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**THE ROLE OF CONSTITUTION-BUILDING PROCESSES
IN DEMOCRATIZATION**

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**Case Study
Kenya**

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INTERNATIONAL IDEA

THE ROLE OF CONSTITUTION-BUILDING PROCESSES IN DEMOCRATIZATION

Seeking Democratisation, Accountability and Social Justice: the Constitution Building Process in Kenya (2000-2004)

This paper was drafted by Jill Cottrell and Yash Ghai¹

The Context and background

The background to the constitutional review lies in the last forty years of Kenya's history. The 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 amended over a period of only a few years. These amendments dismantled freedoms and democracy, replaced the system for devolution of powers by a highly centralised 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 like preventive detention. Thus emerged a highly personalised 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 criticised the government were routinely detained or victimised 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 marginalised, others suffered privations because they were seen to be opposed to the government, threatening national unity.²

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-

¹ Both authors are associated with the University of Hong Kong, Yash Ghai as the Sir Y K Pao Professor of Public Law. He wishes to thank the University for the Distinguished Researcher Award which has facilitated research on this paper.

² 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).

general, were rendered toothless. There was no easy access to public service or other state agencies; merit as the criterion for appointment or promotion 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 of huge tracts of land without productivity; 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 1980s³. 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 democratisation, protection of human rights of individuals and groups, devolution of powers, and social justice. The then president, Daniel arap Moi, and his close political associates resisted strongly. The reform movement intensified its campaigns 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. An institution to co-ordinate the struggle for reform (Citizens Coalition for Constitutional Change) was established. Through marches, street protests, rallies, meetings of key stakeholders, it mobilised hundreds of thousands of people and made it increasingly difficult for the government to carry on administration.

International pressures were added to domestic. 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 process of review of the constitution. The diplomats were reflecting the 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—such support had been crucial to the survival of President Moi.

The president was unable to resist the pressures for long (the overthrow of Ferdinand Marcos in Manila through street protests and marches had, it is reported, a sobering impact on President Moi). He agreed to meet the leaders of the reform movement and to a review of the process. He announced at one stage that he would invite six or so experts from overseas to prepare a draft. But nothing came of this, and civil society resorted to mass action, leading to violence and deaths. Matters again reached a stalemate. There were real fears of a violent showdown. Opposition political parties (supported by the religious leaders) abandoned the civil society process 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

³ The best account of the reform movement from 1992-97 is Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Harare: MWENGO, 1999).

elections of 1997—these included the independence of the electoral commission, repeal of a number of laws restricting civil and political rights, 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 minimise popular participation) without adequate consultation with the opposition parties or civil society ('civil society' is understood for this purpose in Kenya as including NGOs, association of professions, trade unions, social movements (such as of women, the disabled, minorities, youth), and think tanks). These groups wanted much wider public participation than was provided in the legislation. Negotiations to identify an acceptable procedure took place between a large number of stakeholders⁴ at a series of national conferences between June and October 1998.⁵ The Act was then amended to reflect the agreement, which placed people's participation at the centre of the review process. However, implementation ran into difficulties as the political parties were unable to agree on the process for nominating members of the constitution review commission (the number of seats in the commission involved in the controversy was minute—and the suspicion arose that the government was using this as a device to sabotage the process).

The failure to resolve the controversy about membership led civic groups to start a review process of their own, under the leadership of the main religious groups (though not all sects or denominations), known as the Ufungamano Initiative. A People's Commission of Kenya was appointed based on the provisions of the Review Act, and, despite limited financial resources and lack of parliamentary support, proceeded to collect views of the public on reform. Alarmed by these developments, the government promoted yet another review act to start an 'official' process. This act provided for the goals of review (carried over from earlier acts which reflected the consensus developed at the national conferences) and for wide participation by the people. It provided for an independent commission to consult the people and to draft a constitution based on their views as well as on the goals of reform. However, the opposition members of parliament and civil society organisations did not participate in enacting the legislation and boycotted this process. This enabled the government to hand pick the members of the commission.

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 due to differences on 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 either group had a veto in parliament.

⁴ The word 'stakeholders' was widely used in Kenya to refer to those groups or interests that had a right to be participate and be consulted.

⁵ Some of these were held at the Bomas of Kenya – a cultural complex used also for the National Constitutional Conference in 2003-4. Later they moved to the Safari Park Hotel. These discussion 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).

Fortunately his efforts at reconciliation, backed by strong public pressure, succeeded in March 2001. After appropriate amendments to the Review Act, 10 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 process 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 make some comments on the context and the background.

Comments

It was extraordinarily hard to agree on and start the process of review. Over forty years of authoritarian rule, most people had become alienated from the state, but 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.

The essential objective of the initiators of reform, civil and religious groups, was the promotion of democracy, accountability and social justice. The country has had no coups or civil war which might have necessitated complicated negotiations and complex agenda to return life to some normality. In relatively settled circumstances, it was possible to envisage a focussed 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 also or mainly an opportunity to get rid of President Moi and his cronies. Many 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 characterise the reform groups and to bring them around a common agenda was deceptive.

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—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 sensitise 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 process, 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 major impacts on its outcomes.

The international context was favourable and within Africa itself constitutions had played an important role in restoring democracy, stability and national unity, the most noticed being Uganda, Ethiopia and South Africa (which had ambitious objectives and participatory processes). There were considerable pressures from international financial institutions and donors on the government for constitutional reform to ensure 'good governance'.

The Constitution of Kenya Review Act

The Review Act—an extraordinarily long document, a road map with clear directions and timetable—is best analysed in terms of the goals of reforms, procedure for review, and the rules for decision making.

Goals and vision

The goals embody a vision of Kenya as a republic at peace with itself and its neighbours. A caring society in which the basic needs of all its members are provided for. The welfare of the people is the nation's primary goal. This goal is to be attained through national unity and a consensual basis of authority and decision making. But the concept of the welfare of the people does not mean that the people are passive recipients of state largesse. They control their destiny and organise state and society through the values and procedures of democracy. That democracy is not majoritarianism; it arises from and protects the rights of individuals and communities. The citizenry is actively engaged in public affairs and participating in the governance of the country through the devolution and exercise of power, and keeping a constant vigil over those who claim to act on their behalf, politicians and governments. And democracy is one in which the free exchange of ideas is actively promoted, particularly by giving people information and resources. There is also the vision of Kenya as a nation of great diversity—of ethnic origins, religion, culture, traditions and geography—living in peace and harmony.

Process

The dominant objective was a 'people driven' process—a phrase that inspired many, though prompting ridicule from a few. The process must be inclusive—accommodating the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged' (s. 5(b)). People must be given opportunities to 'actively, freely and meaningfully participate in generating and debating proposals to alter the constitution' (s. 5(c)(i))—by providing them with civic education on constitutional issues, and then listening to their views and recommendations. Moreover, the process must ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (sec. 5)(d)). A dominant value is consensus, which the process must promote and, as far as possible, decisions must be by consensus. All the organs of review were to be accountable to the people—the process must be conducted in an open manner and be guided by respect for the universal principles of human rights, gender equity and democracy.

The Act carefully set out the tasks and stages involved in the process and the organs which would undertake them, with the intention that each organ should be suited to the tasks assigned to it. 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 co-ordinator for, and set up a small library in, each of the 74 districts. These arrangements gave the CKRC a presence in every part of the country and greatly facilitated its communications throughout Kenya.

The NCC comprised all members of parliament, 3 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. The NCC 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') 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 an important role at critical moments in the review, marshalling support for particular party positions, determining extensions of time for the process, at times trying to delegitimise the NCC—and consequently there was much jockeying for the position of its chair.

The decision making process

The critical decision making bodies were the NCC and the NA. The NCC had, in the first place, to adopt the provisions of the draft constitution. It had to do so by the votes of two-thirds of all its members. If 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 (this result flowed not from the Review Act but from the constitution (s. 47) itself—for historical and not very honourable reasons).

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 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 a two-thirds votes 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, no referendum was necessary—thanks to these amendments.

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 just one week after the formal presentation of the draft to enact it). As events unfolded, this assumption turned out to be unrealistic (this is discussed later).

The process was conducted more or less—apart from the time keeping—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 2 December 2002, but President Moi dissolved parliament and the process was effectively suspended until April 2003 (see under ‘spoiling’ below). Up to the point of writing, the draft has not been tabled in Parliament.

How the process worked

The Act had conceptualised the review process in a logical manner, with clear tasks and sequencing, and correct specialisation and qualities of the organs of review for their specific tasks. It produced a blend of expertise, popular input, and representative institutions for decision making—and independence when that was critical. However, the assumptions of the Act were undermined from the very start, in the way the CKRC was composed and the subverting of its independence by the government and political parties. Additionally, there was considerable downplaying of expertise in these manipulations—and in the tactics employed by commissioners who were instructed to wreck the process. Overall the process suffered from the lack of expertise in the commission and the willingness to serve political masters as well as the determination not to make full and effective use of talent outside the commission.

Timing

The Chair was conscious from the outset of the crucial importance of timing. He said in January 2000⁶,

In my experience the time devoted to the review process is seldom a response to the requirements of what is deemed to be necessities of the process but is more dictated by political exigencies. Uganda suffered untold misery under successive dictators and its journey to constitutionalism was tortuous. But the extraordinarily long period that Uganda devoted to constitution making cannot simply be ascribed to the need to mobilise and educate the people and draw a perfect constitution. Uganda needed time and opportunity for healing, and the new rulers wanted a period of the consolidation of their powers, as part of the review process. Nor does a long period of gestation necessarily produce a healthy baby. If we may continue with that metaphor, the pre-mature birth of the US constitution, barely three months after conception, is a lasting reminder that haste is not necessarily wasteful or imprudent. On the other hand, we know that Uganda has gone back to the drawing board barely five years into a constitution which absorbed so much time and energy.

The fact is 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,

⁶ ‘The Constitution and the Economy’ a lecture to the Institute of Economic Affairs, Nairobi, January 28th 2002, published as a pamphlet by the IEA; the particular quotation is found on pp. 28-9.

valuable as all these points are. ...constitution making is pre-eminently a political act, subject to political constraints, as well as political opportunities. The art of constitution making lies in evading or minimising the constraints and capitalising on the opportunities. This cannot be achieved without a profound understanding of the political risks of both too much and too little speed. To begin with, constitution makers seldom define their own agenda or time limit: they are creatures of statute or regulations, and owe fidelity to the law under which they operate. Secondly, even if they were free to determine their time table, they must consider the time factor carefully lest, in their quest for longevity and the perfect process, they render themselves irrelevant to the political life of the country. 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.

There may be a short window of opportunity that must be seized to avoid the collapse of the process. In the particular context, the Chair was concerned that that window might close with the election.

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 the Table below, compared with the actuality.

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
	Start work	January 2001	May 2001	Following merger
	Appoint District Coordinators	July-August 2001		See under spoiling below
	Set up Constituency Forums	Aug – Sept. 2001		
	Civic education	From July 2001		
	Constituency hearings	November – December 2001	March – July 2002	
	Report and Bill	February 2002	September 2002	
Public Discussion		March –April 2002	October 2002 – November 2002/April 2003	Period shortened by amendment to Review Act – then lengthened because of Dissolution of Parliament!

⁷ Most of that plan can be found on the Commission's website: <http://www.kenyaconstitution.org/html/fcomm06.htm> (visited December 24 2004). In the Table 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).

NCC	National Constitutional Conference	May – June 2002	April 28 2003 – March 23 2004	Dissolution of Parliament Adjournment for Parliament Mourning Vice President See ‘Spoiling’
	Enactment (unless referendum)	July 2002	December 2005?	Government timetable as at December 2004.

Delay was an important element in the ‘spoiling’ tactics discussed later. 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 writing

According to the Review Act, the Commission was given 24 months to complete its work with effect from October 2000. The deadline is therefore October 2002. However, if the Commission is not able to finish its work by October 2002 then it can ask for an extension of the time from parliament.⁸

The Commission has taken advantage of this possibility no fewer than 3 times.

Timing became an obsession with the media and the public – to the point that until well into the NCC hearings this was the only issue focused by the media and the only question the Chair was ever asked: “When will you finish?”! This is reflected in many of the cartoons – the excellence of the cartoonists being one of the positive sides of the entire process.⁹

The CKRC stage

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.¹⁰ It also prepared a booklet (*The Constitutional Review Process in Kenya: Issues and Questions for Public Hearing*)¹¹ to stimulate reflections on reform and elicit recommendations. Whenever possible, papers and documents, originally prepared in English, were translated into Kiswahili and were widely distributed and made available on its website (www.kenyaconstitution.org). Actual civic education was provided both by commissioners and 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

⁸ “‘Introductory Document on the whole Process’ by Ahmed Issack Hassan, Commissioner, CKRC 15-09-2001” <http://www.kenyaconstitution.org/docs/02d001.htm>

⁹ The *Nation* and *Standard* cartoonists being particularly good. The *Nation* cartoonists, Gado, has his own website, and citations to some of the cartoons there are given at various points in the paper. One can illustrate the issue of delay by the cartoon of May 18 2002 – go to www.gadonet.com and cartoons on the theme of constitutional review.

¹⁰ Yash Ghai, *Reviewing the Constitution: A Guide to the Kenya Constitution* (Nairobi, The CKRC, 2002), available on the website of the Commission (though rather hard to find). Chapter 1 is divided between www.kenyaconstitution.org/docs/03ad001.htm and www.kenyaconstitution.org/docs/03ad002.htm, Chapter 2 is at www.kenyaconstitution.org/docs/03ad003.htm, chapter 3 at www.kenyaconstitution.org/docs/03ad004.htm, and the remaining chapters most conveniently via www.kenyaconstitution.org/dloads/book/ (visited January 9 2005).

¹¹ See www.kenyaconstitution.org/docs/05d001.htm

materials were widely used. Extensive use was made of the district co-ordinators, 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 organisations. The Commission made extensive use of the electronic and print media and sponsored several public meetings and workshops. 14 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. Papers were made available to all through the website, and in hard copy for the delegates to the NCC. The public conducted their own debates and many organisations (some with the assistance of the CKRC) held a series of meetings to prepare their submissions to the CKRC. 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).¹² The media played, on the whole, a supportive role (more on this later). The CKRC succeeded in generating a nation wide debate on critical issues, and for 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 programme 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. By taking seriously the views of the people, hitherto reduced to a passive submission, the process gave them a sense of their own worth and importance. It emphasised the character of a constitution as a compact among the people, not only on relations between citizens and rulers, but also among people and communities. The process gave individuals, organised groups and communities the incentive to study the ways in which public power can be organised 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 mobilisation 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

¹² There are three English language daily papers available on the internet: *The Nation* (www.nationmedia.com, that also includes the weekly *East African*), the *East African Standard* (www.eastandard.net), and the *Kenya Times* (www.kentimes.com). The last is a KANU supporting paper (thus was a government supporting paper 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 organisation, the Kenya Broadcasting Corporation, also has a website: www.kbc.co.ke.

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.

The NCC stage

The NCC—usually colloquially referred to as ‘Bomas’—did not really get under way until April 28 2003. It was a remarkable event in many ways. Had it proceeded before the elections it would have been very different. In some ways it was chaotic, sometimes anarchic; a cartoonist used the analogy of the tower of Babel.¹³ Delegates did not endear themselves to the nation by putting their own remuneration at the top of the agenda.¹⁴

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. 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 finally sat from January 12th to March 23rd 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 of the Government that the current incumbents cannot stomach.

It was clear that major divisions existed between the political parties, even between the parts of the governing coalition. 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 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 NARC Coalition must take responsibility. The consensus committee’s report was rejected by the delegates. The final draft was adopted by consensus in a rush 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.

Participation

Apart from the enthusiastic response from the public at large, civil society generally, including groups representing sectors very often marginalised, were active. The specific example of women is discussed below. Ethnic groups such as the Somalis, Nubians, Ogieks and Goans came forward to give their views. Disability groups were very active. The Commission provided sign language translation at hearing of the CKRC and during the NCC. And during the NCC there were a number of observers from groups that did not have members on the decision making body, such as some ‘indigenous peoples’, the youth, or students.

¹³ Gado cartoon on the ‘Tower of Bomas’ see site in fn 9 date: 14 May 2003.

¹⁴ See Gado cartoon of May 7 2003, *ibid*.

Role of the Media

The dissemination of information, ideas, debate and feedback are critical to the success of a participatory process. As shown above, the CKRC set up its own system for dissemination and feedback (including a newsletter), but, even with its generous funding, the CKRC could not have reached sufficient number of people and the corners of the country without the assistance of the media. The Act required the CKRC to disseminate records of its proceedings (including its report) in the media, and to ensure that sign language inset or subtitles were provided in all visual programmes. Recognising the role of the media and its potential to promote the objectives of the review, the CKRC set up a committee to liaise with them—a precedent which was followed by the NCC.

The assistance of the media was solicited for the following tasks:

- Providing information about the (complicated) process
- Recording the process—reporting meetings and other expressions of views
- Disseminating ideas/proposals of the CKRC
- Promoting debate and exchanges (through commentaries, chat shows, panel discussions (especially on the TV), letters to editors, editorials)

The CKRC organised a series of workshops for the media, at the start of each stage of the process, on the issues and procedures relevant to it. The chair of the CKRC and its media committee maintained close links with senior editors. 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 our activities and hearings, and their transport facilitated 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 for 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 phoned in, on the only broadcasting station which had nation wide reach. Specially prepared (and paid) 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 process (one visiting expert did his own small research by asking rural people and hawkers who the chair of the process was, and invariably received the right answer!) 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 process started—and resulted in a bumper profit for his organisation!).

In these ways the media played a hugely important role in the process. Editors provided strong support for the review and the CKRC and NCC drafts, and constantly kept up the pressure for the enactment of the NCC draft, on occasions severely criticising the Minister of Justice who was seen as the principal ‘spoiler’, and even the President. Since

the end of the NCC, it has kept the issue of the new constitution before the public through news items and commentaries, and editorials.

However, the role of the media was not always positive or constructive. Although some journalists stayed with the process for its entire duration, they seemed to be ill-informed on the procedures and repeated errors despite being corrected. Many of them were prone to misquotations (through inefficiency rather than malice)—to the point that the chair resorted to written briefs, only to find himself misquoted again! Few journalists showed interest in substantive constitutional issues, being obsessed with deadlines, costs and conflicts. Few media houses assigned their senior journalists to cover review activities. Some journalists entered into the political fray—which is fair enough, except they took delight in fomenting conflict, and some were reputed to be accepting bribes to publish stories favourable to protagonists who paid them.

While the CKRC had reasonable relations with the media, relations between the media and delegates to the NCC were not so cordial. Delegates felt that the media was focussing on delegates' concern with allowances and other perks of office, on their 'rowdiness' and bickering—and some tried to pass motions of censure. Media's response was that they were reporting accurately on these matters, and that these were of legitimate public interest. Perhaps exposure of the obsession of some delegates with allowances did have a positive effect in moderating demands. 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 the 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.

Gender and the Constitutional process

The constitution was to be for 'Wanjiku' – a woman's Kikuyu name, picked (by President Moi] to symbolize the ordinary woman; indeed Moi intended to mock the process, but Wanjiku caught the imagination of the people (and the cartoonists). 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 was a factor in appointing CKRC Commissioners (s. 6(5)(b)) and s. 8(b)(iii)¹⁵, 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, and specifically 'gender parity' in relation to citizenship (s. 17 (d)(111) and (ix).

The Wanjikus of Kenya were among the most active participants in the whole review process. Seven of the 29 CKRC Commissioners were women (of whom 4 were originally with the Ufungamano People's Commission). Of these only one, Wanjiku Kabira, consistently really pursued what might be described as a feminist agenda. But women's organizations were very active in making submissions to the Commission, and many received donor funding to hold workshops to prepare for the process. Submissions were

¹⁵ The Act is not felicitously drafted: s. 6 says gender equity is a factor, and s. 8 that at least 6 Commissioners must be women. Gender equity is far from gender equality!

received from, e.g. FIDA (Kenya) (Federation of Women Lawyers), Women's Political Alliance, Widows Support Network.

When it came to the NCC, the Review Act provided that at least one of the three delegates from each District must be a woman, and Regulations made by the Commission provided that at least one-third of the nominees from a civil society group must be women, and women's organisations as such had 24 delegates. Women delegates were well organised, and constituted the most effective caucus, cutting across religions, regions and ethnic groups.

Women's concerns centred on representation of women in elected bodies and more generally: Kenya's record has generally been poor in this respect: the highest representation in Parliament that women have ever had is the current 9 (4.1% of total membership), and some of these are nominated members (there being 12 seats for nominated members under the existing Constitution and these always include some women). The 2002 Draft included a general principle of 30% women in elected bodies. And the electoral system proposed in that draft – the Mixed Member Proportional System (based on that in Germany/New Zealand) was used to strengthen women's representation also: the list for each party, to be drawn on to top up the number of seats held by each party to produce overall proportionality, was to comprise alternately man and woman.¹⁶ And the second chamber would have 30 (out of 100) seats reserved for women; this was not an ideal arrangement as the function of the chamber was essentially to represent the interests of the devolved governments, and the role of the women elected to represent provinces would not be entirely clear.

Women were well organised also between the publication of the 2002 Draft and the convening of the NCC. A publication, *Safeguarding Gains under the Draft Constitution*,¹⁷ among other comments analysed the proposal on women's representation and pointed out that the MMP system could never deliver 30% women representation. This publication was seen in the hands of many women delegates as they participated in the NCC, as was its intended purpose

During the NCC itself, women pressed for a system based on that in Uganda where there are special seats for women in the lower house, and this was adopted (in fact MMP was abandoned). Women's pressure also achieved the creation of a Gender Commission (the 2002 draft had proposed that gender be an issue for the Commission on Human Rights and Administrative Justice rather than having a separate Gender Commission).

The other main ways in which the final Draft recognises the rights and status of women are:

- Prohibits discrimination on grounds of sex, pregnancy and marital status
- Equal rights to include equal right to land, including inheritance, education, office etc

¹⁶ It did not require that each list be headed by a woman, which would have increased the total female representation.

¹⁷ Compiled by Fida (Kenya), Institute for Education in Democracy, the Kenya Human Rights Commission (itself funded by various foreign donors, the Kenyan League of Women Voters. See also the website of African Women and Child Feature Service, for issues of the Newsletter *Yawezekana: Bomas Agender* (supported by the same bodies and ActionAid): <http://www.awcfs.org/contentcreation/bomasagenda.html>.

- Customary rules must conform to constitutional principles (except for an exclusion for certain aspects of Islamic law)
- Equal rights to pass citizenship to children; equal rights of husbands and wives of Kenyans to acquire citizenship
- Equal duties of both parents towards children
- Provision for affirmative action
- Public bodies to equip themselves to deal with issues of gender among others
- Protects interests of women by virtue of special recognition of the importance of the family
- Protects rights in connection with work by general non-discrimination provision: specific provisions on work rights
- Equal rights to marry, within marriage and at its end
- Due account must be taken of need to include women (as part of the ‘diversity of the nation’) in public bodies and judiciary and specifically in the public service
- Political parties must be democratic, including involvement of women and public funding for parties will take account of achievements in this direction
- Rights of [women] prisoners/detainees to be respected: including protection from violence; separation from men; right to treatment which is acceptable to religion etc.

The provision limiting the application of the equality provisions in relation to Muslims was very controversial¹⁸ – but Muslim women in many cases argued that they were happy for Islamic law to be applied to them, and this was a definite improvement on traditional custom, sometimes erroneously argued to be ‘Islamic’.

Spoiling

The architects of this research project perhaps envisaged that ‘spoilers’ would be a subsidiary aspect of the papers. But in the Kenyan context we find ourselves compelled to place much of the story and the analysis under this heading!

The spoilers

A newspaper columnist recently observed,

Some analysts argued that when former President Daniel arap Moi was still in power, opposition to the review commission and its chairman, Prof. Yash Pal Ghai, reflected his reluctance to countenance a new constitution, which was likely to trim the sweeping executive powers he enjoyed.

¹⁸ “The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance.”

But now with President Mwai Kibaki at the seat of power, the wheel has gone full circle and the same charges leveled against Moi are now being directed at the President.¹⁹

Although civil society looked at the CBP as an opportunity for a genuine restructuring of the system of government, even of Kenyan society, the Government itself was dragged into a process 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 at that time, and that his chosen successor would slip into his seat. That chosen successor was a youngish man without long political experience, if of political lineage – being a son of the first President, Jomo Kenyatta. There was strong suspicion that Moi anticipated being able to control Kenyatta, and that this was why Moi retained the post of Chair of the party. In fact it was even suggested by some that Moi hoped that a new Constitution would give him a new lease of presidential life, and that he could argue that the two term limit did not apply to the new constitution. The truth may not have been constant, and may never be known, but 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 regard 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 unenthusiastic about a new constitution that 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 a coterie that perhaps found it easy to exercise influence on an ailing man, cannot be known (except that Kibaki was opposed to the age limit even before his election). 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.²⁰ 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

¹⁹ Henry Neondo, “Will Kenyans have a new constitutional order by Sept. 2005?” *Kenya Times* 20.12.04 (the newspaper is essentially that of the opposition party KANU).

²⁰ 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.

that would have been less subject to Government control. Thus the new judges could be those the government wanted. 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. They are able to continue 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 the President’s office – which would probably be a casualty of the new constitution. And 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. Various members of the diplomatic community as well as church and political leaders (including some actually in government!) have made such allegation. Only one has resorted to verse²¹:

"He likes to be in transit and he's partial to hotels,
He has a place in Manchester, he's fond of the Seychelles,
So when the nation's revenue's in European banks,
Or you need a team of tractors but acquire a troop of tanks,
Or the nation's full of caviar but hasn't any bread,
Or you want a road for Christmas but a frigate comes instead,
You can look behind the scenery or stare up in the air
But the ministers will tell you that Macavity's not there . . .
He's a menace to the donors, he's the taxpayers' despair,
For the Treasury is empty – but Macavity's not there!"

Many MPs have been spoilers in the sense that there were specific aspects of the draft that they did not want to see implemented. 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 happiest to continue to operate the system they were used to.

Judges were to some extent spoilers – especially once they realised that the Draft would lead to serious investigation of judicial defalcations for the first time.

Religious groups have at times been spoilers, though also at times the driving force. A major contentious issue has been the position of Kadhi courts (as it was way back in 1963²²). 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 last session of the NCC the Catholic Church was reported as demanding a

²¹ The parodist of T S Elliott’s *Macavity the Mystery Cat* is Sir Edward Clay, British High Commissioner to Kenya – see “British envoy attacks Narc over 20 new graft cases” *Nation* Feb 3 2005.

²² See Ghai and McAuslan, above, pp. 365-9.

referendum.²³ 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.²⁴

And 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 CKRC all the time and many members of the Commission for some of the time. It also included some members of the NCC – perhaps including some MPs who would come and sign in, collect a daily allowance, and then leave.

These various groups were spoilers in the sense that they took positive steps to prevent the process being completed, or to delay the process of completion. Others were negative spoilers in the sense that they failed to play their assigned roles in moving the process along. Many MPs perhaps fitted into this class. Hardly anyone actively involved in politics seems to have believed, in the early stages, 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!), is not at all surprising in view of the country's record of foot dragging on constitutional reform (see above) and of official reports being unpublished, and unimplemented – something that is to some extent continuing.²⁵ 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 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. KANU requested an extension of time but submitted a flimsy document with no senior person present except Odinga. Moi himself kept postponing his own submission; although an appointment had been made at his request for him to submit his own views, he cried off on the pretext that there was no point – the CKRC had already made up its mind. Few MPs made individual submissions (other than lengthy but superficial statements at hearings in their constituencies); indeed few ministers did so.

Spoiling tactics

President Moi held in his hand the most powerful spoiling mechanism, dissolution of Parliament: the President has the power enjoyed by the British Prime Minister to call a

²³ David Mugonyi, "Catholic Bishops Call for Referendum on Draft Constitution" *Daily Nation* 25.3.04.

²⁴ *Nation* 23,5.04. And in November the Episcopal Church warned against taking the initiative away from the people and giving it to Parliament – *Standard*, 4.11.04.

²⁵ The current Government released a report on irregular land allocations (the Ndungu Report) in 2004 only under great public pressure, and at least 2 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. Under the previous regime this failure to publish reports was routine.

general election at any time. In fact elections have almost always been held in late December, and Kenyans are used to this and would view any departure with intense distrust. But President Moi could have delayed dissolution until February 2003²⁶; this had been explained to him and he had in fact not seemed displeased at the idea of a few extra months in office.

But when the moment came for dissolution if the election was to occur at the ‘traditional’ time, it seems that KANU had decided that the moment was right to go to elections. 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 December 2nd. During the previous week all the non-Parliamentarian delegates²⁷ had assembled for a week of pre-conference activities, including ceremonial tree planting (organised by 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 pm on the last day of this inaugural week, Friday November 29th. He may have feared that delaying would have cost KANU the election; in the event public anger at this spoiling tactic was a nail in the coffin of KANU’s chances.

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 (one for North-East Province) and by a process of application by those interested in serving. But this approach meant that many people who would have been genuinely good appointees did not apply, and many who did 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 was the making of a particular recommendation, or applying brakes to the process. Applying brakes also turned out to be something that many commissioners found to their taste – especially once they had managed to negotiate for themselves ridiculously high salaries and allowances. It was perfectly clear that many of the Commissioners were reporting regularly to their patrons, and during the intense period of drafting the Draft Constitution 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 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

²⁶ Because the life of Parliament is 5 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 February 3 1998. On February 3 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.

²⁷ MPs were welcome, but by and large did not come.

foot dragging was 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.

It is inappropriate to explore all the ways in which the process was delayed: it 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 hearings²⁸ with Commissioners arguing that 4 or 5 should go together, and the Chair that 2 was enough. When the Deputy to the Chair, Dr Ooki Ombaka died in June 2002 Commissioners insisted on taking 10 days off work – disrupting the schedule for the final constituency hearings, notwithstanding the insistence of Ombaka’s wife that this was the last way her husband would have wanted to be mourned. A further cause of delay engineered by the CKRC related to a later stage: the Commission insisted that its members would present detailed accounts of the contents of its lengthy report and its recommendations (although most NCC members had had various opportunities to familiarize themselves with and discuss the CKRC Draft). The chair, who was overruled, had recommended that the report should be presented over one day at the start of the NCC. This procedure absorbed several weeks; it was clear to many that some commissioners were deliberately dilatory.

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 process within 6 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 April 28th. But 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 June 6th 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 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 another two weeks were taken out of the process.

On September 26th the NCC adjourned for another parliamentary session, to resume on November 17th. But Government decided that it was needed more time to strategise over what now seemed the real possibility that the NCC would produce a constitution, and it said the conference should not resume until January 12th 2004. The Chair insisted again 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 November 17th, to find themselves confronted by locked gates and mounted police! Some delegates also took

²⁸ Many of the constituency reports can be found on the Commission’s website, and these include dates of hearings as well as a lot of other interesting information; see <http://www.kenyaconstitution.org/docs/constituencies.htm>.

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 Government arrived.

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. Litigation as a spoiling tactic has been a recurrent phenomenon. 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 process, led by 7 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.

In August 2002 the judges went to court! Incensed by proposals to take corruption on the bench seriously, a group of judges, backed, it was reliably learned, by the Chief Justice himself and with connivance of the State House and some 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 process that, rather to their own surprise perhaps, produced a draft Constitution and short report in September. As a spoiling technique the litigation rather backfired! It also served to galvanise 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”²⁹ 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.

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.³⁰ This case has never been completed nor the injunctions formally lifted.³¹

One case went to trial,³² it was instituted to stop the work of the NCC and prevent Parliament from enacting the Draft Constitution. 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 the running for chair of the reconstituted anti-corruption commission (alternatively for the Court of Appeal), and another was only a temporary

²⁹ *Tunataka Katiba Mpya Sasa* in Swahili – and on the t-shirts!

³⁰ *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 in his capacity as Attorney General!).

³¹ Another case was *Mwalimu v Attorney-General* High Court Constitutional Case No. 1 of 2004 seeking a Declaration that the Review Act was unconstitutional as contrary to S. 47 of the existing Constitution. This case was withdrawn.

³² *Timothy Njoya v CKRC and National Constitutional Conference* High Court Misc App. No. 82 of 2004 decided March 25 2004. The judgment can be downloaded from the website of the Law Society of Kenya: at <http://www.lsk.or.ke/lskcreview.asp>.

judge (Justice Kasango). The third judge (Justice Kubo) dissented. The applicants argued that the provisions of the Review Act leaving it to the NCC to decide whether contentious issues should be referred to a referendum 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 as all 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 only amend but not repeal and replace the current constitution (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.³³ Both 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.³⁴ 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.

Where do things stand now?

Since the end of Bomas III numerous meetings have been held ostensibly to achieve consensus on the draft. That consensus is to be essentially between the political parties — in other words the initiative has passed from the people to the politicians. This remains some sort of spoiling tactic—whether it is spoiling with a view to having no new constitution at all, or to having the constitution that the government and its parliamentary majority want is really not clear. 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% majority.³⁵ No sooner had the Bill passed through Parliament than certain politicians began to crow that it protected the NCC Draft because they were confident no 65% would 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 can change the Draft – despite the opposition of Odinga’s party and KANU. It has been reported that the amendment to the Review Act will be published before Parliament reconvenes in March 2005 and it will have 3 months to debate the Draft, and introduce the changes agreed in the consensus meetings. The draft will then go back to the Attorney General to prepare the Final Bill; this will go to a referendum in October, and then – the

³³ Drawing on Indian jurisprudence, especially *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

³⁴ The authors have written a critique of the judgment, a brief account of which appeared in the Kenyan press, and propose to publish it as a journal article.

³⁵ Every recommendation to the Attorney-General for amendment to the Draft Bill on the contentious issues shall be by consensus or 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” *Nation* 8.10.04.

newspaper report says – the President will ‘promulgate or publish’ the Constitution within 14 days.³⁶ But there would also be 45 days “for any challenges that may arise on the referendum process”. Exactly how the 14 days and the 45 days interact is not clear from this newspaper summary.

The Njoya case held that it was not possible to substitute a whole new Constitution by means of the amendment process in section 47 of the current Constitution.³⁷ But the Minister of Justice has now decided against amending s. 47 itself³⁸; it is not clear how – if there is any serious intention of enacting the Constitution – he intends to get round this difficulty the Njoya decision creates.³⁹ Possibly the argument is that the referendum itself gives the document force – the force of the constituent power of the people, which the Njoya case says is crucial.

On the substance, an accord among MPs was supposed to have been reached in early November in a meeting in Naivasha: it was reported that members had agreed that there should be a Prime Minister without executive powers – in other words the person in charge of government business and essentially an assistant to the President (what is often called the Tanzanian model), and a one tier system of devolution based on the Districts.⁴⁰ However, the Minister of Justice was then reported as saying that the consensus should be submitted to religious and civil society groups before taking it to Parliament. Again, how this meshes with the timetable the same Minister is reported to have given is unclear. Maybe he has changed his mind, since he is now reported as saying “The consensus was based on national interest, as understood by the leaders who met in Naivasha, and informed by the views expressed by the public through written memoranda which had been solicited by the Parliamentary Select Committee...The debate on what kind of constitution Kenyans want has been going on for the past 10 years. It is, therefore, not difficult to identify the essential characteristics and qualities of the new constitution. The substance of what Kenyans have said over the years is well documented.”⁴¹ Though attention has been concentrated on these two major issues, committees of MPS have also

³⁶ The item, “Murungi promises new constitution in 2005” in *Standard* of 25.12.04 reports an advertisement placed in the press on December 24; the authors have not seen that actual advertisement. The President may promulgate but he does not publish legislation! It has been reported that the President finally signed the Bill early in 2005.

³⁷ (1) Subject to this section, Parliament may alter this Constitution. (6) (b) references to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision.

³⁸ Bernard Namunane, “Kiraitu rejects fresh debate on review” *Daily Nation* 11.18.04.

³⁹ This point is also made by Professor Okoth Ogendo, a deputy Chair of the CKRC in the item in the *Standard* of December 25 [fn 35] above. He is reported as saying, “The President has no legal authority to promulgate a new constitution. The new constitution is only legitimate if it is brought through a process that authorises the President to do so. ..They have provided one under an ordinary Act of Parliament, and that will definitely be challenged”. The only way out was for the government to accept the [Parliamentary Select Committee’s] proposal to create Section 47 (a) in the constitution to give room for replacement.

“I don’t see a new constitution next year if Parliament does not do that. It is also possible that the government is luring people into a trap so that somebody can go to court. Unless all loopholes are closed, nothing will work”.

⁴⁰ See Nixon Ng’ang’a, “Consensus struck over review as retreat ends” *Standard* 6.11.04.

⁴¹ Taken from the *Standard* item in fn [18] above.

been looking at other issues, not necessarily with liberal results or results that correspond to the wishes of Kenyans.⁴²

During the later phases of the process many groups, and for various motives, called for the whole constitution making process to be turned over to 'experts'. For some this was genuine frustration with what they saw as the unruly process of the NCC. For others, it was, however, more linked to a sense that a group of experts might more easily be controlled. The National Council of Churches of Kenya actually produced a draft drawing on the NCC proceedings.⁴³ 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.⁴⁴ The NCKK Draft is one that is now being supported in certain quarters.

Throughout this post-'Bomas' period, many sections of the public have been pressing the government to proceed with the Constitution. A group called Bomas Katiba Watch headed by delegates to the NCC including a Deputy Chair, held a number of meetings, and has constantly pushed for implementation, reacting to the most recent ministerial announcement as "an insult to Kenyans".⁴⁵ It has recently called for the NCC to be reconvened, so that a timetable can be worked out to enact the NCC draft.⁴⁶

Views on whether there will be a new constitution and whether it will genuinely reflect the views of Kenyans are mixed. In December it was announced that the Ufungamano initiative was appointing a council to "re-negotiate the Bomas Draft with stakeholders and come up with an acceptable document", having no faith that Parliament would do so.⁴⁷ One commentator has reviewed a number of options—acceptable and unacceptable to him—including, first: Parliamentary amendment of the Draft Parliament—"The real trouble is that this option is illegal [because of the Njoya judgment] and terribly unpopular with the public who has little trust in parliament." Second: 'another IPPG⁴⁸ deal'—"There are two problems with this option. One is that the party leaders have no control over the MPs. ...The second and most serious limitation of this option is that party leaders or even a select team of the same have no mandate to even touch the Draft. There is no entity called "party leaders" in the constitutional review process." Third, elect a new constituent assembly to look at people's views and produce a new Draft – "all those other drafts like the Ufungamano Draft or whatever someone else is 'cooking' have no place in the national constitution making process." Four, put the Draft to a referendum – which would have to be just one question 'Yes or No?'. Five, Parliament should pass

⁴² Thus in October it was reported that a sub-committee of the Parliamentary Select Committee was proposing doing away with dual nationality and being 'punitive' with the press, and retaining provincial administration – see Jerry Okungu, "At this rate we're better off with old Constitution" *Kenya Times* 31.10.04. More recently there have been reports that the Government is planning to strengthen Provincial Administration.

⁴³ Available from the NCKK website – see <http://www.nckk.org/downloads/> visited January 9 2005.

⁴⁴ Available at the Law Society of Kenya website – see above fn 31.

⁴⁵ See *Standard* item cited in fn [35] above.

⁴⁶ *Kenya Times* January 9 2005.

⁴⁷ "Clergy pick 9 to revive review talks" *Standard*. 17.12.04.

⁴⁸ For the earlier IPPG agreement see above.

the Draft and amend it as needed, and finally, six: recall the NCC: “We recall Bomas delegates for a quick two-three week final session, stop the silly consensus talk which is going nowhere and then sort out a few wrinkles in the draft amicably with no threats, no walkouts no drama and no trickery.”⁴⁹

How the process influenced the outcome

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 emphasise consensus and other aspects of the process facilitate it, then the constitution will be determined by the dynamics of consensus building (e.g., less majoritarian).

In Kenya, the fact that the pressures for the process came from civil society and in the face of government opposition meant that large sections of the community were mobilised and a fairly radical agenda grew. That radical agenda persisted through the different stages leading up to its formalisation in the review acts. The early mobilisation 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 such as goals of local self-government, rehabilitation of traditional institutions, and basic needs, as well as and direct forms of democracy (e.g., the recall of MPs).⁵⁰

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 take extreme positions. 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.⁵¹

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

⁴⁹ Adongo Adony, “Bomas draft: Available options to break stalemate” Kenya Times 25.12.04.

⁵⁰ 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 to *The Constitution of Finland* (Helsinki, Parliament of Finland, Ministry of Foreign Affairs and Ministry of Justice, 2001) esp. at p. 23.

⁵¹ For a discussion of the very different Fiji process see Ghai and Cottrell, “Constitution Making in Fiji: Context and Process” (International IDEA, 2004, Stockholm).

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 was 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 of the process. The mobilisation of people and the radicalisation of the agenda, combined with the rural and civil society based 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—who 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 incentives they might otherwise have had to persuade other NCC delegates and search for a consensus. This approach was evident the moment NCC ended and the opponents moved to undo its work.

Another consequence of highly participatory process, resulting in part from the expansion of the reform agenda as each group advances its claims, is the necessity of negotiations among the key stakeholders to find common ground. In the Kenya process we can see the gradual expansion of the agenda, as communities and groups hitherto marginalised were given voices, for the first time ever, and were listened to sympathetically. 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 counterproductive. Politicians also used the NCC forum to mobilise support along ethnic lines, undermining other non-ethnic lobbies. Although ethnic politics have long been the bane of Kenya, and are recognised as such, 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 meetings’⁵² outside the NCC were used to reinforce the ethnic agenda and to bribe delegates. Moreover issues were viewed in terms of very short time perspectives, focussing on what individual politicians would gain from institutional arrangements. These approaches, plus the large size of the NCC and an inefficient committee organisation, meant that the NCC was not used for the purposes of negotiations and building consensus and common identity.

⁵² The expression was coined by the press and came to have well understood implications of trickery and subversion of the process.

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 process had succeeded in these objectives, it would also ensure 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 politicisation of the people and the broadening of the agenda for democratisation 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 sometimes painfully, to the circumstances of the large majority of our 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.

Wide participation, especially when carried through to the NCC, minimised the role of 'experts'. This, as is obvious, has both advantages and disadvantages. The document produced has far greater popular legitimacy than if it had been produced by technicians. Part of this popular support, it must be said, is less a sign of endorsement of the particularities of the document than of rejection of the perceived manipulation of the government and politicians more generally. But exclusion of expertise may mean that there are problems of inconsistency. It may mean that changes are made to existing structures for no good reason (a simple example is a decision to change the name of the National Revenue Authority to the Kenya Revenue Authority – which will involve a good deal of expense!). Delegates wanted to see their own words in the draft – failing to realise the possible legal implications. And the very size of the decision making body made it impossible to service every committee with a constitutional drafter. Each committee did have a trained legal drafter, some of whom exercised considerable influence in their committees, not always to the good – this is a disadvantage of expert involvement: that some may be less expert than their self-confidence may suggest.

The rules for decision making added up to a complex method of decision making and offering hostage to 'spoilers'. It represented a compromise between those (like civil society organisations) who wanted to exclude the government and parliament from any role as such in the 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. Ironically there may now be a referendum, as a result of the Njoya decision. But that referendum will differ from the original proposal – though be of very questionable value in our view.

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 suited it, despite principles of independence, openness, and accountability (see section on ‘spoiling’). 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).. Recently, the Attorney General said that the manner of amendment of the constitution provided in the Act was deliberately drafted to leave doubt about its validity, in case the process got out of control (see the section on spoilers). Civil society organisations 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 deflectors might not have succeeded in derailing the process if it had been concluded within the original time frame of the Act. However, as shown in the section on spoilers, Moi’s dissolution of parliament on the eve of the first session of the NCC, frustrated that possibility, but also led to the downfall of his party in the elections. The supreme irony is that it is the parties overwhelmingly supported by civil society (suspicious of these carefully planted mines in the process) who, now in government, detonated these mines in an attempt to subvert the process—demonstrating that few politicians had a genuine commitment to constitutional or social reform.

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 characterised 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 process 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 mobilise public support than civil society organisations (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 reflection and suggests caution in designing the process.

Decision making in a group of 600 people is very different from decision making in a group of 50-100. This is especially so when the larger group operates in the full glare of publicity. Reading transcripts of the Technical Working Groups of the NCC one generally finds a sober discussion of issues. But discussion in the plenary was sometimes rowdy, contributions had to be short, and it was very difficult to generate an atmosphere of clear headed moderation. Individuals who might in private discussion have supported openings for a wider right to abortion would find it difficult to stand against the sort of emotion that this topic produced in plenary.

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, and a common process emphasising national unity, were important goals. The immediate failure to adopt the constitution is not the only basis for the evaluation of the process. It succeeded in conscientising 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 since then when people want more accountability, government policies and acts are subjected to greater scrutiny, and in the continuing pressures on the government and parliament to enact a constitution based on the NCC draft.

Conclusion

To draw a few rather preliminary conclusions from this whole experience: a CBP may have more chance of actually building a constitution if there is sufficient public participation to generate genuine debate and public commitment. But it does not follow that every type of public participation at every stage of the process is equally valuable; constitution making involves two other essential elements at least: political deal making and a technical legal side. Dragging the process out for a long time is likely to be counter-productive in terms of the chances of finishing; circumstances may change, new power structures and allegiances develop. The political, if not the popular, will to reform may wane. Delay is more likely if there is money to be made by delaying, among other possible causes. There should be a congruence between the process of review and the process of decision making: if review produces a document that then has to be enacted by a group that positively dislikes the product, the chances of enactment are slim. A rational decision making process is more likely if it can be separated from issues of personal advantage. Especially constitution making should not be embarked on just before or just after an election (very difficult to avoid both these unless the process is very short, of course). Mixing politicians and the public in decision making is fraught with difficulty - especially in a context where politicians are arrogant but also profoundly distrusted. Once a draft document has been produced, hopefully on the basis of popular views, those responsible for it should not continue to be part of the process. The decision making process should be organised by a neutral body of people as a technical matter.

Each situation is different. And the dynamics of a situation can change during the process. This happened in Kenya with the ouster of Moi. For some important groups, the transfer of power removed the urgency of reform. Thus the CBP should be seen in a wider spatial and temporal context. Constitution making, arguing about constitutions, trying to secure advantage through constitutional provisions, etc. are part of the on-going political process. The Kenya process did more to enable people to be part of this on-going process than other more 'safe' and controlled processes which might actually have led to a constitution. It also put in the public domain a large number of interesting ideas, of values, institutions and procedures, which will continue to dominate public debate, and which future governments will find themselves under pressure to implement.