establishment of the State until this very day. Without it, the constitutional continuity would be broken, and the validity of all of the entrenched Basic Laws as the creator of elevated norms would be called into question.

...[T]he State of Israel has a constitution—the Basic Laws...

In exercising its constituent authority, the Knesset may limit the future use of its constituent power. This derives from the essence of the constituent function itself. The constituent function is intended by its very nature to create a formal constitution, the essence of which is the establishment of provisions regarding the means by which the constitution may be amended... [T]he power of the Knesset—when it exercises its constituent authority—to limit itself, and thereby "to entrench" its provisions, derives from the very grant of its authority to frame a formal constitution.

...[T]he Basic Law: Human Dignity and Liberty contains an entrenchment provision [which] is substantive, providing that a provision of the Basic Law may be infringed by means of regular legislation, but only if the regular legislation meets the substantive requirements... This entrenchment provision is valid...

Neither the Basic Law: Freedom of Occupation nor the Basic Law: Human Dignity and Liberty includes an express provision—in the guise of a supremacy clause—addressing the fate of a law that infringes a protected human right without fulfilling the requirements of the Basic Law. This silence—in view of the Honouring, limitation or override clauses—calls into play the basic principles of Israel law regarding the relationship between superior and subordinate norms according to which the superior norm prevails... The Court is competent to declare the conflicting norms invalid. In this manner, the Court actualizes democracy and the separation of powers...

Barak concludes that although the Basic Law: Human Dignity and Liberty protects property rights—including debt obligations—from infringement, the law in question meets the requirements of the limitations clause and is constitutional.

Cherin J.

[In my opinion the Knesset has no competence to frame a constitution... [Although] the Knesset is competent to impose upon itself limitations on future legislation—the competence to enact provisions is not the same as the power to make a constitution, though the latter will include the former.]

... When the constituent Assembly—which was the First Knesset—dissolved without having written a constitution of Israel, the Knesset's right to write a constitution as established by the Declaration of the Establishment of the State, expired. The continuity that was maintained by the transition provisions... relates solely to matters of legislation, and not to constitutional issues.

... The mission of the Constituent Assembly to write a constitution was a personal and one-time mission [for which the members were elected].

Concerning the Basic Laws of 1992. I have grave doubts whether the Knesset members themselves were aware of the "revolution" that they were generating. Note how the Basic Law: Freedom of Occupation was passed by a majority of 23 members of Knesset (with no opposition or abstentions), whereas the Basic Law Human Dignity and Liberty was passed by a majority of 32 for, 21 against, and one abstention...

... I agree, of course, that following the adoption of the Basic Laws, the Court acquired the authority to review Knesset laws and to determine whether they are consistent with them validly—completely or partially—in cases where they unlawfully infringe fundamental rights... However to what extent a "revolution" has transpired, only time will tell...

d. The Post-World War II Constitutions in Germany and Japan: Subsequent International interventions

Use of coercion by conquering powers to impose regimes of constitutionalism and respect for human rights may seem paradoxical. But the experience of the United States after the Civil War, in which the victorious Union forces denied the defeated southern states representation in Congress until after ratification of the 14th amendment had been secured, has parallels in this century.

At the end of World War II, the victorious Allied Powers (including the United States) required Germany to adopt a constitution establishing a federal structure of government, designed both to protect the rights of the Länder (German states) and provide "adequate central authority," and to guarantee "individual rights and freedoms." Many scholars agree that these "minimal conditions... coincided fully with the ideas of the Germans themselves." At the demand of the Allied Powers, the new Länder legislatures selected representatives to a Parliamentary Council, working with a committee of German experts at Herrenchimsee, drafted a new Basic Law. Allied powers interacted with the work of the Parliamentary Council, and posed objections in April 1949 to the draft in development because it provided "too much centralization of authority." An acceptable compromise was worked out, that in the views of some German jurists drew sufficiently on prior German constitutional traditions that it was not regarded as an instrument "stained" by imposition from the outside. The new Basic Law was submitted to the legislative bodies of the Länder, and ratified by more than two-thirds of those legislatures in May, 1949.

Germany's Basic Law has been regarded as largely successful in structuring a modern, federal, constitutional democracy. Regular...
elections and orderly changes in elected leadership have prevailed. As you have already seen from the first chapter, the German Constitutional Court has not shied from declaring invalid laws enacted by the national legislature.

Japan adopted its constitution in 1947, also under pressure from American occupying forces. Here, however, there seems to be less evidence of a foundation in prior legal traditions for the Constitution that emerged, and the process involved more of a sudden, externally imposed departure from prior tradition. The initial draft of what became the Constitution was prepared by a small group of American lawyers in General MacArthur’s office as Supreme Commander of Allied Powers (SCAP), under orders to establish human rights protected by the constitution, retain the emperor but make him subject to popular control, renege belligerency and eliminate trappings of aristocracy. This draft was then worked on and modified by the Shidehara government, with continued consultations and negotiations with SCAP. While the amendment procedures of the Meiji Constitution were followed, the legislative body that approved the new Constitution was elected under voting rules imposed by the Allies that broadened suffrage (e.g. to include women).

Professor Beer characterizes the process of constitution-drafting as “a binational product.” He argues that the 1947 Constitution both embodies a “statement of the rights of an American, as envisioned by some American occupationnaires in the authentically idealistic months following World War II,” and at the same time, “for most Japanese the Constitution has also become the most authoritative statement of their rights... and... the most sacred writ of the country’s current civilization.” He notes as further evidence of the success of this Constitution the history since 1947 of peaceful electoral transitions, recognition of rights, and stability of the constitution itself.

Note the possible distinction between interventions by occupying forces that are themselves from liberal constitutional democracies (the U.S. in Japan and Germany) and interventions by less domestically-constrained occupying forces. See Franklin and Baun, in Chapter III above.

In some respects like coerced constitution-making under the occupation of a victorious foreign power, international involvement in “domestic” constitution-making may seem in tension with conceptions of a constitution grounded in decisions of “we the people” of that polity. But an increasing phenomenon has been the role of “the international community,” often under U.N. auspices, in the process of constitution-making, especially in states in transition from autocratic rule or from prolonged periods of inter-group violence. Examples include the

* Beer, supra note 9, at 229. For a more restrained evaluation, see Masamitsu Ishii, The Modern Development of Law and Constitution in Japan, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 128-74 (Lawrence W. Beer, ed., 1990) (noting reservations calls for amending the constitution, in part because it was forced on Japan, but concluding that this is very unlikely to occur). For a useful collection of articles, see Symposium, The Constitution of Japan: The Fifth Decade, Penny R. Lomax, Special Editor, 56 Law & Contemp. Probs. 1 & 2 (1990).

SECTION A. CONSTITUTIONAL LEGITIMACY: PROCESSES AND SUBSTANCE 319

Constitutionmaking process in East Timor under U.N. supervision, the “Dayton accords” to end conflict in the former Yugoslavia, annexing to the international agreement the Constitution for Bosnia-Herzegovina, recent constitution-making in South Sudan following its secession from Sudan, and international involvement in the Good Friday (or Mitchell Agreements) of 1998 in Northern Ireland. For additional examples between 1978 and 2005, see FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (2010) (Laurel E. Miller ed., 2010) [hereinafter FRAMING THE STATE].

QUESTIONS AND COMMENTS

1. Note the importance in both Hungary and South Africa of devising a system of transition that took account of the continuing political power of supporters of the old regime. Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 Cardozo L. Rev. 601, 674 (1992-93), suggests another, more pragmatic reason why Round Table processes might be valuable:

* See Lewis AulCoin & Michele Brusch, East Timor’s Passage to Constitutional Independence, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 250-64 (Laurel E. Miller ed., 2010) 250-64 (describing how the method of drafting a constitution was that which U.N. representatives and a few political elites insisted on, involving election of a constituent assembly, rather than a more staged and drawn out process based first on gathering public input).
* See James C. O’Brien, The Dayton Constitution of Bosnia and Herzegovina, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 230-49 (Laurel E. Miller ed., 2010) 230-49 (describing how the method of drafting a constitution was that which U.N. representatives and a few political elites insisted on, involving election of a constituent assembly, rather than a more staged and drawn out process based first on gathering public input).

too, indeed the whole society, had good reason to fear the triumph of a revolutionary logic.

How did the use of the Constitutional Court in South Africa facilitate the transition? Note that the processes in South Africa and Hungary involved negotiations among politically important groups. Consider the problems of (a) identifying the groups who should participate in such negotiations, and (b) selecting the representatives of those groups. Are there any principles that might be used to solve those problems? Are they resolved by purely political means, varying with local circumstances? (Do the prior questions pose a false choice between alternatives?)

2. What, if any, role did preexisting legal institutions play in the process of constitutional change? Consider the effects of prior legal history, both as sources of continuity and as counter-examples. Note, too, that while South Africa had an existing court system, it chose to establish an entirely new Constitutional Court in its Interim Constitution, which was then used to assess and validate the final Constitution.

3. Participatory constitution making, South Africa: What reasons might there be for thinking that civic education about the Constitution would be effective in South Africa? Ineffective? Cf. S. Afr. Const. of May 8, 1996, Explanatory Memorandum (stating that “[t]he objective in drafting this text was to ensure that the final constitution is legitimate, credible and accepted by all South Africans. To this extent, the process of drafting this text was involved many South Africans in the largest public participation programme ever carried out in South Africa.”); Makuwa Mutua, Hope and Despair for a New South Africa: The Limits of Rights Discourse, 10 Harv. Hum. Rts. J. 63, 83 n. 110 (1997) (noting widespread public hearings and a national media campaign resulting in over 1.7 million public submissions to the constitutional assembly). For more on participatory constitution making, see Section (c) on Kenya and the Note on Iceland below.

4. Reaching legitimacy I—Constitutional momente: Is there a "moment," or a particular step in the process, when one can say that South Africa created its new constitution? Once agreement to the 34 principles in the extra-legal negotiations between the white government and the ANC and other groups was reached, when was the constitution created? When its decisions (i.e., invalidating the death penalty in 1995) were respected? When it declared unconstitutional some of the proposed constitution? Not quite yet because the process of fully implementing the new constitution is ongoing.


As there are any chances for a constitution in Poland? Has the "round table" paradigm of constitution-making lost ... any normative potential? ... By "grass roots constitutionalism" I understand a process of slow formation of constitutional principles "from below", in the everyday experience of citizens participating in local governments, non-governmental organizations, associations, and ethic commissions whose members participate in the decision-making process or in conflict resolution, and construct their by-laws. . . .

. . . Considering the legacy of the communist system, one should then stress the political experience of a society that constituted a source of democratisation of a constitutional culture and the primary constitutional principles. One has to stress that the specific constitutional legacy of a society for which the formal, written constitution meant very little, since its very prescriptions were not binding at all, especially those which regulated liberal rights and liberties, and declared democracy. Hence, there is a lack of social trust in a formal declaration of democracy which, in light of experience, has no binding force at all. Secondly, one has to point to the destruction of the public sphere, destruction of public discourse that was of no interest to a society which functioned as an agglomeration of subjects deprived of private property, not making a profit, not paying taxes, and totally taken care of by the state. This gave rise to the . . . infantilisation of the society, which had no actual, economically bounded and hence accountable interest in controlling the authorities and binding them by law. . . . Considering such empirical arguments, one may then postulate the development of "grass roots constitutionalism" because one assumes it would foster the recovery of the meaning of the binding force of law, of the democratic principle, citizenship, public sphere, and so on.

Professor Skapska suggests that a constitution can gain legitimacy incrementally. Her focus is on the conditions in Poland and similar societies (and for additional discussion, see the excerpt from Professor Holmes and Sunstein below). Her notion of "grass roots constitutionalism" involves the development of constitutional consciousness by individuals participating in essentially local activities. Consider whether a condition for such grass roots constitutionalism is the reasonably stable operation of an existing government at the national level, and, if so, whether Professor Skapska's concept might be applicable more broadly (for example, in the development of a constitutional consciousness about the existence of a "European" state for the European Union).

6. Reaching Legitimacy III—"Transnational" Involvement and Support: In troubled or failing states, is the relevant community for which the "constitution" must have legitimacy an internal or an external one? To some extent every constitution aspires to legitimacy internally and externally. But, for some states, is the international audience more important? If international peacekeepers are present in a state that is also dependent on financial support from international financial institutions, are there risks that the need to sustain support from the international community will result in greater attention to legitimacy in that community than to legitimacy in the internal domestic community? Can international involvement, even under the terms of a domestic constitution, assist in establishing legitimacy? Consider provision such as those in the Dayton Agreement Constitution of Bosnia-Herzegovina for members of the state's constitutional court to be appointed by the President of the European Court of Human Rights.
7. Reaching legitimacy IV—A Constitution’s Substance: Consider the possibility that a constitution gains legitimacy (perhaps gradually) from the “rightness” of its substantive provisions. Are there processes by which “rightness” can be guaranteed, or at least by which the likelihood of “rightness” can be increased? Consider what examples might support—or undercut—Bruce Ackerman’s suggestion that, in what he calls constitutional moments, individuals manage to set aside their more immediate concerns in favor of a broader civic-mindedness—perhaps because of the depth of the crisis they confront—and then can deliberate on matters of constitutional design that increase the likelihood that the constitution will be substantively “right.”

8. The average duration of national constitutions in the world is about 19 years. Zachary Elkins, Tom Ginsburg, & James Melton, The Endurance of National Constitutions (2009). Can legitimacy be inferred from longevity? Does this depend on whether a regime in power is willing to use force against its citizens to suppress change?


In 1986, the Nicaraguan National Assembly invited comment on the draft of a new constitution. Some 100,000 citizens took part in open town meetings, forwarding 4,300 suggestions. In 1988, constitution makers in Uganda and Brazil requested suggestions before, as well as comment after, the drafting process, with equally impressive levels of response. . . . Between 1994 and 1997, Eritreans engaged in constitutional education and consultation, addressing a nation with markedly low literacy rates through singing, poems, stories, and plays in vernacular languages, and using radio and mobile theatre to reach local communities. In 2002, members of the Rwanda drafting commission and thousands of trained assistants fanned out to spend six months in the provinces, so that constitutional education and discussion could become an integral part of community life. . . .

The Rwanda process . . . suggests another characteristic of these creatively participatory processes. Constitutional re-visualization comes into play when the alternative is unsustainable or too dire to contemplate, whether that be dictatorial oppression, violence, or genocide. A democratic constitution-making process contributes to making peace because the prerequisite of any livable alternative to the horrors many nations have experienced is that all parties are willing to try to keep talking about their disagreements. . . .

Constitution making is essentially about the distribution of power. Unsurprisingly, the idealism of the innovations described above must be tempered with realism about who is really in charge. In both South Africa and Rwanda, political elites initiated the process of constitutional change, provided the personnel for the key institutions, and framed the educational campaigns. At the most cynical extreme, a determined elite or one that is confident of its continuing control may offer a participatory process as a charade, a democratic hoax intended to mollify unrest by granting the appearance of democracy without its substance. The achievements of participatory constitution making, then, are not to be romanticized.

Literacy and language are only two of the factors that have operated to exclude groups and individuals from constitution making in the past. Participatory processes have worked to overcome these two factors as well as racial and ethnic exclusions and have been notable in some nations for the new participation of indigenous peoples and in most cases for the very visible inclusion of women.

... (The idea of constitution making as an open-ended conversation between all the members of a political community, rather than as the legal and expert drafting of a contract by a technically qualified elite on behalf of the nation, no longer lurks only on the fringes of democratic theory. In many parts of the world, participatory constitution making is more than just an aspiration, it is an emergent international right and an experimental practice. Process has joined outcome as a necessary criterion for legitimating a new constitution; how the constitution is made, as well as what it says, matters.

I. KENYA’S CONSTITUTION-WRITING PROCESS

A. The Movement for a New Constitution

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

While Kenya has been at peace since achieving independence, it has been a repressive one-party state throughout most of its history. Kenya’s first president was Jomo Kenyatta, a hero from Kenya’s liberation struggle, who ruled from 1963 until his death in 1978 and created a de facto one-party state in 1969. Daniel arap Moi succeeded Kenyatta and introduced de jure one-party rule in 1982. Both Kenyatta and Moi silenced opposition, sometimes through the use of torture and intimidation.

Agitation for constitutional reform in Kenya began in 1990–1991. The primary impetus for reform came from elites in Kenya’s civil society, including religious and human rights groups, which mobilized opposition political parties and their supporters and which helped create a popular movement. In 1991 Moi acceded to international and domestic pressure and permitted a constitutional amendment reforming the presidential election procedure and reinstating a multiparty political structure. These reforms, however, failed to bring opposition leaders the gains they had anticipated, in part due to continued structural disadvantages in the political system. By 1994, democratic agitation in Kenya had become linked with the call for a new constitution: “Constitution-making became the sole vehicle through which democratization, promotion and protection of human rights and social justice were robustly agitated.” This agitation led to... the enactment of the Constitution of Kenya Review Act (“Review Act”).

B. The Review Act

The Review Act outlined a three-step constitutional review process for Kenya: (1) public consultation and initial drafting by a small review committee; (2) revisions by a national convention; and (3) ratification by Parliament. Strikingly, the Act seemed consistent with many of the preconditions that scholars have argued are necessary for successful constitution-writing: it included several measures to ensure that the document was “home-grown” and would create “a sense of ownership.” It also included checks to ensure that “the government would neither control nor unduly influence the process.” In particular, the Act emphasized consultation with ordinary Kenyans and extensive deliberation among drafters, and it attempted to sidestep interference in the process by the President or by Parliament.

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

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

Thus, the Review Act emphasized broad public participation at every stage of the drafting process and deliberately mitigated the influence of Parliament and the President in constitution-writing. The President could not participate in the Review Commission or in the National Conference, and MPs composed less than a majority of the Conference and could only approve the draft constitution in an up-or-down vote, without subsequent amendment. But while Kenya’s process was designed to avoid partisan capture and to reflect the will of the populace, numerous expert revisions undermined those ambitions.

C. The Constitutional Review Process

1. The 2002 Elections and the Review Process

Kenya’s review process began late in 2001, and the Review Commission completed the Act’s first stage of information-gathering, public education, and initial drafting by mid-2002. The Commission planned to start the second stage of the process, the National Conference, in October 2002, and to have the entire process completed before December 2002 so that a new constitution could be in place before Kenya’s presidential and parliamentary elections.

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

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

The Memorandum of Understanding succeeded in keeping NARC unified before the elections and thereby facilitated Kenya's peaceful democratic transition from KANU rule. Backing expectations, NARC won control of Parliament from KANU in a free and fair election, and Kibaki defeated Moi's chosen successor to win the presidency.

Despite its role in Kenya's political transition, however, the Memorandum of Understanding also helped make the subsequent Constitutional Conference highly divisive and contentious, prompting six post alterations to [procedures for parliamentary review]...

2. The Constitutional Conference at Bomas

[After being elected in late 2002,] Kibaki pushed back his promise of a new constitution to June 2003. The second stage of the Review Act, the Constitutional Conference, began in late April 2003. The Conference took place at the Bomas of Kenya theater facility and was widely referred to simply as "Bomas."... [Despite almost a year of negotiations, the Bomas draft was never enacted by Parliament or presented to the public for a referendum.]

Three major issues dominated Bomas: (1) the structure of the executive (whether there should be a Prime Minister in addition to the President, and if so, what powers the position should enjoy); (2) devolution (whether Kenya should have a federal system with significant lawmaking powers at the local level); and (3) Kadhi courts (whether Kenya should codify separate civil courts for Muslims). However, the issue of executive power was by far the most publicized issue and the most divisive among delegates.

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

Key NGO representatives pulled out of the Conference in January 2004. Meanwhile, negotiations at Bomas continued, and a consensus draft was a set of proposals that included a mixed executive system with a strong President. However, ... Bomas delegates rejected the consensus document and voted for a constitution with a strong Prime Minister (as well as devolution of political powers). President Kibaki's allies proceeded to walk out of Bomas.

The remaining members of the Conference continued their work without [representatives from the government] and subsequently passed a draft constitution—which included a strong Prime Minister—to be submitted to Parliament under the Review Act.

3. Revisions to the Draft

... Complicating matters, just as Bomas was completing its work, Kenya's High Court issued a ruling that any new constitution ultimately needed to be ratified through a national referendum. Parliament amended the Review Act in response to this High Court's ruling, adding a provision for a referendum subsequent to Parliament's ratification of the draft constitution. However, Kibaki's supporters further demanded that Parliament amend the Act to enable itself to alter the Bomas draft before presenting it to the public, instead of having to accept or reject the draft in an up-or-down vote. Kibaki argued that given the disputes over the Bomas draft, "consensus" among MPs—particularly on the issue of executive power—was the only way forward.

Critics charged that the proposed constitutional consensus-building was nothing more than deal-making among MPs, and prominent leaders such as Odinga refused to participate, arguing that any parliamentary alteration to the draft constitution would be illegitimate. The "consensus group" nonetheless agreed to a proposal to give Parliament power to amend the Bomas draft before voting on it. This revision to the Review Act passed Parliament despite strong resistance from Odinga and his coalition parties, including the former ruling party KANU.

With new power to make amendments, MPs participated in a series of retreats to rework the Bomas draft in light of the ruling government's concerns, particularly over the scope of executive power. Odinga's followers and the opposition parties boycotted these retreats, accusing the government of "mutilating" the Bomas draft. However, the retreats went on, and the drafters finalized a revised constitution in July 2005, promising a referendum for November. The new draft mandated, among other changes, a Prime Minister who was appointed by and reported to the President. Odinga's followers and KANU opposed the new draft, arguing that it was a new constitution and that it ignored the "views expressed through the [Commission] and ... Bomas ... for a Parliamentary system of government and a devolved participatory form of local government."

4. The Referendum

The lead-up to the referendum was marked by a moderate level of violence, including riots in Western Kenya, an area dominated by Odinga's Luo ethnic group. The Kibaki government also openly made promises of patronage and resources in return for electoral support. Kibaki's government threatened to fire cabinet members and civil servants who did not support the draft constitution, and he issued a televised address to encourage passage of the constitution, without providing the opposition with a similar opportunity to address the country. Odinga and other opposition politicians, for their part, stoked ethnic tensions and at times misrepresented the content of the proposed draft.

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

... [Despite a general desire to adopt a new constitution, the Review Act was unable to deliver a document that was both palatable to entrenched political interests and capable of receiving wide public support.

II. LESSONS LEARNED...

... Kenya's experience offers insight into when public participation is necessary for drafting a constitution, and how such participation should be structured so as to mitigate costs. [The author of this Note emphasizes “that the risk of capture is heightened when constitutional reform requires ongoing negotiation with an entrenched government.”]

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

One key lesson from Kenya is that public participation is a more equitable value than many commentators have recognized. In Kenya's political context, broad participation was necessary for legitimacy... [But] participation generated significant economic costs and social disruption...

1. The Participation Myth

Many commentators have understated the costs of broad participation and have failed to recognize the extent to which its value depends on specific social and political contexts. For example, the Commonwealth of Nations and the U.S. Institute of Peace have urged best practice guidelines that support participation in generalized terms, urging countries to develop a process that “constructively engages the majority of the population” and that empowers ordinary people “to make effective contributions,” without specifying why or how to structure that participation. Indeed, highly participatory processes have had legitimating effects in some countries, such as South Africa.

However, those who argue that highly participatory constitutional review processes are prerequisites to legitimacy face some embarrassing counterexamples. Perhaps most notably, Japan's constitution has enjoyed long-term legitimacy despite the fact that it was written by approximately two dozen Americans during Japan's postwar occupation, with relatively minor revisions made by Japanese government officials and virtually no public consultation. [Highly participatory processes have also had delegitimizing effects in some countries. For example, Chaco's participatory constitutional conference in 1996 increased Francophone-Arab tensions, due in part to the slowness of deliberations. Similarly, Nicaragua's 1987 constitutional review process led to fairness concerns regarding the methods of canvassing local opinion.]

2. The Benefits of Broad Participation in Kenya

[Kenya's history made consultation important to legitimacy in a way that it may not be in countries where constitutionalism is not associated with a popular democratic movement. Kenya's existing constitution is strongly associated with colonialism and political oppression under the Kenyatta and Moi governments, and the

reform movement emphasized the need for “a home-made and home-grown constitution.” Kenya's constitutional reform movement was itself an outgrowth of a broader democratization movement, and the rhetoric of participation thus played an essential part in the debate over the draft constitution...

... [While Kenya's particular history suggested a need for broad participation, in countries where constitutionalism is not synonymous with democratization, it is less likely that participants will see public input as a logical necessity or as imperative for legitimacy.

In addition to providing legitimacy, Kenya's process—particularly its government-supported, popularly consolidated democratic institutions. For example, despite the Kibaki government's attempts to buy support with patronage and public works projects, Kenyans still rejected the proposed constitution. ThisMaturation of Kenyan democracy was not in the Kenyan press... Even more significantly, Kenya's referendum itself was relatively free and fair, and the government—which had campaigned vigorously for the new constitution—accepted the legitimacy of its opponents' victory. The consolidation of democracy as a non-governmental right, and its implementation in practice, gave rise to the idea that it now into a powerfully effective weapon, capable of withstanding even very significant pressure under crisis conditions.

Furthermore, the referendum led to extensive multipartisan coalition-building over both sides of the constitution debate—an important development for an ethnically divided country like Kenya...

Moreover, Kenya's referendum was by no means a panacea for Kenyan democracy. For example, despite the referendum's "success," electoral observers noted that the "campaign in the run-up to the referendum gave decreasing attention to the substance of the matter and focused increasingly on ethnicity."... [The] decision of Kenya's participatory process was closely rooted in its politics and culture; a referendums would have been less valuable had Kenya's baseline institutions been weaker or its ethnic cleavages stronger.

3. The Costs of Broad Participation in Kenya

While Kenya's participatory procedures were important in legitimizing the process and consolidating democracy, they also generated severe costs in terms of expense, time, and the opportunity cost of other legislative initiatives. Outreach, education, and negotiation among delegates took time... over three years. The "participatory" elements of Kenya's process, including the referendum, the Bomas Conference, and outreach efforts, were also expensive. Official government statistics report that the review process cost approximately $50 million (or roughly $25.75 per person), and unofficial estimates are as high as $138 million. This is a significant cost for a nation with a per capita GDP of only $255. ... Weak communication and transportation infrastructure made personal outreach costly, and low literacy rates required alternative outreach methods, often in an individual’s tribal language. Commissions and conferences with large delegations—all of whom expected generous salaries—were an additional drain on the fisc.
as was the national referendum. Given Kenya’s limited resources and
great needs, these economic and opportunity costs posed a significant
burden for an already weak government.

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

The lesson, then, is mixed. Broad participation lent legitimacy to
Kenya’s review process and helped strengthen Kenya’s democratic
institutions. However, participation was not an unconditional good; it
was expensive, time-consuming, and brought with it risks of violence and
corruption.

B. Lesson 2: The Risk of Capture

... Kenya’s experience is particularly useful in highlighting the
capture that can occur when constitutional negotiations take place in
the shadow of an entrenched government. ...

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

[Well-designed procedural rules can increase the cost of
altering the status quo and thereby constrain behavior. For example, a
review process should limit elites’ control over drafting, while also
providing them with meaningful opportunities to influence substantive
choices (thereby reducing the benefits of capture) and including
mechanisms for transparency and publicity (thereby increasing the
costs of capture). ... More generally, any proposal for constitutional
review must be realistic about the interests of elites and must include
mechanisms for placating (or buying off) powerful factions with the
potential to derail the process.]
and the risk of stoking ethnic tensions when designing membership rules for drafting committees and review conferences, as well as when designing voting procedures. Likewise, the risk of heightening ethnic tensions is a significant cost of highly participatory processes such as elections. . . .

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

Another general lesson from Kenya’s experience is that process choices, such as the number of participants and the structure of the drafting process, can affect the coherence of the final product. Kenya’s constitution-writing process, with its multiple drafting stages and myriad participants, did not lend itself to creating a set of institutions carefully designed to produce clearly articulated values.

Kenya faced two main challenges to producing a coherent draft: logistical difficulties due to the number of drafters—over 600—involved in the process, and difficulties stemming from the need to bargain in order to accommodate interests that were fundamentally at odds and not necessarily concerned with the greater good. As Makau Mutua has observed, the Review Commission “was too unwieldy and packed with far too many incompetents, political lackeys who were in it simply to ‘eat.’ The [Commission] was paralyzed by internecine political and personal struggles and vendettas.” . . . “Bargaining has much to commend it, but coherence is not among its virtues” (quoting Donald Horowitz).

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

It is not possible to do away with bargaining and negotiation in constitution-drafting. However, . . . Kenya’s experience suggests that an effective review process should involve a relatively small number of drafters and be insulated from willy-nilly revisions by stakeholders with no commitment to the coherence of the document, as a whole. Process choices may also help promote better compromises; for example, “expert” drafters might be more sensitive to the value of coherence.

F. Lesson 6: The Dynamism of Political Environments

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

Many opposition leaders who had pushed for specific amendments to Kenya’s constitution changed their views as delegates after landing a seat in government in the 2002 elections. Likewise, many allies in civil society also changed the scope of their proposed reforms to match the new political environment. . . .

In addition to changing the attitudes of delegates chosen in a different era, a political sea change can also shift ethnic alliances, as illustrated by the dramatic shift in the status of the Kikuyu ethnic group, which went from being primarily in opposition to primarily supporting the ruling party under Kibaki.

III. DESIGNING CONSTITUTIONAL REVIEW PROCEDURES

The author argues here that “[s]eemingly minor details, such as the structure of a referendum or the size of a review commission, can have a significant impact on issues like the opportunity for capture or the risk of ethnic tension.” She makes several recommendations.

First, the author argues for a “limited number of drafters with broad consultation duties.” Although Kenya’s “highly participatory model made the process more ‘democratic and helped promote legitimacy, the use of hundreds of delegates and two sets of constitution-drafting bodies . . . was both cumbersome and costly.” In addition to keeping down costs and promoting coherence, a small drafting team would promote accountability because the decision-makers would be clearly identifiable and likely to become significant public figures. Arguing that consultation has two purposes—eliciting the population and soliciting specific input—it asserts that the “education component is critical both for legitimizing the drafting exercise and for sparking useful suggestions on content” and observes “that there was strong public interest in Kenya’s constitution-drafting activities throughout the five-year review process, with the process consistently enjoying front-page status in national newspapers.” Further, she suggests, public input would provide a “check against capture in that strong popular disagreement with a particular proposal would be documented and made public.”

Second, the author argues for “including nonnationals as delegates to the drafting body” and excluding national politicians. She acknowledges such costs as unfamiliarity with local conditions, and the possibility that the inclusion of nonnationals would be politically unacceptable, but argues that her proposals might enhance the use of expertise and expand the base of knowledge used in drafting a constitution. She recognizes practical limitations on excluding existing politicians, because doing so “is exactly the kind of procedure that lends itself to ex post revisions if it appears that the new constitution will be challenging powerful interests.”

Third, the author suggests, drafters must recognize that referenda pose both values and risks, offering a chance to check elite capture, and consolidate democratic institutions, but posing risks of corruption and violence along ethnic lines. She writes: “In an ethnically divided country like Kenya, the referendum should not operate by a simple[e] majority vote; rather, there should be regional requirements as a way to reduce
the risk of ethnic tensions. In this way, the document would have to appeal not only to a majority of voters but also to a relatively wide swathe of the country. Because Kenya's ethnic groups are regionally based, region is a good proxy for ethnicity, in addition to being more administratively manageable. In countries where region and ethnicity are not correlated, it may be necessary to include more direct group voting. It may also be important to account for the presence or absence of a federalist tradition.

[The author goes on to note that Kenya's constitution provided that the President must receive at least 25% of the votes in at least five of eight provinces, and suggests that it would be appropriate to require that a new "constitution receive a higher percentage of the votes in a supermajority of the provinces."

CONCLUSION...

While Kenya's constitution-writing process has in many ways "failed" to achieve its aim... Kenya successfully held a free and fair constitutional referendum, and its government... readily accepted an embarrassing defeat. Cross-ethnic coalitions formed in support of and opposition to the draft, and serious violence did not erupt. This was only the second fair election that Kenya had ever held, and its success reflects significant progress in the development of Kenya's democratic institutions...

Kenya's process... helped engender a culture of "constitutionalism" among Kenyans. There was a strong backlash in Kenya against the post-Boas procedural irregularities; despite dissatisfaction with the existing constitution, Kenyans were not willing to accept a replacement that they deemed partisan. As Stephen Ndugu and Ryan Letourneau have observed, "Constitutional discourse has its own momentum that is difficult to subvert and is likely to inform discourse on transition politics"...

QUESTIONS AND COMMENTS

1. In August 2010, 67% of the voters approved a new constitution for Kenya, one developed in a process that began after the referendum defeat in 2005. Heavy reliance was placed on a Committee of Experts, including those foreign to Kenya, to prepare a coherent draft; periods of public comment and opportunity for parliamentary amendments was provided before the referendum vote.

2. Is a constitution-making effort that does not succeed in establishing a new constitution necessarily a sign of a defective process? Cf. Jill Cottrell & Yosh Ghai, Between Coup: Constitution Making in Fiji, in FRAMING THE STATE, supra, at 276, 276 (arguing that a constitution produced in 1997 was in many ways an achievement in "charting a new path" to overcome longstanding ethnic divides, whose "vision and goals" retain "persuasive power"). The 1997 Constitution resulted from a unanimous report by a Constitutional Commission, made up of representatives of two competing ethnic groups and a foreigner as chair, whose recommendations were then modified as a parliamentary committee drafted the actual new constitution. The 1997 Constitution went into force in 1999, but following the first election under the new constitution, a coup occurred in 2000, though the constitutional court held that the constitution was still in force; further coups in 2006 and 2008 fully abrogated that constitution. Ghai, who was an active participant in a civil society group that engaged in the constitutionmaking process described in the paper, is (as of 2012) heading a commission to produce a new constitution for Fiji. Are academics and NGOs necessarily more impartial than elected officials?

3. Should peace treaties ending civil wars be considered as "protocoalitions"? Does thinking about constitutions as "peace treaties" shed light on the conditions for success in constitutionmaking? See Sujit Choudhry, CIVIL WAR, CEASEFIRE, CONSTITUTION: SOME PRELIMINARY NOTES, 33 CARDOZO L. REV. 1907 (2012) (reflecting on the role of violence in the move from authoritarian regimes to constitutional democracies, and suggesting that the South African negotiations might be understood in terms of a peace pact designed to stave off or diminish violence between the ANC and the minority white government).

NOTE: ICELAND AS NEW MODEL? PUBLIC PARTICIPATION, TRANSPARENCY, TIME, AND ATTENTION

Following the world financial crisis of 2008, there were popular demands for change in Iceland, which led to a parliamentary decision to design a new constitution-making process grounded in public participation and transparency. Public involvement proceeded in several stages.

Initially, an independent committee was set up by parliament, which coordinated convening 950 citizens, chosen at random, as a national forum to generate ideas for reform; their meeting was held in November 2010. Gúnius Dees, THE ICELANDIC CONSTITUTIONAL EXPERIMENT, at www.opendemocracy.net (Oct. 28, 2012) (describing a "national brainstorming session"). Thereafter, an election was held for membership in a constitutional assembly or council. (The turnout for this election was only 35%: on a complaint of irregularities, in January 2011 the Supreme Court held it invalid; the parliament responded by essentially appointing the same 26 persons, previously elected, to a constitutional council, with a mandate to make specific proposals on amendments. See Referendum, Saturday October 12, 2012, at http://www.thjodararfvaeni.is/2012/en/)


[The Council was encouraged by popular participation via more than 300 unsolicited reports from the public plus thousands of comments and suggestions on the Council's interactive website. After four months of high-voltage work in mid-2011 in full view of the public, the Council approved the bill unanimously with 26 votes against zero, no abstains. Eight months after receiving the bill in March 2012, the parliament (Althing) directed some issues to the Council, including [a] question about ‘full’ vs. ‘fair’
B. CONSTITUTIONAL CHANGE AND CONSTITUTIONAL LEGITIMACY

1. CONSENT AND LEGITIMACY

Walter F. Murphy, Consent and Constitutional Change, in HUMAN RIGHTS AND CONSTITUTIONAL LAW (James O’Reilly, ed., 1992)

... [Some constitutional texts ... prohibit certain kinds of amendment, that of the United States, for instance, forbids denying any state equal representation in the Senate without that State’s consent. Such textual interdictions present interesting problems for constitutional theory. Even more interesting and more difficult issues revolve around whether there are non-textually prescribed limits to valid constitutional change.

These problems are not merely academic. Germany’s Federal Constitutional Court, following the reasoning of the Constitutional Court of Bavaria, has claimed authority to strike down not only an amendment but part of the original constitutional text itself as violative of the Basic Law’s fundamental principles. The Supreme Court of India has on several occasions, though with differing rationales, declared constitutional amendments unconstitutional. ...

Objections to judicial invalidation of clauses in or added to a constitution are not generally of two kinds. The first is ... based on fear of judicial oligarchy—In short, on constitutionalism’s weakening democracy and corrupting itself in the process.

The second, related, objection is that the text of the constitution is what “the people” have consented to be ruled by. They have also agreed to certain procedures to change that basic compact and even the larger constitution that the text reflects and of which it is a part. Thus, if there is ground at all for any institution’s invalidating a portion of that text, it can only be that the government did not secure the people’s consent to the document in the first place or did not follow agreed upon procedures for change.

This paper deals only with the second objection. The reasoning behind that objection is straightforward. The people are sovereign and can accept any kind of political system that pleases them; it follows that they can transform the system as they wish, provided only that they observe the procedures they previously agreed to and, in fact, they and/or their representatives permit free and informed choice. In short, consent of the people is the great legitimating of government. With consent, any political system is legitimate; without it, no system is legitimate.

A weaker form of the claim would stipulate that consent is a necessary but not sufficient element in legitimation. This dilutes variant is, I believe much more defensible, but it deprives consent of its supposed role as ultimate legitimating. I wish to challenge the stronger proposition, not for the joy of attacking a straw man, but because I think that in so doing I can both better explicate the nature of consent and offer a more convincing reason for the weaker version than its proponents do...