an independent and expert body while reflecting the diversities of the country. Its tasks were to provide civic education to the public on constitutional issues, seek the views of the people on reforms, and prepare a draft constitution for consideration at a National Constitutional Conference (‘NCC’). The CKRC also had to establish constitutional forums (of locally elected leaders) in each of the 210 electoral constituencies to promote discussions on reform and to facilitate the CKRC’s consultations with the residents of the constituency. In order to assist its work in constituencies, the CKRC appointed a coordinator for, and set up a small library in, each of the 74 districts.

The NCC comprised all members of Parliament, three delegates elected from each district, 42 representatives of political parties, and 125 representatives of religious, women’s and youth groups, the disabled, trade unions and NGOs – 629 people in all. It was the most representative body ever assembled in Kenya and was set up to reflect public concerns and to be the primary negotiating forum in the process. Its function was to debate, if necessary amend, and adopt the draft constitution presented by the CKRC. Finally, there was the National Assembly (‘NA’)⁶ which was to enact changes to the constitution by formal amendments. The NA was to be assisted in the discharge of its functions in relation to the review by a Parliamentary Select Committee on the Constitution. This Committee, which the opposition joined only after the merger of the two processes, was to play a important role at critical moments in the review, marshalling support for particular party positions,

determining extensions of time for the proceedings, at times trying to delegitimize the NCC – and consequently there was much jockeying for the position of its chair.

The critical decision-making bodies were the NCC and the NA. The NCC was to adopt the provisions of the draft constitution by the votes of two-thirds of all its members, failing consensus. If on any point such a vote was not forthcoming, the provision in question had to be referred to the people in a referendum, and the results of the referendum were to be incorporated by the CKRC in the draft adopted by the NCC, before sending it to the NA. The NA could either approve or reject the draft, but could not modify it.

The referendum was a device to resolve differences among delegates of the NCC, but it was not well thought out, for theoretically a number of provisions could have been submitted to the people, with various options on each. This was a probable result given that the NCC could make a decision only by a two-thirds vote of all the members, *whether present or voting or not*. A negative vote would have automatically triggered a referendum. It would not only have made it exceedingly hard to explain the choices to the people and conduct the referendum, but it would have been almost impossible for the CKRC to incorporate the results of the referendum in the draft as some of the questions were likely to be so fundamental as to require radical surgery or reconstruction. When these difficulties were pointed out by the chair of the CKRC to the Parliamentary Select Committee on the Constitution, amendments were made to provide that decisions should be made by a two-thirds vote of those *present and voting*, and to require a referendum only if the NCC agreed by a similar two-thirds vote to refer the issue to the people. In the event, the NCC was able to adopt a draft without a referendum, thanks to these amendments. The referendum that did take place in 2005 came about in a completely different way.

As to the division between the NCC and the NA, the general assumption seems to have been that once the draft had been approved by the NCC, of which all the parliamentarians were members, enactment by the National Assembly would be a formality (and indeed the Review Act gave the National Assembly only one week after the formal presentation of the draft to enact it). As events unfolded, this assumption turned out to be unrealistic (see below).

The process was conducted more or less – apart from the timekeeping – in accordance with the formal provisions of the Act (if not, as we demonstrate later, in its spirit). The CKRC published its report and the draft constitution in September 2002. The inaugural meeting of the NCC was convened to meet on 27 October 2002, but President Moi dissolved Parliament, undoubtedly to derail the process, which was effectively suspended until April 2003 (see below). A draft was adopted by the NCC in March 2004, but no new constitution has yet been enacted (as we explain below).

Timing

The original schedule (based on the plans when the chair took office and then on the workplan adopted by the Commission in July 2001⁷) is indicated in Table 1, compared with the actuality.

TABLE 1
SCHEDULE FOR CONSTITUTIONAL REVIEW PROCESS

Stage	Event	Early planned date(s)	Actual date(s)	Comment/explanation
CKRC	Swearing in	December 2000	December 2000 except for Chair	Chair refused – to achieve merger with People’s Commission Following merger
	Start work	January 2001	May 2001	
	Appoint District Coordinators	July–August 2001		
	Set up Constituency Forums	August–September 2001	October 2001	
	Civic education	From July 2001	Late 2001	
	Constituency hearings	November–December 2001	March–July 2002	See below
Public Discussion	Report and Bill	February 2002	September 2002	
		March–April 2002	October 2002– November 2002/April 2003	Period shortened by amendment to Review Act – then lengthened because of Dissolution of Parliament!
NCC	National Constitutional Conference	May–June 2002	28 April 2003–23 March 2004	Government timetable as at December 2004 planned December 2005, but referendum rejected Draft.
	Enactment (unless referendum)	July 2002	Not enacted	
	Dissolution of Commission	August 2002	January 2006	

The thrust of this article is to explain why an initiative that had received so much public support should have been so drawn out, and ultimately lead (at the time of writing) to no new constitution.

Participation in Action

The CKRC

The Act had provided a very participatory process, to which the CKRC was deeply committed. The CKRC prepared some materials for civic education, including a book authored by the chairperson on an analysis of Kenya's constitutional history, the independence and current constitution, and options for reform.⁸ It also prepared a booklet (*The Constitutional Review Process in Kenya: Issues and Questions for Public Hearing*)⁹ to stimulate reflections on reform and elicit recommendations, though this was a document that Yash Ghai at least found too legalistic and formulaic. Whenever possible, papers and documents, originally prepared in English, were translated into Kiswahili and were widely distributed and made available on CKRC's website. Actual civic education was provided both by commissioners and the CKRC staff, and a large number of NGOs who had already begun an extensive, nationwide programme even before the start of the process (assisted by generous funding from a number of western embassies) – their carefully prepared materials were widely used. Extensive use was made of the district coordinators, constituency forums, and documentation centres to promote education and debates.

Commissioners travelled throughout the country providing information about the process and the reform agenda, and addressed numerous meetings of professional, gender, religious, administrative, and social organizations. The commission made extensive use of the electronic and print media and sponsored many public meetings and workshops. Fourteen workshops addressed specific issues (such as electoral systems, gender, human rights and affirmative action, devolution, national values and cultural norms, disability, land, and financial management) at which papers were presented by local and overseas experts, including think tanks. The papers were publicly available, and in hard copy for the delegates to the NCC. The public conducted their own debates and many organizations (some with the assistance of the CKRC) held meetings to prepare their submissions to the CKRC.¹⁰ It was possible through the website and the Kenya press (which can be read on the Internet) to reach out to Kenyans overseas (who were also consulted in London and Washington when the chair and vice-chair visited these places on private business).¹¹ The media played, on the whole, a supportive role (more on this later). The CKRC succeeded in generating a nationwide debate on critical issues, and for several months constitutional issues dominated the media.

The public response was overwhelming. Over 37,000 submissions were received, both from institutions and groups and individuals, ranging from lengthy (and sometimes learned) presentations to a few oral sentences. There were hearings in each of the 210 constituencies – sometimes in more than one centre in each constituency, and thousands of people attended. The views were carefully reviewed and analysed by

the CKRC which developed a software program for computation and analysis of views.

True to its mandate, the CKRC's draft constitution faithfully reflected public views, which, for the most part, turned out to be congruent with the goals of reform established in the Review Act.

However, it is striking that hardly anyone actively involved in politics on the political scene seems to have believed that there really would be a new constitution. This scepticism, that was sometimes shared by members of the public (and perhaps they were all right, as we shall see!), is not at all surprising in view of the country's record of delaying constitutional reform (see above) and of not publishing and implementing official reports – something that is to some extent continuing at the present time.¹² But whereas individual citizens and civil society groups overcame their hesitation and participated with a will, the response of political parties was disappointing. Many presented their submissions very late and those submissions were generally poorly conceived and thin in terms of ideas. The Democratic Party (Kibaki's) and subsequently the National Alliance of Kenya (the DP with other parties) did present detailed proposals and a large team of senior politicians came to a well televised meeting to submit them. Simeon Nyachae, chair of Ford (People) Party refused to come at all. Kenya African National Union (KANU) requested extensions of time but submitted a flimsy document with no senior person present except Raila Odinga, and Moi himself kept postponing his own submission and eventually he withdrew it on the pretext that there was no point – the CKRC had already made up its mind. Few MPs or ministers made individual submissions.

Role of the Media

Even with its generous funding, the CKRC could not have reached enough people and the corners of the country without the assistance of the media. The Act required the CKRC to disseminate a record of its proceedings (including its report) in the media, and to ensure that a sign-language inset or subtitles were provided in all visual programmes. The CKRC set up a committee to liaise with the media – a precedent followed by the NCC. The CKRC organized a series of workshops for the media, at the start of each stage of the process, on the issues and procedures relevant to it. Briefing notes were distributed regularly. For much of the process the chair held a weekly press conference, and during the NCC provided daily briefings. The media were invited to all activities and hearings, and transport was provided for them if the meetings were held at relatively inaccessible places.

Articles written by the chair regularly to keep the public informed of the progress and issues and occasionally by other commissioners were published in the leading newspapers. The chair and some other commissioners appeared frequently on chat shows and panel discussions (especially on television). Occasionally the CKRC bought space – for example, it published both the CKRC and NCC drafts of the constitution in pull-out sections of newspapers, and the CKRC draft also in Kiswahili newspapers. It also paid for weekly radio programmes in English and Swahili in which commissioners would briefly introduce an issue and then engage in discussion with listeners who telephoned in, on the only broadcasting station which had

nationwide reach. Specially prepared talks in various local or regional languages were also broadcast on this station. Surveys showed that a very large majority of Kenyans had familiarity with the review and the exercise. It seemed that Kenyans had an insatiable appetite for news and commentary on the review (the manager of one of the largest media houses told the chair that sales and audience ratings had increased greatly since the review started).

Relations between the media and delegates to the NCC were less cordial. Delegates felt that the media was focusing on delegates' concern with allowances and other perks of office, on their 'rowdiness' and bickering. But the delegates (especially active politicians among them) also played to the gallery through the media, and complained when there were few cameras or journalists covering their sessions or broadcasts were brief. In return the media amplified differences among delegates. The matter became so alarming that serious consideration was given to excluding the media from sensitive meetings in a bid to reach consensus. They were in fact excluded from meetings of a 'consensus building group' that the NCC set up.

Special Groups and the Process

The participatory nature of the process and special representation of women, the disabled, minorities and marginalized communities, gave a voice to groups who have had little impact on politics or social and economic policies. They made full and skilful use of the opportunities opened up by the review for women in particular. Kenyans became aware of the discrimination that many ethnic and cultural groups, like the Somali, Nubians, and Ogieks, had suffered in both the colonial and post-colonial periods.

The group which came out best from the process were women who were able to present a united and coordinated position, transcending ethnic or religious distinctions. Women had made considerable gains during the whole reform movement in which they were very active and the Review Act itself was 'gender sensitive': it provided that gender equity be a factor in appointing CKRC commissioners (s. 6(5)(b)) and s. 8(b)(iii),¹³ one vice-chair was to be a woman (s. 9(2)) and the commission was to ensure that its recommendations were directed towards gender equity generally.

Women's concerns were wide-ranging, but focused especially on representation of women in elected bodies and more generally rights in land (something on which Kenya's record has usually been poor¹⁴), and pressure for a Gender Commission. The force of the women's lobby rather distorted the proposals on legislative structure: a second chamber, which formed part of the NCC draft, was to have reserved seats for women over and above those for representatives of devolved governments, which was not really consistent with the essence of the house which was to represent the interests of those lower level governments. And women were one of the reasons for the rejection of the Mixed Member Proportional System (based on that in Germany/New Zealand), which was designed to combine the virtues of a system of constituency MPs with proportional representation.

The National Constitutional Conference

The NCC – usually colloquially referred to as 'Bomas' – did not really get under way until 28 April 2003. It was a remarkable event in many ways. Had it taken place

before the elections it would have been very different. In some ways it was anarchic; a cartoonist used the analogy of the tower of Babel.¹⁵ Delegates did not endear themselves to the nation by putting their own remuneration at the top of the agenda.¹⁶

Instead of moving rapidly to detailed consideration of the draft in committees, there were interminable debates in plenary where members insisted on discussing points of detail, and repeating points made by others. And once committees began to meet, the discussions were more focused and in some committees moved with reasonable dispatch, but in others the chairs were not really on top of the subject (the CKRC having resisted the suggestions of the chair that committees should be serviced by independent experts instead of by commissioners) The NCC final session was from 12 January to 23 March 2004, without adjournment, though this did not mean that all members were working together towards a common aim. Ministers boycotted the final stages complaining that they were not treated with sufficient respect. The government walked out – leaving the delegates to vote for a system that the government incumbents could not stomach.

It was clear that major divisions existed between the political parties, even between the parts of the governing coalition (which has now fallen apart to an even greater extent). So a committee was set up to try to reach a consensus within the NCC framework, but outside the formal meetings. At the final hurdle of the system of government, and also on the issue of devolution, this consensus did not hold, and for this prominent members on both sides of the ruling coalition must take responsibility. The consensus committee's report was rejected by the delegates. The final draft was adopted by consensus in an eruption of people power, and the fact that a parliamentary system was adopted was partly a reflection of the disgust of the delegates with the attitude of the government – though a parliamentary system was also the essence of the 2002 Draft.

Defeating the Democratic Will

The Kenyan process provides a textbook example of how the democratic will can be, at least temporarily, frustrated, by governmental recalcitrance and obstruction, corruption and manipulation.

Government

Although civil society looked on the review as an opportunity for a genuine restructuring of the system of government, even of Kenyan society, the Moi Government itself was dragged into a review that it did not want. Although he seems to have accepted that he would have to leave office at the end of 2002 or early 2003, Moi evidently hoped that his party, KANU, would win the elections, and that his chosen successor would slip into his seat. There was strong suspicion that Moi anticipated being able to control the party's nominee, Uhuru Kenyatta, and that this was why Moi retained the post of chair of the party. Whatever the truth it does seem true that Moi had no enthusiasm for a new document, and was prepared to put party or personal interest before it. Nor did he have the slightest enthusiasm for a 'people driven' process.

Even after the election, the old guard (assuming that it accepted that it was for the time being out of power) was not keen on the new constitution as it embodied a scheme for 'truth and justice', investigation of and punishment for past violations of human rights and corrupt activities.

Despite having been swept to power on a tide driven in part by people's enthusiasm for a new constitution, the new government soon lost its own reforming zeal. Many members of the new government were people who had strong credentials in fighting for human rights and a new constitutional order, though others were familiar faces, being late defectors from KANU. The constitution that had seemed so obnoxious did not seem so bad when it had brought them to power! Particularly there was little enthusiasm for curbing the president's powers, nor for limiting the age of presidents – Kibaki being 71 when he took office. How far these were Kibaki's personal concerns, and how far those of his surrounding coterie who perhaps found it easy to exercise influence on an ailing man, cannot be known. There is the more specific concern that a new, parliamentary, system would lead not simply to a largely ceremonial role for Kibaki, but a powerful role for the most charismatic politician in the country, Raila Odinga.¹⁷

There were also suspicions that the government found it more convenient to carry out some aspects of its programme without being impeded by, or perhaps even without the assistance of, the new constitution. They carried out a sweeping review of the judiciary – which would have been required under the Draft – but without a revamped Judicial Service Commission that the Draft would have required and that would have been less subject to government control. They were able to set up a new structure for corruption control, introduce free primary education, bring into being an Economic and Social Council to advise the government on policy, create an official Human Rights Commission and establish an inquiry into illegal appropriation of land. All these steps were required under the Draft, but the government could shape them in its own way, and perhaps even claim credit for them rather than appearing to be simply responding to a constitutional mandate (and perhaps along the way ensure that their own supporters replaced Moi's appointees).

The government continued to make use of the Provincial Administration – a colonial creation designed to ensure top-down control of the native population, and manipulated from the president's office with the assistance of a police force also controlled from that office. Even when, as will be explained, the new Government finally held a referendum on a document that would have abolished Provincial Administration, the president seems not to have understood this, and the government seems to have planned to reinvent the discredited institution in some way.

Unfortunately there is good reason to suppose that some sections of the new government have behaved at least as corruptly in purely financial terms as the old – something which a new constitution might make a little more difficult (see below).

President Moi held in his hand the most powerful spoiling mechanism, dissolution of Parliament: under the existing constitution the president had the power to call a general election at any time. At one point Yash Ghai believed that he had persuaded Moi to delay the elections for as long as possible to give the process the best chance of

being completed.¹⁸ But for whatever reason he decided to call the election at the end of December (the 'traditional' time) nearly three months before he was required by the Constitution to do so. Dissolution had the automatic effect that the process could not continue: every MP was a member of the NCC, and MPs ceased to be such when the writs were issued for the elections, which took place a few days after the dissolution. The dissolution could not have come at a more dramatic moment: the formal inauguration of the NCC was to be on Monday 28 October 2002. During the previous week all the non-parliamentarian delegates¹⁹ had assembled for a week of pre-conference activities, including ceremonial tree planting (organized by the delegate Wangari Maathai), and sessions where discussions of the CKRC Draft were led by distinguished academics and others, including those critical of the Draft. The President dissolved Parliament at around 3 p.m. on the last day of this inaugural week, Friday 25 October .

But Moi's spoiling tactics go back a good deal further – to the setting up of the CKRC at least. The body seems to have been designed to be ineffective and compliant. It was appointed through an ostensibly open process; with 2 members from each province (except Northeast Province) and by a system of application by those interested in serving. But many people who would have been genuinely good appointees did not apply, and many who did apply were nonentities, and few had any knowledge of constitutions. Many of those appointed to the original commission were clients of powerful politicians. And there was an expectation that they would do the bidding of their patrons – whether that bidding was the making of a particular recommendation, or applying the brakes.

A brave new Kenyan world was supposed to dawn at the end of 2002 when it became clear that KANU had lost its bid to remain in power. During the election campaign the 'faith based' group Ufungamano asked the leaders of the parties to undertake to complete the review within six months of the election. 'Six months?' – responded NARC – '100 days!'. Some slippage was perhaps inevitable as the coalition got to grips with the realities of governing. But there was a good deal of disappointment that the NCC did not reconvene till 28 April. And every time Parliament needed to meet the NCC had to adjourn. This was because the MPs were all members, though in reality there were many members whose appearances at the NCC were rare (and around 100 who never appeared at all). So the NCC had hardly got going, it seemed, when it had to adjourn on 6 June for the Budget session. For these adjournments the government was not responsible. But in August the vice-president died just after the NCC had reconvened, and it seemed that the first act of the president, even before he had spoken to all to the cabinet, was to insist that the NCC be adjourned to mourn. The chair insisted he had no power to do this – but the conference was persuaded to go along with this, so the proceedings were postponed for another two weeks.

On 26 September the NCC adjourned for another parliamentary session, to resume on 17 November. But the government decided that it needed more time to come up with a strategy in the light of what now seemed the real possibility that the NCC would produce a constitution, and it said the conference should not resume until 12 January 2004. The chair again insisted that no-one except the NCC itself could fix

the dates of sittings. A small number of delegates, including the chair, turned up at the venue on 17 November, to find themselves confronted by locked gates and mounted police. Some delegates also took legal action seeking a ruling on the date. Though the judge was one of the 'new breed', the case was repeatedly adjourned and the date fixed by the government arrived.

There were people who were not opposed for reasons of personal interest or political conviction to a new constitution as such, or to any particular new constitution, but whose main interest was in the process, from which they benefited. They just hoped that the gravy train would roll for as long as possible. This group included some members of the NCC – perhaps including some MPs who would come and sign in, collect a daily allowance, and then leave. It also included some members of the CKRC all the time and many members for some of the time.

Applying brakes turned out to be something that many CKRC commissioners found to their taste – especially once they had managed to negotiate for themselves outrageously high salaries and allowances. It was perfectly clear that many of the commissioners were reporting regularly to their patrons, and during the intense period that led to the production of the Draft and Report in 2002, a few came only to collect information to pass on to ministers close to the president. Unfortunately there were many periods when relationships between the chair and many of the CKRC members were so hostile that commissioners would be motivated by a desire *not* to do what the chair wanted done!

Delaying tactics of all sorts were employed, by both Governments (acting themselves or through others including members of the CKRC), by members of the CKRC acting on their own account (though of course it is not always possible to discern at whose behest delays were taking place), and by some members, including committee chairs, of the NCC. In the NCC itself members used the quorum rule to have the body adjourned prematurely on many days, and some members tried to move motions objecting to the whole body, or other irrelevant and diversionary issues. Much of the delay – but by no means all – can be laid at the door of the commissioners of the CKRC. As early as September 2001 one commissioner was reminding his colleagues that the Act provided for an extension of the deadline.²⁰ The commission took advantage of this possibility no fewer than three times.

To explore all the ways in which the process was delayed would smack too much of personal grievance. But a few can be mentioned. There were disagreements within the commission as to how many commissioners should constitute a panel, for constituency hearings,²¹ with commissioners arguing that four or five should go together, and the chair that two was enough. When the deputy to the chair, Dr Ooki Ombaka died in June 2002 commissioners insisted on mourning by taking ten days off work – disrupting the schedule for the final constituency hearings, notwithstanding the insistence of Ombaka's wife that this was not the way her husband would have wanted to be mourned. Drafting the NCC rules of procedure offered the CKRC another opportunity to engineer delay.

The autonomy and process of the NCC was subverted by politicians of various hues, not only by boycotts, irrelevant grandstanding or simple lack of interest but by outright bribery of delegates.

The Fate of the Bomas Draft

The government did not care for the Draft produced at the end of the Bomas process. Particularly it disliked the proposed parliamentary system, and some aspects of the provision for devolution. One reason for some sense of haste in the final stages was a suspicion that some more mischief was brewing in the form of litigation. And indeed that was so, and a convenient court order prevented the CKRC from passing its report and the draft constitution to the attorney-general.

There was a strong suspicion that the government would have been perfectly happy to leave the existing constitution untouched. But it was very aware of the popular commitment to a new document, and no doubt believed that its electoral fate in 2007 depended on its giving the country at least some sort of new document.

After the end of Bomas numerous meetings were held ostensibly to achieve consensus on the draft. The consensus sought was essentially between the political parties – in other words the initiative had passed from the people to the politicians. In June 2004 it was said that a political consensus had been reached, and a Bill was passed by Parliament. This was to amend the Review Act so that Parliament could amend the Draft, at least in certain ‘contentious’ areas. Such change was to be by a 65 per cent majority.²² No sooner had the Bill passed through Parliament than certain politicians began to crow that it protected the NCC Draft because they were confident 65 per cent would not support changes. The president refused to sign the Bill, on the basis that it was unconstitutional since decisions of Parliament must be by simple majority unless the constitution, not ordinary law, states otherwise. In December Parliament passed the legislation with the requirement that only a simple majority of MPs could change the Draft – despite the opposition of Odinga’s party and KANU.

The document said to have been the result of the consensus meetings was tabled before Parliament and approved in one sitting (it was not treated as requiring a regular legislative process). It was then given to the Attorney General who produced what has usually been known as the Wako Draft (Amos Wako being the Attorney General), which appears to contain some new changes even post-‘consensus’. This was submitted to a referendum on 21 November 2005: and rejected resoundingly.

In one sense the referendum was a triumph for the democratic will. It is clear that many people were disgusted at the way the government had hijacked the process. But it is also clear that the exercise turned into a popular vote of confidence in the government as a whole, and was probably a reflection as much of frustration with that government and especially its record on corruption – for by this time it was becoming clear that the Kibaki government is just as adept at this as its predecessor.²³ Unfortunately, it was also a heavily ethnic vote, with only Kibaki’s own ethnic group, the Kikuyu, voting in favour.²⁴

It is not clear what will happen now. The government realizes that it still needs to produce a constitution, but does not, it seems, know how to get what it wants and give the people what they want. During the later phases of the process many groups, and for various motives, called for the whole constitution-making business to be turned over to ‘experts’. For some it was, perhaps, linked to a sense that a group of

experts might more easily be controlled. For others this was genuine frustration with what they saw as the unruly process of the NCC, or the subversion of the process by politicians. The National Council of Churches of Kenya actually produced a draft drawing on the NCC proceedings.²⁵ It was in some ways a definite improvement on the NCC Draft (especially in being more concise) but it betrayed the influence of government thinking in that it incorporated a presidential system and a unitary system at a time when the NCC had opted for a parliamentary and devolved systems. Similarly the Law Society of Kenya produced its own draft.²⁶ The government was reported in December 2005 as favouring a group of 11 experts, but nothing happened until late February when it announced a group of 15 people, chaired by a retired diplomat, and including ten academics, and activists, a retired judge, but no active politicians or religious leaders. The group was given until 30 May 2006 to produce a report, analysing what went wrong with the process and making suggestions for the way ahead. At the end of May it made several alternative suggestions, all of which involve a referendum, in deference to the court decision discussed below, but otherwise might involve a constituent assembly, or 'experts', or a national but unelected forum.²⁷

Later in the year the Government revived the idea of constitutional reform and opinion was divided over whether it was possible to have an entire new constitution by the elections due at the end of 2007, or whether there should be 'minimum reforms' to level the playing field. There is little reason to suppose that the atmosphere is any more conducive to rational debate.²⁸

The Litigation Strategy

There has been strong suspicion that government support or instigation has lain behind the remarkable number of court cases that attempted to derail the process. The commission was first taken to court in 2001 by its own secretary whose dismissal was being sought by the chair. Shortly thereafter a group of litigants from the evangelical churches, who were not participating in the review, led by seven bishops including a spiritual adviser of President Moi, sought a declaration that the chair was not qualified and that they should be given seats in the commission and the NCC. Both cases were eventually withdrawn, but they did serve to waste time.

At least three cases were brought around the time the final Draft was produced. In one various rulings about the invalidity of the adoption process of certain chapters at the NCC were sought, and the court actually issued interim injunctions prohibiting the Attorney General from receiving the Report and the Bill, and even prohibited the CKRC from completing its report and the Bill.²⁹

One case got to the point of judgment;³⁰ it was instituted to stop the work of the NCC and prevent Parliament from enacting the Draft Constitution adopted by the NCC. It was also aimed at requiring a referendum on the proposed constitution. It was assumed to have been brought with the backing of government and it did not go unremarked in the media that the presiding judge (Justice Ringera) was in line for a major post as chair of the reconstituted anti-corruption commission (alternatively for the Court of Appeal), and another was only a temporary judge (Justice Kasango). The third judge (Justice Kubo) dissented. The applicants challenged the

constitutionality of the provisions of the Review Act that left it to the NCC to decide whether contentious issues should be referred to a referendum, arguing that this violated their constitutional right to a referendum. They argued that the NCC itself was unlawfully constituted since the majority of its members were not directly elected and its composition did not observe the principle of equal representation. This is because parliamentary constituencies and districts had the same number of representatives regardless of their size, which varied considerably. Finally, they sought a ruling that Parliament could not repeal and replace the current constitution but only amend it (under s. 47 of the Constitution) and therefore s. 28 of the Review Act which required Parliament to enact the draft constitution was invalid. Towards the same end, they also argued that Parliament could not amend the basic features of the constitution. Both majority judges essentially accepted the arguments, though Kasango ruled that a referendum was sufficient for the adoption of a new constitution since a draft was now in existence. This is not the place to analyse this judgment. The point is that it has been used as an excuse for not proceeding with the process mandated by the Review Act. There has been no appeal by the government, as the Attorney General has occasionally promised there would be.

A final, cynical, use of litigation was in 2005, when suddenly a case that seemed to have quietly died came back onto the court calendar.³¹ This concerned a fresh challenge (brought by a group not colluding with the government it must be said), begun in May 2005, to the process as it had been amended by the government, and to the forthcoming referendum. There was a suspicion that the courts held up a decision on this case until it was clear what the government wanted. But when the government believed that they would win the referendum, it gave the go-ahead to the courts to decide it, which it did on 15 November. It was held that the process, including the referendum, was constitutional.

Other Spoilers

Members of Parliament, or many of them, were not very enthusiastic supporters of reform either. They did not want exposure even to a largely theoretical possibility of recall by their constituents, nor restrictions on the number of terms of office for MPs; they did not want to lose the possibility of being ministers, or a second chamber that might curb the power of the assembly they were members of. Generally they were happier to continue to operate the system they were used to. Although most political parties had made some sort of submission to the CKRC, when it came to the NCC it was very difficult to hold any sort of party line. If not concerned only with their personal advantage, MPs were largely motivated by ethnic considerations.

Once the judges realised that the Draft would lead to serious investigation of judicial defalcations for the first time, they were only too willing to uphold efforts to use the judicial process to delay the review. And in August 2002, a group of judges, backed, it was reliably learned, by the chief justice himself and with the connivance of the president's office and some CKRC commissioners, obtained an interim injunction to the effect that the CKRC must not discuss the judiciary. News of this, on the eve of the crucial meeting in Mombasa where the Draft Constitution was to be produced, engendered in most commissioners a surge of defiant unity that carried

them through much of the proceedings that, rather to their own surprise perhaps, produced a Draft Constitution and short report in September. The litigation served to galvanize public opinion; it was reported that the judge could not walk down the street for fear of public abuse. And the legal profession led a 'We want a new Constitution now',³² campaign. Lawyers and members of the public wore yellow ribbons in support of a new Constitution. Public resistance prevented the arrest of the chair for contempt of court.

Religious groups though at times the driving force, have at times been spoilers. A major contentious issue has been the position of Kadhi courts. Muslim groups have sometimes threatened to pull out if they did not get recognition of Kadhi courts; Christian groups have threatened the reverse. Immediately after the final session of the NCC the Catholic Church was reported as demanding a referendum.³³ Yet they have also been strong supporters of the NCC Draft, with the Catholic archbishop warning the government in May 2004 that no more delay should occur in enacting the Draft.³⁴

Process and Product

There is always a connection between the process and the outcome. We can think of process in terms of: defining the agenda, designing the process, the breadth and nature of stakeholders, the degree of participation and transparency, the division of functions and responsibilities, the span of time and deadlines, and the rules for decision-making (the adoption of the draft). Each of these can influence the outcome, but since the implications of each of them may be different or even contradictory, the connections may not be obvious or clear-cut. For example if the process is very participatory but the rules for decision-making restrict authority to a few persons, the draft constitution, reflecting the reform agenda, may be radical and wide ranging but the final constitution may be conservative and unduly protective of the interests of the decision-makers. If the rules emphasize consensus and other aspects of the process facilitate it, then the constitution will be determined by the dynamics of consensus building (for example, less majoritarian).

In Kenya, the fact that the pressures for reform came from civil society and in the face of government opposition meant that large sections of the community were mobilized and a fairly radical agenda grew. That radical agenda persisted through the different stages leading up to its formalization in the Review Acts. The early mobilization of the people also resulted in an inclusive and participatory process. The agenda was further broadened through the wide participation of groups outside the establishment or urban centres that raised or refined issues which had the goals of local self-government, rehabilitation of traditional institutions, and basic needs, as well as direct forms of democracy (for example, the recall of MPs).³⁵

The openness of the proceedings of the NCC may have made it harder to achieve consensus. The media loved to report heated and polemical debates, which encouraged delegates to state and stick by extreme positions.³⁶

The Kenya process valued decision-making by consensus, but did not provide enough incentives for parties to search for it. In the event that no consensus was forthcoming, the matter would be resolved by two-thirds of the votes of all NCC members,

failing which it would be referred to a referendum. If all parties and groups are committed to a settlement, as in South Africa, they have an incentive to compromise to avoid the uncertainty of referendum results, especially minority groups who have a veto in the decision-making forum. The threat of a referendum in case of disagreement in the constituent assembly did in fact help to produce a consensus. But in Kenya where more than one group had little reason to welcome a new constitution, the rules discouraged consensus in favour of the delay or uncertainties of a referendum. The NCC was able to reach its decisions only because the voting rules were changed from two-thirds of all the members to two-thirds of those present and voting, and by the boycott of the opponents of reform at the last minute leaving behind just enough members to constitute a quorum.

The Kenya process which divided the decision-making between two institutions with different representation of interests produced many tensions, particularly as those in command of the NA chose not to play an active role in the earlier stages. The mobilization of people and the radicalization of the agenda combined with the rural and civil society basis of the NCC meant that only an innovative constitution with strong components of participatory democracy, self-government, and accountability would have any chance of approval. Yet it is precisely such a constitution that is the worry of politicians as a class and they dominated the other decision-making forum. They were prepared to let the NCC make its decision in the knowledge that they had the ultimate veto in the NA, as some were brazen enough to say in public. This factor also removed the incentives they might otherwise have had to persuade other NCC delegates and search for a consensus. This approach was evident the moment the NCC ended and the opponents moved to undo its work.

Another consequence of a highly participatory process, resulting in part from the expansion of the reform agenda as each group advances its claims, is the necessity for negotiations among the key stakeholders to find common ground. In the Kenya case we can see the gradual expansion of the agenda, as communities and groups, hitherto marginalized, such as the Somalis, Nubians, Ogieks, Goans, women, the disabled, were given voices, for the first time ever, and were listened to sympathetically. The NCC readily agreed to special provisions for these groups, of affirmative action, special representation in state institutions, the preservation of the environment for groups whose lifestyle was defined by it (especially forest people and pastoralists).

Under the Review Act, the forum for negotiations was the NCC. Unfortunately key political parties, including important factions in the government, either chose to effectively boycott the NCC or chose not to use it for serious negotiations but instead pushed their own case to the point that it became counter-productive. Politicians also used the NCC forum to mobilize support along ethnic lines, undermining other non-ethnic lobbies. Although ethnic politics have long been the bane of Kenya, and are recognized as such (by the press and the people at least), ethnic claims played only a minor role in the general debates or the submissions to the CKRC. It was only when politicians got into the act that ethnic claims and loyalties seemed to displace other considerations. Night-time meetings outside the NCC were used to bribe delegates and reinforce the ethnic agenda. Moreover issues were viewed in terms of very short-term perspectives, focusing on what individual politicians would gain

from institutional arrangements. These approaches, plus the large size of the NCC and an inefficient committee organization, meant that the NCC was not used for the purposes of negotiations and building consensus and common identity.

Reflections

The principles underlying the process were important not only to ensure a good and acceptable outcome, but also to generate habits of rational and honest debate, to heal the divisions in society, to settle differences through discussions and negotiations, and to strengthen national unity and national resolve to identify and tackle the urgent problems facing Kenya. If the exercise had succeeded in these objectives, it would also have ensured a favourable environment and political culture in which the new constitution would be able to take root and flourish. But it may be that the politicization of the people and the broadening of the agenda for democratization and social justice set the scene for a reaction from the more self-serving politicians and sharpened the tension between the people and politicians already implicit in the rules for decision-making.

Public consultation did help the Commission. It increased the commissioners' knowledge of the country and its people. It introduced them vividly and some times painfully to the circumstances of the large majority of the Kenyan people: living on the margins, eking out a precarious existence, and extraordinarily vulnerable. Consultations highlighted the vulnerabilities of minorities, women, the disabled, children, and the elderly. It also enabled the Commission to focus more on local governance and self-government issues than they would have without the benefit of what they heard as they travelled from one part of the country to another.

The rules for decision-making added up to a complex method of offering hostage to 'spoilers'. The outcome represented a compromise between those (like civil society organizations) who wanted to exclude the government and parliament from any role as such in the review process and those (like President Moi) who wanted to exclude the people. As we have seen, there was agreement in many quarters that the provisions that would have triggered a referendum were unworkable, and they were changed. Ironically there was, as we have seen, a referendum, with a different format and for a different motive which produced a result diametrically opposed to the wishes of its sponsors. It not only led to a rejection of the draft favoured by the government, but also damaged the legitimacy of the government.

In some other respects too, the apparent assumptions of the Act did not work. Perhaps they were not meant to. The expectation was that the government would be able to manipulate or subvert the process as it wanted to, despite principles of independence, openness, and accountability. The membership of the NCC was seen to be loaded in favour of the Moi government, particularly through parliamentary and district representation (both predominantly controlled by his government). There is some reason to believe that the manner of amendment of the constitution provided in the Act was deliberately drafted to leave doubt about its validity, giving the government an escape route in case the review got out of control. Civil society organizations always suspected this, and were reluctant to merge their own process with the

government's. When they did join, they were unable to secure all the guarantees they considered necessary to ensure a fair and effective process.

But these built-in defectors might not have succeeded in derailing the process if it had been concluded within the original time frame of the Act. The original deadline would have ensured that the review would be concluded successfully before the next elections. Moi's dissolution of parliament on the eve of the first session of the NCC not only frustrated that possibility but also led to the downfall of his party in the elections. The supreme irony is that it was parties overwhelmingly supported by civil society (suspicious of carefully planted mines in the process) who, now in government, triggered off these mines in an attempt to subvert the process – demonstrating that few politicians had a genuine commitment to constitutional or social reform.

Yash Ghai was conscious from the outset of the crucial importance of timing. He warned in January 2000 that

the realities and dynamics of constitution making cannot be determined by academic disquisitions on slow and measured deliberations, popular participation, civic education, transitional governments, and the like, valuable as all these points are. . . . constitution making is pre-eminently a political act, subject to political constraints, as well as political opportunities. . . . Constitution makers, particularly if they are not the political masters, can easily lose control of the process. The conjuncture under which they can drive the process is contingent on factors they do not control – and is frequently short lived. Constitution makers are ever vulnerable – and they must keep reminding themselves of this fact. How to use their limited leverage constitutes another component of the art of constitution making.³⁷

Due to either some commissioners' greed or political sabotage (or both), the CKRC lost the window of opportunity and failed to deliver a constitution.

There were considerable advantages in having a detailed legal framework for the review (and this was perhaps a necessary condition given the suspicions and lack of trust that characterized the political situation when the review was being negotiated). It provided an excellent and logical road map and enabled the momentum of the process to be maintained even in difficult times. But its very details opened avenues to litigation and give 'spoilers' opportunities to challenge various aspects of the procedure adopted by the CKRC or the NCC.

The Kenyan process aimed to reduce the influence of politicians on the review and decision-making. Traditionally in Kenya constitutional amendments had been seen as the responsibility of politicians – it is parliament that has been given authority to amend the constitution. Indeed in most countries politicians have traditionally played the leading role in constitution making. Kenya therefore provides an interesting case study of the attempt to reduce the role of politicians and make them just one of the stakeholders. And the evidence seems to be that politicians are better able to mobilize public support than civil society organizations (which tend to be urban based) – and also perhaps because politicians are more willing to introduce and exploit ethnic issues. Here is an issue which requires further reflections and suggests caution in designing the process.

The Kenya experience also suggests reflections on the process for another reason. Did the process fail? This question can only be answered if we identify the various tasks and functions of a process. In Kenya the empowerment of the people, responsiveness to their aspirations, a common process emphasizing national unity, were important goals. The immediate failure to adopt the constitution is not the only basis for evaluation. It succeeded in raising the political awareness of the people, and the results of that were already evident in the way they voted in the general elections of 2002. And it is evident in the way that, since then, people have demanded more accountability and government policies and acts are subjected to greater scrutiny. It has been particularly clear in the way the corruption issue, in the closing months of 2005 and early 2006 when this article was written, has not been allowed to die. And it is also seen in the continuing pressures on the government and parliament to enact a constitution based on the NCC draft.

By taking seriously the views of the people, hitherto reduced to passive submission, the review gave them a sense of their own worth and importance. It emphasized the character of a constitution as a compact, not only between citizens and rulers, but also between people and communities. The process gave individuals, organized groups, and communities the incentive to study the ways in which public power can be organized and exercised. It increased their awareness of the structures of state. By increasing their knowledge of the draft constitution, the process prepared them for the defence and mobilization of the constitution. It considerably broadened the agenda of reform, especially the social issues. It also enabled them to connect the local to the national, and produced a consciousness that they were part of a wider community engaged in a similar pursuit of defining their identity and future. Conformity to people's views contributed greatly to the legitimacy of the draft constitution and to its acceptance as the framework for the development of consensus on the formulation and implementation of national policies and settlement of differences. And through all the various drafts following the CKRC draft, the social and economic agenda developed in the discussions – emphasizing democracy, the dispersal and accountability of power, integrity in public office, social justice, and human freedoms – remained unimpaired. It is unlikely that this agenda can be ignored in the future.³⁸

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NOTES

1. The background to the independence constitution and the way it was gutted in later years are discussed in Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970, reprinted with a new Introduction by Ghai, 2001).
2. The best account of the reform movement from 1992–1997 is Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992–1997* (Harare: MWENGO, 1999).

3. The word 'stakeholders' was widely used in Kenya to refer to those groups or interests that had a right to participate and be consulted.
4. Some of these were held at the Bomas of Kenya – a cultural complex. Later they moved to the Safari Park Hotel. These discussions are often called just 'Bomas' or 'Safari Park' – and there is some risk of confusion as the National Constitutional Conference is also called 'Bomas', subdivided into Bomas I, II and III to reflect the major adjournments (see below).
5. Kenyan legislation, including this Act in its current version, is to be found on the Internet at the Kenya Law Reports website, available at http://www.kenyalaw.org/KenyaLawOnline/klr_home/index.asp
6. There is one house of Parliament only – the National Assembly. Parliament is defined in the current Constitution as comprising the National Assembly and the President (s. 30).
7. Most of that plan was available on the Commission's website (<http://www.kenyaconstitution.org>), but that closed in mid-2006. In Table 1 the plan for every stage after May 2001 is based on that workplan, itself drawn up after the initial delay caused by the merger process that dragged on for months.
8. Yash Ghai, *Reviewing the Constitution: A Guide to the Kenya Constitution* (Nairobi, The CKRC, 2002).
9. On file with the authors.
10. Organizations that prepared documentation that can be found on their websites include the Institute for Economic Affairs (see <http://www.ieakenya.or.ke/>), the Institute for Education in Democracy (see <http://www.iedafrica.org/publications.asp>)
11. There are three English language daily papers available on the Internet: *Daily Nation* (<http://www.nationaudio.com>, that also includes the weekly *East African*), the *East African Standard* (<http://www.eastandard.net>), and the *Kenya Times* (now at <http://http://www.timesnews.co.ke>). The last is a newspaper which supports KANU (thus it supported the government for the first half of the process). The CKRC used mainly the first two, but anyone wanting as full a view of events as possible should also consult the third. The government broadcasting organization, the Kenya Broadcasting Corporation, also has a website, available at <http://www.kbc.co.ke>
12. Under the previous regime this failure to publish reports was routine. The current government released a report on irregular land allocations (the Ndungu Report) in 2004 only under great public pressure, and at least two members of that Commission have dissociated themselves from the report as published, alleging that it is incomplete and does not contain the names of all the recipients of land that the Commission had identified. A report of a task force on whether to set up a Truth and Reconciliation Commission has never been officially released, and the report on the judiciary was not released although it was leaked by the Ministry of Justice. In early 2006 the government released a report on corruption under the Moi regime, the Goldenberg affair. However, the president had been told it was ready for him to receive in November 2005 and did not act until February, and only then it was released to the public. There is widespread suspicion that the hope was that the release would distract attention from the current government's own corruption scandal, the so called Anglo-Leasing Affair.
13. The Act is not felicitously drafted: s. 6 says gender equity is a factor, and s. 8 that at least six commissioners must be women. Gender equity is far from gender equality!
14. The highest representation in Parliament that women have ever had is the current nine (4.1 per cent of the total membership), and some of these are nominated members (there being 12 seats for nominated members under the existing Constitution which always includes some women).
15. See cartoon 'tower of Bomas' by *Daily Nation* cartoonist Gado, dated 14 May 2003 and available on his website www.gadonet.com under heading 'constitutional review'.
16. See Gado cartoon of 7 May 2003.
17. Raila Odinga is the son of the veteran politician Oginga Odinga, originally an ally of Jomo Kenyatta but ultimately excluded from high office. As a Luo, there is some doubt whether Raila could win a presidential election under the existing system, but he might well be the choice of the largest single parliamentary party or coalition for prime minister. Raila had played a major role in the victory of the NARC (National Rainbow Coalition) in the elections, when he brought his own party out of alliance with KANU and into alliance with Kibaki's Democratic Party in the closing months of 2002.
18. The life of Parliament is five years from the date of its first sitting after an election (Constitution s. 59(4)) and the Parliament that existed in 2002 had begun its term on 3 February 1998. On 3 February 2003 dissolution would have been automatic, but President Moi would have stayed in office until his successor was identified by election which would have had to be by April.
19. MPs were welcome, but by and large did not come.
20. Ahmed Issack Hassan (Commissioner, CKRC), 'Introductory Document on the Whole Process', 15 September 2001, available at <http://www.kenyaconstitution.org/docs/02d001.htm>

21. The Commission's papers were deposited with the National Archives of Kenya.
22. Every recommendation to the attorney-general for amendment to the Draft Bill on the contentious issues shall be by consensus or must be supported by the votes of not less than 65 per cent of the Members of the National Assembly, present and voting. See 'How Constitution Bill was Passed in 10 Minutes', *Daily Nation*, 8 October, 2004.
23. The reader is referred to the wide publicity given to what is termed the Anglo-Leasing (or Anglo-fleeing) affair. At the time of writing the BBC website is a good source (available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1024563.stm). There one can find among other things the summary of a dossier compiled by former anti-corruption Permanent Secretary John Githongo, detailing various corrupt deals and cover-up attempts (available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf).
24. The results province by province are available on the website of the Government Information Office (see http://www.communication.go.ke/referendum_results.asp).
25. Available from the NCKC website at <http://www.nckc.org/downloads/> (accessed 9 January 2005).
26. Available at the Law Society of Kenya website at <http://www.lsk.or.ke/lskereview.asp>
27. See 'New Constitution: Kiplagat's Verdict', *Daily Nation*, 7 June 2006, available on the newspaper's website, <http://www.nationmedia.com>. The authors of this article have not seen the actual report.
28. The situation is well summed up by the Gado cartoon in *Daily News*, 20 November 2006. In a step that owes more to hope than experience, Yash Ghai has recently prepared a fresh constitution draft for the Kenyan public's consideration. The text is available on the website of the University of Hong Kong Center for Comparative and Public Law (<http://www.hku.hk/ccpl/>), or from the authors.
29. *Njuna Michael Kung'u and ors. v The Republic, the Attorney General and the CKRC*, High Court Misc. App. 309 of 2004 (see *Draft Final Report of the CKRC*, chapter 25.1). Because of this the Attorney General received the Bill at the last session of the NCC to enormous applause and then insisted that he had done so as a delegate and not as the AG (although he was a delegate only in his capacity as Attorney General!).
30. *Timothy Njoya v CKRC and National Constitutional Conference*, High Court Misc. App. No. 82 of 2004 decided 25 March 2004. The judgment can be downloaded from the website of the Law Society of Kenya (see note 26).
31. *Onyango v Attorney General*, High Court Misc. Civil App. No. 677 of 2005 (O.S)
32. *Tunataka Katiba Mpya Sasa* in Swahili – and on the T-shirts!
33. David Mugonyi, 'Catholic Bishops Call for Referendum On Draft Constitution', *Daily Nation*, 25 March 2004.
34. See *Daily Nation*, 23 May 2004. And in November the Episcopal Church warned against taking the initiative away from the people and giving it to Parliament (see *East African Standard*, 4 November 2004).
35. By contrast, the motivation of the Finnish constitution in the late 1990s came from the established political elites, was directed at specific institutional relationships, and conducted essentially by the government with the help of a committee of experts: see Jaakko Nousiainen, 'The Finnish System of Government' (Introduction), *The Constitution of Finland* (Helsinki, Parliament of Finland, Ministry of Foreign Affairs and Ministry of Justice, 2001), esp. at p.23.
36. By contrast, leaders on both sides of the ethnic divide in Fiji considered that concessions and compromises would be easier if they could be negotiated in secrecy, and therefore restricted transparency.
37. 'The Constitution and the Economy', a lecture to the Institute of Economic Affairs, Nairobi, 28 January 2002, published as a pamphlet by the IEA; the particular quotation is found on pp.28–9. The lecture is available on the website of the IEA (available at <http://www.ieakenya.or.ke/documents/Lecture%20-%202002%20-%20Prof%20Yash%20Pal%20Ghai.pdf>).
38. In all their attempts to sabotage the process, neither Moi's nor Kibaki's factions paid much attention to the social goals of the review. It is hard to believe that this indifference suggests a commitment to the agenda. More likely they thought that once in power they could conveniently and easily ignore it. That is why it was important to structure state institutions in a way that they would be responsive to the agenda. On this question, see Yash Ghai, 'Redesigning the State for "Right Development"', in Steven Marks and Andreas Baard (eds), (Cambridge, MA: Harvard University Press, in press).

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