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### Voting on a constitution: Implications for democracy in Kenya

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## Voting on a constitution: Implications for democracy in Kenya

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In November 2005, Kenya held its first-ever national referendum on a proposed constitution. After a contentious review process, 58% of voters rejected the final document. It is common in the analysis of Kenyan politics to rely on ethnic explanations; indeed, the referendum results cannot be understood without exploring ethnic cleavages in Kenyan society. However, an exclusive focus on ethnicity obscures other factors that influenced voters, including the controversial process of drafting the constitution, the mobilisation efforts of the 'yes' and 'no' campaigns, and the perceived performance of the government. In the end, the referendum was seen as a positive step toward democratic consolidation in Kenya and raised hopes for the future. For the second time in three years, voters rejected the preference of the sitting government, which respected the results. Hopes were dashed, though, when irregularities marred the 2007 election and the announcement of contested results sparked a wave of violence. Under intense domestic and international pressure, the opposing sides reached a power-sharing agreement, as the need for a new constitutional order in Kenya became even more apparent.

**Keywords:** referendum; constitution; ethnicity; democratic consolidation; power sharing

After decades of authoritarian rule, the 1990s saw African countries shift toward competitive politics. One way in which power has been contested is through the rewriting of constitutions. From Benin and South Africa to Burundi and Congo, controversy has surrounded the process of drafting new constitutions. Efforts to amend existing constitutions in Malawi, Namibia, Nigeria, and Zambia have met mixed results (VonDoepp 2005), but all have generated debate over the best way to organise and constrain power in countries where it previously was concentrated in few hands. Kenya is no stranger to this trend. On 21 November 2005, after a lengthy review process, Kenyans voted in their first-ever referendum on a proposed new constitution. They rejected the document by a margin of 58 to 42%. Even as votes were still being tallied, supporters and opponents alike reiterated the need for a new constitution.

There is a tendency in the study of Kenya, and Africa more broadly, to explain political outcomes by focusing on underlying ethnic cleavages. Indeed, the results of the 2005 referendum demonstrate the political importance of ethnicity in Kenya and the pattern of voting along ethnic lines (Lynch 2006b; Steeves 2006). Support for the proposed constitution came primarily from the Kikuyu, Meru, and Embu communities, while opposition was strongest among Luo, Kamba, and Kalenjin. However,

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an exclusive focus on ethnicity obscures other factors that help explain political outcomes (Lynch 2006a). Individual voters had a choice when they marked the ballot. That choice was influenced by calculations based on ethnic identities and by other factors, including the controversial process of drafting the constitution, the mobilisation efforts of the campaigns, and the perceived performance of the government. The aggregate result of these individual choices was a resounding defeat of a draft constitution that was backed by the sitting president. Even as politicians resumed their wrangling after the referendum, Kenyan people looked forward to the opportunity to have their say again in subsequent elections.

This article examines the 2005 constitutional referendum in Kenya and its implications for democracy. It is based largely on research conducted by the authors in Nairobi from August 2005 through June 2006. An initial overview of the constitutional review process starting in the 1990s shows that the proposed constitution was already very much contested by the time it was presented to the public for a vote. During the 'yes' and 'no' campaigns in 2005, as discussed in the next section, the debate was as much about process, politics, and positioning as about substantive issues in the document. Our subsequent analysis of the referendum results confirms the importance of ethnic voting patterns while drawing attention to the role of other political and economic factors. Finally, after a summary of post-referendum developments, the conclusion argues that the referendum raised hopes for the future of democracy in the country. When the conduct of the 2007 presidential elections fell far short of expectations, therefore, widespread frustration among Kenyans fuelled the political crisis and violence that followed.

The referendum initially suggested that power was being reorganised in important ways, most clearly through the ballot box. The constitutional review process raised political awareness among Kenyans and the referendum gave them the opportunity to demand accountability from their leaders (Cottrell and Ghai 2007), making it difficult for politicians to ignore the preferences of the people in the future (or so it seemed). This is consistent with arguments that the holding of elections, regardless of their quality or outcome, deepens democratic values in Africa (Lindberg 2006). It also lends support to the notion that democracy comes 'in parts and fragments' (Sklar 1987), as the optimism generated by the referendum quickly gave way to frustration over politics as usual. Although power is contested through the process of negotiating a new constitution, even one that does not take effect, democratic consolidation in Kenya is likely to remain elusive without a fundamental restructuring of power through a new constitutional order.

### **Long road to the referendum**

Although the official constitutional review process did not start until the late 1990s, debates about the constitution in Kenya go back decades. Since before independence from Britain in 1963, Kenyans have argued about the best way to structure political institutions in a diverse society. The debate has focused especially on the vertical and horizontal divisions of power, that is, the extent to which power should be devolved to subnational units and the extent to which executive power should be kept in check. Other issues have also become contentious, but these core questions have been the underlying focus of constitutional debates in Kenya for years.

In the early 1960s, as Kenyan leaders met in London to draft a post-independence constitution, a split emerged between the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) over the devolution of powers. The former drew its support from the country's two largest ethnic groups (Kikuyu and Luo), while the latter was a coalition of smaller groups. Fearing domination by the larger groups, KADU called for *majimboism*, or regionalism; under the leadership of future President Jomo Kenyatta (a Kikuyu), KANU resisted the idea. The resulting 1963 constitution included a scaled-down version of *majimboism* that decentralised power to the regions. After independence, however, KANU used its overwhelming strength in parliament to undermine regional governments, change the constitution, and eventually swallow up KADU.<sup>1</sup> The *majimboism* debate faded away, but came back full force in the 1990s, championed by none other than President Daniel arap Moi.<sup>2</sup> In its worst form, the renewed call for *majimboism* fuelled ethnic clashes and stalled political reforms. In more positive articulations, it represented a legitimate clash of visions over how to protect minority interests and divide power in a multi-ethnic democracy (Anderson 2005; Ndegwa 1997). As the debate continued, *majimboism* became a 'political idea that refuses to die' (Anderson 2005, 548).

The question of executive power has been another focus of constitutional debates in Kenya. In the decades following independence, under Kenyatta and then Moi, power became increasingly concentrated in the hands of the president.<sup>3</sup> As Moi used repression and other tactics to avoid political reform throughout the 1990s, critics described his as an 'imperial presidency'. Opposition politicians suggested various constitutional alternatives to limit the president's power and expand that of parliament. Later, during the constitutional review process, many settled on the idea of creating the post of prime minister to assume some powers from the president. The substantive debate in the run-up to the referendum thus focused on how executive powers would be divided between the president and a new prime minister. The underlying discourse, however, was really about the promises, ambitions, and ethnicities of the personalities expected to fill those roles. It was with the backdrop of these debates about the vertical and horizontal divisions of power that the constitutional review process picked up steam.

The need for constitutional reform in Kenya became obvious with the return to multiparty politics in the early 1990s. After years of resisting domestic and international pressure for political liberalisation, Moi relented in 1991 and allowed the legalisation of opposition parties. This was done by repealing a section of the existing constitution that was added in 1982, but no changes were made to a wide range of laws that 'constituted a supporting matrix for the single-party regime' (Ndegwa 1998). These included limits on the freedoms of assembly and speech that were subsequently used to curtail the activities of new opposition parties. In addition, shortly before the multiparty election in 1992, the outgoing single-party parliament rushed through a measure requiring a presidential candidate to get at least 25% of the vote in five of the country's eight provinces. Supporters saw this as a way to prevent domination by the large ethnic groups; opponents argued that it was designed to block opposition parties, most of which drew their support primarily from one or two heavily populated regions.

Thus, heading into the 1992 election, KANU was no longer the sole legal party, but the playing field was far from level. When opposition parties failed to unite

behind one presidential candidate and pre-election violence (allegedly sparked by KANU youth) reduced turnout in opposition areas, Moi was returned to office with a mere 36% of the popular vote. Although opposition parties managed to win 88 seats in the 200-member National Assembly, Moi returned to business as usual after the election and refused to involve them in the legislative process (Barkan and Ng'ethe 1998). Opposition leaders took a similarly defiant stance toward KANU while continuing to fight amongst themselves over their role in a new multiparty system.

As the politicians bickered, civil society organisations (especially those led by lawyers and churches) began pushing for constitutional reform. Opposition leaders soon joined the call, with both groups demanding that changes be implemented *before* the 1997 election. Despite their collective efforts, however, the two groups differed in what they hoped to achieve. Civil society groups like the Citizens' Coalition for Constitutional Change and the National Convention Executive Council sought structural reforms such as limiting presidential powers and providing a bill of rights, while opposition politicians were primarily concerned with levelling the playing field in order to win power away from KANU (Ndegwa 1998).<sup>4</sup> Although Moi initially resisted change, he soon decided to turn the issue over to parliament, where his party was in control. In 1997, the Inter-Parties Parliamentary Group (IPPG) was formed to negotiate these issues among KANU and opposition parties, effectively sidelining civil society.

After two months of negotiations, a reform package was enacted weeks before the 1997 election. It created a more competitive campaign environment by recognising unregistered parties, requiring balanced media coverage, repealing laws that limited freedoms of expression and association, and mandating opposition representation on the Electoral Commission of Kenya. In addition, the agreement prevented the president from filling all 12 nominated seats in parliament with members of his own party; instead, nominations would reflect the proportion of each party's elected seats. The IPPG package also included the Constitution of Kenya Review Act outlining a constitutional review process to be started after the election. Although Moi retained the presidency with 40% of the vote, KANU's majority in parliament was reduced to just four seats, thanks largely to the IPPG reforms, and the ruling party felt vulnerable (Southall 1999). Perhaps more importantly, after forcing the ruling party to agree to minimal political reforms, opposition parties and civil society groups were reinvigorated in their push for a wider range of constitutional changes (Barkan and Ng'ethe 1998).

Despite the promises of the 1997 deal, the next few years were a roller coaster ride for supporters of 'people-driven' constitutional reform in Kenya.<sup>5</sup> An initial agreement to involve political parties, religious organisations, and civil society in the review process was reneged on in 1999, when Moi turned control of the process back over to parliament.<sup>6</sup> Outraged over their exclusion, religious leaders and civil society representatives launched the Ufungamano Initiative<sup>7</sup> to conduct an alternative constitutional review. As the parallel processes continued, a divided parliament appointed 15 people to the Constitution of Kenya Review Commission (CKRC) and named Professor Yash Ghai as chair. While commissioners came under fire for squandering resources and visiting State House, Ghai sought to break the impasse with the Ufungamano group. After initial resistance, Moi endorsed the merger, paving the way for an amendment to the earlier law that expanded the

CKRC to 29 members (including 12 from Ufungamano)<sup>8</sup> and provided for a referendum on the final draft constitution. With the 'people-driven' process seemingly back on track, the newly constituted CKRC was able to begin its work in June 2001.

Under pressure to complete the review in time for a new constitution to be in place for the December 2002 election, the CKRC travelled the country in late 2001 and early 2002 to gather Kenyans' views about what they wanted in a constitution. Individuals and civil society groups participated actively in the process, but politicians and political parties contributed minimally, either because they saw little chance of a new constitution or little need for genuine reform (Cottrell and Ghai 2007). The result of these consultations was a report and draft constitution presented by the commission in September 2002. Per the requirements of the Constitution of Kenya Review Act, the CKRC draft was to be presented to a national conference for consideration. Before that conference was organised, however, the country held another national election that would significantly alter the political climate for subsequent negotiations.

Moi's commitment to step down in 2002, as required by a constitutional amendment, left an open presidential field that was eventually narrowed to a two-man race. In early 2002, recognising the need for an opposition coalition, three unsuccessful presidential candidates from the previous election joined forces. Mwai Kibaki of the Democratic Party, Michael Wamalwa of FORD-Kenya, and Charity Ngilu of the National Party of Kenya, along with 11 smaller opposition parties, created the National Alliance of Kenya (NAK). Meanwhile, KANU politicians and their allies were jockeying for position to become Moi's successor. In July 2002, Moi selected Uhuru Kenyatta, son of Kenya's first president and a relative newcomer to politics, as the party's candidate. This move prompted presidential hopeful Raila Odinga to end his brief alliance with the ruling party and, along with several KANU defectors, to join the lesser-known Liberal Democratic Party (LDP). In October 2002, in an effort to form a united front against KANU, the NAK and the LDP entered into a memorandum of understanding (MOU) that established the National Rainbow Coalition (NARC).

This MOU was to become the subject of significant controversy after the election, in part because its details were never made public. On the surface, the NARC strategy included agreements to field one candidate in each constituency, with Kibaki as the nominee for president, and a promise to push through a new constitution within the first 100 days in office. NAK and LDP would each get a share of cabinet positions, though the percentages were unclear. The deal also allegedly included agreements that Odinga would become the prime minister under a new constitution,<sup>9</sup> and that Kibaki would serve only one term as president (Brown 2004). Regardless of the MOU terms and controversies to follow, at the time NARC represented a formidable coalition in Kenya's complicated ethnic politics, bringing together four of the five largest ethnic groups through the leadership of Kibaki (Kikuyu), Odinga (Luo), Wamalwa (Luhya), and Ngilu (Kamba). With the opposition finally united behind a single presidential candidate and Kenyans anxious for change, the December 2002 elections produced a decisive NARC victory and Kibaki was sworn in as the country's third president.<sup>10</sup>

In a climate of 'post-transition euphoria' (Wolf et al. 2004),<sup>11</sup> the National Constitutional Conference (NCC) began deliberating at the Bomas of Kenya near

Nairobi in April 2003. The 629 participants included the CKRC commissioners (without voting power), all members of parliament, three delegates from each district, and representatives of political parties and civil society. Over a period of months and three separate sessions, NCC delegates debated each chapter of the CKRC draft and made significant changes, with groups negotiating provisions to protect their own interests. Although there was widespread agreement on key principles (separation of powers, checks and balances, bill of rights, devolution of power), there was heated debate over every detail of the structures and processes to achieve these goals.

It was the issue of executive power that ultimately tore apart the conference, planting the seeds for the subsequent 'yes' and 'no' camps. Before the 2002 election, members of the NARC coalition were unanimous in their desire to reduce presidential powers. Once in office, a split emerged between NAK (led by Kibaki) and LDP (led by Odinga), with the former advocating an executive president and the latter pushing for a parliamentary system. Each side had strong personal incentives; the new president wanted to hold onto executive powers and the presumed prime minister wanted to secure some himself. NARC was in trouble outside of Bomas as well, with the LDP complaining that they had been denied the cabinet positions they had been promised in favour of Kibaki's inner circle (the so-called Mt. Kenya Mafia).<sup>12</sup> In early 2004, when the NCC draft included an executive prime minister, NAK delegates walked out of the conference and called for parliament to amend the document. In 'an eruption of people power' (Cottrell and Ghai 2007, 12), the 'Bomas draft' passed easily in their absence.

After another delay pending related court cases, the Bomas draft was presented to the Attorney General to table in parliament. The initial legislation outlining the constitutional review process had stated that parliament could not change the document, but members of the new parliament elected in 2002 passed an amendment known as the Consensus Act allowing them to make changes. (The first version required 65% approval in parliament to change the Bomas draft, but Kibaki refused to sign. A revised Bill requiring a simple majority prompted a boycott by LDP and opposition KANU members, allowing the measure to pass easily.) The law also created a parliamentary committee to iron out the complexities and inconsistencies of the Bomas draft, effectively returning control of the process to politicians.

At a meeting in Naivasha in November 2004, members of parliament identified contentious issues in the proposed constitution and suggested solutions. These ideas were discussed further at a July 2005 retreat in Kilifi to which KANU and LDP did not send representatives, arguing that Kenyans should have an opportunity to vote on the Bomas draft. The Kilifi meeting produced a document from which Attorney General Amos Wako put together the final proposal. The resulting 'Wako draft' was thus different from the earlier Bomas draft in significant ways. Most importantly, it reduced the devolution of powers from a four-tier to a two-tier system,<sup>13</sup> eliminated a proposed senate, and restored full executive powers to the president.

In the end, therefore, the proposed constitution that was presented to the public in August 2005 was already very much a contested document. For more than a decade, Kenyans had been debating who should be involved in writing the new constitution (politicians, civil society, or experts), the extent of reform (enough to create a level playing field or a more fundamental restructuring of power), and how

the final document should be approved (by parliament or by the public). Over that time, politicians, civil society representatives, and individual citizens had developed opinions about the process and staked out positions on the proposal. With the designation of a banana as the ballot symbol for yes and an orange for no, the stage was set for an intense campaign to sway millions of Kenyan voters.

### **Bananas and oranges**

Though campaigning was not supposed to begin until a month before the referendum, leaders on both sides started crisscrossing the country and holding public rallies soon after the date was announced. Politicians quickly aligned themselves into 'yes' and 'no' camps, which seized on the banana and orange ballot symbols to create the full range of campaign materials (T-shirts, posters, hats) in yellow and orange respectively. In September 2005, as the election commission distributed four million copies of the proposed constitution, issues that had been contentious throughout the review process dominated public debate.

The most obvious was executive power. In the Wako draft, the prime minister would be appointed by the president and direct government business in parliament but would not have executive authority. Supporters of the proposal, including Kibaki, argued that executive powers should rest with the directly elected president, not an indirectly elected prime minister. They also highlighted new requirements that all senior presidential appointments, including the prime minister, be confirmed by parliament. Opponents such as Raila Odinga wanted an executive prime minister as a check against the president and were concerned that only the first two choices for prime minister would be subject to parliamentary approval; after that, the president could appoint any member of parliament. Orange-no campaigners also argued that the proposed 75% threshold required to remove the president through impeachment was too high.

Opponents criticised the Wako draft as well for failing to sufficiently devolve the powers of government to subnational levels. There was general agreement about the need for devolution, but the controversy came over questions of how much and to which levels. The Wako draft provided for government functions to be divided between the national and district levels, eliminating existing provincial administrations. Banana-yes campaigners argued that this two-level system would be cost-effective, ensure equitable distribution of resources, and provide ample opportunity for local decision-making. The Orange-no team saw the provision as merely a decentralisation of functions that would fail to achieve the aims of devolution. They were also upset about the elimination from the Bomas draft of a proposed senate whose responsibility would have been to represent the devolved levels of government.

In addition to these ongoing concerns, Kenyans debated other provisions in the draft constitution that can be mentioned only briefly here. Although both sides agreed on the need to ensure diverse representation in parliament, they disagreed over how to achieve the requirement that one third of members be women. The mechanism offered in the Wako draft was post-election nominations, making it impossible to predict exactly how many people would be in parliament. The draft also allowed for the creation of Christian and Hindu courts to parallel existing Kadhis courts for Muslims. Critics pointed out the difficulties of implementing that provision, especially with so many Christian denominations, although Orange



campaigners rarely highlighted this issue for fear of alienating any group. Finally, land is always important to Kenyans. The proposal provided for the creation of a national commission to administer land, and outlawed gender discrimination in inheritance; opponents argued that these provisions would reduce the ability of communities to control their own land, especially in pastoral areas.

Early on, in public discourse, consensus emerged among the Banana and Orange camps that roughly 80% of the provisions of the proposed constitution were good and 20% were contentious. Banana-yes supporters lobbied for Kenyans to approve the draft, which was seen as better than the existing constitution, and parliament would correct the flaws later through amendments. Orange-no campaigners focused instead on the problem areas and argued that the new constitution would be virtually impossible to amend. On the basis of the document itself, therefore, the question for Kenyans was whether to approve a flawed but arguably improved constitution or live under the old one until a better draft could be developed.

Beyond the specifics of the document, however, much of the debate was really about three Ps: process, politics, and positioning. First, Kenyans argued over the process that produced the Wako draft. After years of preparations and months of negotiations, the Bomas draft was seen as a 'people-driven' constitution. The document was a bit unwieldy in parts, but was the result of a consultative process with input from all sections of society. The subsequent decision by parliament to alter the document before holding a referendum essentially undermined the constitution-making power of the people. As Kenyans watched this process unfold, many were angry about the way in which Kibaki and his allies hijacked the Bomas draft and unilaterally wrote a new constitution that served their own interests. The Orange-no team, led by rebel LDP cabinet members, seized on this theme as a focus of their referendum campaign.

Second, the referendum was about politics among personalities fighting over lingering issues from the 2002 election. Due to vague language in the MOU that created NARC, there was disagreement over whether LDP was entitled to 50% of cabinet positions, including some more senior posts, which they did not get. The referendum thus became a perfect opportunity for LDP members to protest their perceived marginalisation within the NARC government. Raila Odinga was particularly disgruntled; he had presumably been promised the anticipated post of prime minister (with executive powers) in exchange for delivering the votes necessary for the NARC victory. With Kibaki clearly intent on reducing the prime minister to little more than an agent of the president, Odinga and his supporters led the charge for a 'no' vote.

Third, the referendum involved luminaries on both sides positioning themselves for the 2007 elections. Media coverage and massive rallies surrounding this historic process allowed politicians such as Orange supporters and then-government ministers Raila Odinga and Kalonzo Musyoka to obtain national exposure and gain followers beyond their home regions in advance of presidential campaigns just two years down the road. Given these underlying dynamics and the history of political manoeuvring surrounding the reform process, Kenyans perceived the referendum as a struggle among power-hungry politicians rather than a genuine effort to produce a workable constitution for the country.

For three months, Kenyan politics focused on nothing but the referendum. Parliament adjourned in October to allow members to campaign, and a divided

cabinet stopped meeting. Seeking to drum up support for the proposed constitution, President Kibaki hosted a series of delegations at State House; his favours included issuing land titles to displaced squatters (despite a high court injunction), handing over Amboseli National Park to a local council, creating additional districts, elevating a technical school to university status, doubling salaries of local chiefs, and distributing relief food in areas at risk of famine.<sup>14</sup> Several campaign rallies turned violent and nine people were killed when police intervened, prompting a high-level blame game. In late October, when Orange-no campaigners argued that the proposed constitution would be so difficult to amend that it would invite coups d'état, Kibaki condemned the statement as incendiary. With tensions rising, Kenyans worried about the possibility of escalating violence as the referendum approached.

On a more constructive note, media groups organised several debates during the campaign, including two that were broadcast by all television and radio stations in the country. The first such 'Big Debate' was criticised for the pro-Banana bias of its moderator and personal attacks among participants, but the second received high praise for balancing both sides and focusing on the most contentious issues. In the midst of the mudslinging between Bananas and Oranges, a small group of politicians calling themselves the 'Middle Ground Group' pushed to postpone the referendum until compromises could be made.<sup>15</sup> Though the effort quickly fizzled, a court case challenging the legality of the scheduled referendum worked through the legal system. On 15 November 2005, with Banana and Orange leaders present, the High Court ruled that the process had been lawful and that the authority of the people is paramount in creating a new constitution. Thus, the voters would have their say in Kenya's first-ever referendum.

The referendum weekend itself came off without major incident. On Saturday, just two days before the vote, the two campaigns officially ended with parallel rallies less than a mile apart in downtown Nairobi. Cautious business owners closed stores and boarded up windows, but the events remained peaceful and city residents breathed a collective sigh of relief. The voting process on Monday was similarly uneventful, with Kenyans throughout the country standing in long lines to exercise their democratic right. When the Electoral Commission of Kenya announced the Orange-no victory on Tuesday afternoon, both sides quickly accepted the verdict of the people. A humiliated President Kibaki went on live television to concede defeat and call on Kenyans to come together, while jubilant leaders of the Orange-no campaign pledged to continue their push for constitutional reform.

### **Ethnic politics and beyond**

The final results of the 2005 constitutional referendum in Kenya were decisive, with 58% voting against the Wako draft.<sup>16</sup> After 15 years of calling for reform and five years of drafting a document, why did Kenyans vote against the proposed constitution? Several factors were important, and most had little to do with the details of the document itself.

The referendum results cannot be understood without considering underlying ethnic dynamics in Kenya. Indeed, 'ethnicity is a fundamental force in Kenyan politics, a fault line along which elites mobiliz[e] and compet[e] for power' (Ndegwa 1997, 612). Since the colonial period, as many have shown (including Anderson 2005; Berman 1998; Klopp 2002; Orvis 2001; Steeves 2006; Throup and Hornsby

1998), politicians have appealed to ethnic solidarity to foster loyalty and generate support; people also expect ethnic ‘big men’ to deliver the goods (roads, schools and so on) in their areas. The politicisation of ethnic identities is thus perpetuated both from above and below. Even so, it is important to distinguish between what Lonsdale (1994) calls ‘political tribalism’ (the instrumental use of ethnic identities) and ‘moral ethnicity’ (cultural ties that create a sense of community). In addition, ethnic identities are constantly changing, contested, and renegotiated in terms of prevailing political dynamics and institutions (Berman 1998; Lynch 2006a; Posner 2005). The current analysis focuses on Kenyan ethnic identities as they were constituted at the time of the referendum, when politicians sought to sway whole communities to one side or another, though these identities clearly have long and contested histories. At the same time, though, the power of ethnicity should not be exaggerated; as explored later, other factors also played a role in how individual Kenyans voted.

In the 2005 referendum, Kenyans continued the pattern of voting along ethnic lines. Even before the polling, it was clear that the Kikuyu, Embu, and Meru (collectively, GEMA)<sup>17</sup> ethnic groups, representing approximately 28% of the population, would vote for the proposal. The president and most other politicians from the area were on the Banana team, and many held prominent posts in Kibaki’s government. As the largest ethnic bloc in the country, they would presumably benefit from a constitution in which power was checked but not dispersed too widely. These pre-election assumptions were confirmed at the polls. In Central Province, which is dominated by members of Kibaki’s own Kikuyu ethnic group, 93% of voters chose ‘yes’. Neighbouring constituencies in Eastern Province inhabited by the smaller Meru and Embu communities also voted overwhelmingly in favour of the Wako draft.

On the other side, it was clear before the referendum that ‘no’ would prevail among the Luo (roughly 13% of the population), based largely on the popularity of the Orange headliner Raila Odinga. The Kalenjin (11%) and some smaller neighbouring communities<sup>18</sup> also seemed likely to heed the advice of former President Moi, who spoke out against the Wako draft and reportedly funded the Orange campaign. These groups worried about Kikuyu domination under a proposed constitution that did not significantly divide powers, and wanted a shot at other posts (including the position of prime minister that Odinga presumably had been promised). They also accused Kibaki of surrounding himself with ethnic cronies. In the final tally, Orange-no garnered 98% of the vote in the Luo-dominated constituencies of Nyanza Province<sup>19</sup> and more than 75% in Moi’s Rift Valley Province backyard, but wide margins in many other provinces suggested a broad wave of sentiment against the measure.

As in past elections, the swing votes came from the Luhya (13% of the population), Kamba (11%), Kisii (6%), and coastal areas (Mijikenda and other groups), with all leaning ‘no’ in the end. In Luhya-dominated Western Province, nearly 60% voted against the proposed constitution. The exception was Bungoma district, home to cabinet minister and Banana leader Musikari Kombo, where four out of five voted ‘yes’. Orange won more than 85% of votes in Ukambani,<sup>20</sup> despite a split between the two most prominent local personalities. The health minister and former presidential candidate Charity Ngilu was on the Banana team, while environment minister and future presidential candidate Kalonzo Musyoka was a leader of the Orange campaign. Local Orange supporters called on the Kamba to

vote with one voice to prove their reliability in future political coalitions, which was perhaps one reason for the lopsided results. In the Kisii districts of Nyanza Province, 58% of voters said 'no', despite the efforts of Energy Minister Simeon Nyachae. In Coast Province, where religion forms a bond among smaller ethnic groups, Muslim leaders spoke out strongly against the Wako draft; roughly 80% of voters there rejected the document.

Through the lens of Kenya's ethnic politics, therefore, the referendum results were not surprising. Out of 210 constituencies nationwide, the referendum was competitive (that is, a margin of less than 5%) in just ten. In nearly one-third of the constituencies, the winning side (Orange or Banana) received at least 90% of the vote. Clearly, the support bases for each side were highly concentrated geographically, indicating frequent voting in ethnic blocs. In addition, voter turnout was highest in Central and Rift Valley provinces,<sup>21</sup> suggesting that the Banana and Orange camps respectively focused mobilisation efforts in their strongholds. Politics after the referendum reinforced this polarisation along ethnic lines, and there was a growing sense of an irreconcilable divide between Kikuyu (with Meru and Embu) and the rest of the country.<sup>22</sup>

But the referendum was not simply about Kenyans voting in ethnic blocs; the reality was more complex. There were splits among elites within each community and the campaign teams for each side had broad ethnic representation. The Orange campaign was led by politicians from across the country, including cabinet ministers Raila Odinga (Luo) and Kalonzo Musyoka (Kamba), opposition leader Uhuru Kenyatta (Kikuyu), and former Vice-President Musalia Mudavadi (Luhya). Similarly, the Banana team included Kibaki (Kikuyu), Vice-President Moody Awori (Luhya), and cabinet ministers Charity Ngilu (Kamba) and Raphael Tuju (Luo). Two prominent politicians (Tuju and Kenyatta) crossed lines and went against the clear majority sentiment within their communities. The continuation of the Banana Orange divide after the referendum suggested a possible realignment of political parties into two multi-ethnic blocs, but subsequent infighting within the Orange Democratic Movement (ODM)<sup>23</sup> and NARC was a reminder of the potential for splintering into ethno-regional parts.

There were also signs of change from below. In several communities, voters went against the recommendations of their presumed ethnic leaders. Nearly three out of five Kisii voters in Nyanza Province uncharacteristically went against the advice of local 'big man' Simeon Nyachae and rejected the Wako draft. In Western Province, dominated by the Luhya ethnic group, Vice-President Awori and FORD-Kenya leaders campaigned hard for a 'yes' vote but received only 40%.<sup>24</sup> Countrywide, six ministers in the Banana camp lost in their own constituencies. Kenyans also looked beyond the favours doled out by Kibaki in the weeks before the referendum, often happily accepting the gifts but voting against the constitution anyway. The increasing independence of voters suggested that politicians would have to listen to their constituents in the future. As aspiring leaders are forced to compete for support within their ethnic communities, Kenyans have the opportunity to define for themselves 'what the unit of political loyalty is and how its interests are best served' (Orvis 2001, 12).

For many Kenyans, the referendum actually represented a protest against the Kibaki government for its practice of politics as usual. After sweeping into power as a multi-ethnic coalition in 2002, NARC's honeymoon was short-lived

(Holmquist 2005; Logan et al. 2007; Murunga and Nasong'o 2006). High-profile education and public transportation reforms maintained support for a while, but in a subsequent cabinet reshuffle, Kibaki elevated the so-called Mount Kenya Mafia while sidelining LDP members of the NARC coalition. Corruption scandals involving senior members of government confirmed the growing suspicion that this leader was no different from his predecessors.<sup>25</sup> Thus, few were surprised when Kibaki started passing out political favours in exchange for support of the proposed constitution. The president adamantly defended the use of public funds for the Banana-yes campaign despite the opposition of donors, civil society, and, according to an October poll,<sup>26</sup> the majority of Kenyans. The referendum provided a unique opportunity for voters to signal their disillusionment with Kibaki's government. Ironically, therefore, continued voting along ethnic lines was at least in part the result of people rejecting ethnic politics as usual.<sup>27</sup>

Thus, ethnicity was clearly an important factor in the referendum, but it was not the only factor driving Kenyans to reject the proposed constitution. An exclusive focus on ethnicity overlooks other underlying dynamics and diminishes the agency of voters in the process. Voting patterns, media reports, and conversations at the time suggest that the referendum was about much more than regional coalition building and the ethnic balance of power.<sup>28</sup>

First, throughout the campaign, public debates focused much less on ethnicity than they did on the process surrounding the drafting of the proposed constitution and the provisions of the document itself. Many Kenyans resented the way in which the 'people-driven' Bomas draft had been unilaterally rewritten by Kibaki's allies and in his interest. The resulting Wako draft bore little resemblance to the proposal that came out of the lengthy constitutional review process, especially in contentious areas. In a national poll conducted in October 2005, 40% said the Bomas draft best reflected the views of Kenyans, as compared to just 24% for the Wako draft (*Daily Nation*, 22 October 2005). Orange campaigners and commentators alike highlighted the many weaknesses of the proposed constitution, from the vague notion of Hindu courts to the fact that it would require more than 50 Acts of parliament before becoming operational. Even supporters of the document acknowledged that 20% of it was flawed. Although the Bomas draft was not presented to Kenyans as an option, many hoped that their rejection of the Wako draft would force politicians back into negotiations for a better constitution.

Another factor in the defeat of the proposal was that the Orange team was better organised than their Banana counterparts. They started campaigning as soon as the referendum date was announced and had a unified strategy throughout the country. The fact that the Orange campaign was led by defectors from Kibaki's own cabinet attracted considerable media attention and established them as rebels with a cause. Up against a Banana team that brazenly used public funds, Orange reportedly got contributions from former President Moi and non-citizen landowners worried about provisions that threatened their land tenure. Of course, the Orange effort was made easier by the widespread frustration among Kenyans over the process by which the Bomas draft had been altered and the weaknesses in the document. In contrast, as the Banana group admitted after the referendum, their side was less coherent and consistently one step behind. They pulled together later in the campaign and were strong in the second 'Big Debate' just days before the vote, but it was too late; Kenyans had already made their decisions.

Finally, socio-economic factors influenced the referendum results. The Orange camp in particular sought to appeal to the masses of people who have not benefited from recent economic growth in Kenya by arguing that wealth has failed to trickle down because of the concentration of power. Under this logic, by keeping executive power in the hands of the president, the proposed constitution would do little to change the plight of the poor. Although there is a strong correlation between socio-economic status and ethnicity in Kenya, Kimenyi and Shughart (2006) present a quantitative model of the 2005 referendum results by constituency which demonstrates that economic factors played a role even when controlling for ethnicity. Disadvantaged groups were more likely to vote against the constitution regardless of their ethnic affiliation. Coupled with their statistical finding that ethnicity was also important, the authors conclude that 'voters who have benefited from the concentration of political power were significantly more likely to support a constitution that preserved the status quo' (Kimenyi and Shughart 2006, 18).

In the end, Kenyans rejected the proposed constitution for a variety of reasons. Ethnic solidarity seemed particularly important among the Kikuyu and Luo, who voted overwhelming for 'yes' and 'no' respectively. Despite a split among elites, the Kamba embraced a similar approach and threw their support to Orange. Other ethnic communities like the Luhya and Kisii were more divided and voters had a choice, in some cases rejecting the views of their presumed leaders. Beyond ethnicity, the rejection of the Wako draft also was due to widespread disillusionment with the Kibaki government, the mobilisation efforts of the Orange campaign, and the unbalanced nature of recent economic growth. In the aftermath of the referendum, these factors would continue to influence the Kenyan political landscape.

### **Post-referendum fireworks and the 2007 election**

The day after the referendum, President Kibaki conceded defeat. Although disappointed in the results, he lost nothing in losing the vote. By rejecting the Wako draft, Kenyans left Kibaki with even stronger powers under the existing 1963 constitution, and he quickly exercised them. He sacked his entire cabinet and prorogued parliament until March 2006, avoiding a possible vote of no confidence. The new cabinet that was announced two weeks later dropped the seven rebel ministers who led the victorious Orange campaign and one Kibaki ally accused of corruption, but otherwise was quite similar to the old one. Winners in the new cabinet included several MPs rewarded for their loyalty to the Banana side.<sup>29</sup> More than twenty ministers and assistant ministers initially declined their appointments,<sup>30</sup> mainly because they felt their parties should get more posts.<sup>31</sup> Subsequent negotiations forced a weakened Kibaki to expand his cabinet to 34 ministers and 49 assistant ministers, one of the largest cabinets in post-independence history.<sup>32</sup>

As the cabinet was sworn in, Kibaki faced one of the biggest challenges of his political career. The coalition that brought him to power in 2002 was dead. The split with LDP had been coming for a while, but the referendum cemented the divide. And LDP members were happy to be kept off the new cabinet as it allowed them to engage in opposition politics. Indeed, in the coming months, Orange leaders established ODM-Kenya (though they did not dissolve the component parts), and initially agreed to field a single candidate in the 2007 presidential elections. The group ran into problems, though, when its many presidential hopefuls could not

agree on a selection process. After extensive wrangling, KANU dropped out, and the rest of the group split into ODM (led by Raila Odinga) and ODM-Kenya (led by Kalonza Musyoka), with each fielding its own candidate for president.

Meanwhile, Kibaki continued to encounter problems. In early 2006, the media revealed new information about two corruption scandals involving the Moi and Kibaki governments. The resulting public clamour forced the resignation of four Kibaki allies, including three cabinet ministers. Weeks later, masked government agents raided the *Standard* newspaper and its sister television station. The government claimed that a story from the media house threatened national security. Civil society, reporters, and foreign diplomats were united in their condemnation of the operation. A subsequent scandal involving two Armenian brothers and a prominent NARC activist bordered on the absurd.<sup>33</sup> When Kibaki supporters established NARC-Kenya, the few remaining partners from the original NARC sought other alliances. Kibaki's decision to seek re-election in 2007 prompted outrage among former allies who vowed that he had promised to serve only one term. Eventually, several parties (including NARC-Kenya and KANU) formed the Party of National Unity (PNU) and nominated Kibaki as their presidential candidate, setting the stage for a three-way race among the most prominent figures of the referendum campaigns.

With attention focused on scandals and political intrigue, the likelihood of constitutional reform declined. Within months of the referendum, at least six efforts to jump-start the constitutional review process were launched, including the government-appointed Committee of Eminent Persons, chaired by Ambassador Bethwell Kiplagat. The group recommended dialogue among political parties and civil society, and advised that Kibaki should spearhead the process. In late 2006, though, opposition politicians walked out of the resulting Multi-Sectoral Forum when they could not agree with government representatives on the extent of reforms. Kibaki provoked more controversy in January 2007, when he unilaterally appointed nine new members to the Electoral Commission of Kenya.<sup>34</sup> Shortly thereafter, opposition lawmakers and civil society leaders formed *Muungano wa Katiba Mpya* (Union for a New Constitution) to lobby for minimal reforms before the December elections. The government largely ignored their demands, however, and politicians soon turned to more pressing concerns: campaigning for the election.

For months, public opinion polls showed a tight presidential race between Odinga (ODM) and the incumbent Kibaki (PNU), with Musyoka (ODM-Kenya) a distant third. When Kenyans finally voted on 27 December 2007, they turned out in record numbers.<sup>35</sup> Election day went relatively smoothly, but delays and irregularities in the subsequent vote counting process soon generated concern and tension. Initial tallies gathered from polling stations showed Odinga in the lead, but the results reported by the Electoral Commission of Kenya from Kibaki's strongholds seemed to shift totals in his favour.<sup>36</sup> On December 30, after the commission had stopped announcing piecemeal results for nearly 24 hours, Kibaki was suddenly declared the winner and hastily sworn in for a second term. Within hours, protests erupted throughout the country.

In the two months that followed, more than 1,000 Kenyans were killed and 500,000 displaced. Although sparked by the controversial election results, the violence grew out of long-standing economic and political tensions among various groups, and thus took on an ethnic dimension. Lingering land conflicts led to brutal

attacks on Kikuyu in the Rift Valley, and to retribution massacres of Luo and Kalenjin in Kikuyu-dominated areas. As the international spotlight focused on Kenya, pressure mounted on Kibaki and Odinga to find a solution to the crisis. A series of international mediators initially found little willingness to negotiate. Eventually, though, the former UN Secretary-General Kofi Annan chaired talks that led to a power sharing agreement at the end of February 2008. Among other measures, the deal included the creation of the post of prime minister, to be filled by Raila Odinga,<sup>37</sup> and a commitment to negotiate a new constitution within a year. After nearly two decades of deliberation, debate, and contention, therefore, the roller coaster ride of constitutional reform in Kenya would continue.

### **Implications for democracy**

On 21 November 2005, Kenyans voted in their first-ever national referendum on a proposed new constitution. The process leading to that historic event began with the transition to multiparty competition in the early 1990s, and continued through the elections of 1992 and 1997, the formation of the Constitution of Kenya Review Commission, the victory of a new political coalition in 2002, a National Constitutional Conference in 2003–4, and a series of meetings among politicians that created the Wako draft. After years of discussing, debating, and drafting, Kenyan voters rejected the proposed constitution by a 16-point margin. The referendum results were due in large part to strategic calculations based on the politicisation of ethnic identities, but also reflected widespread disappointment with the policies and politics of President Kibaki's government. After the referendum, the divisions between the Banana and Orange camps deepened, even as tensions emerged within each bloc.

The events surrounding the 2005 constitutional referendum generated much speculation about the process of democratic consolidation in Kenya. In the immediate aftermath of the referendum, politicians praised Kenyans for their conduct during the vote and academics argued that it was a sign of 'maturing' democracy. Concerns lingered, however, over the divisive nature of the outcome and the political uncertainty that followed. Even with the continued pattern of politicians appealing to ethnic solidarity and people voting along ethnic lines (neither of which are necessarily incompatible with democracy), there were several signs that democracy was becoming 'the only game in town' (Linz and Stepan 1996).

First, the freedom of expression that was allowed throughout the process represented a significant change from earlier periods in Kenyan history. Citizens openly debated the pros and cons of the proposed constitution without fear of being punished. Kibaki even tolerated dissent within his own cabinet, at least until after the voting. On the whole, media outlets did a commendable job covering the campaign, from regional rallies to State House promises and spending patterns on both sides. Reporters challenged politicians to back up their claims with facts, and the debates provided a national forum for both sides to articulate their positions. One exception to this pattern was a Kalenjin-language radio station that was shut down by the government just before the referendum for inciting ethnic animosity. Otherwise, the climate of open debate and discussion surrounding the proposed constitution was a positive sign.<sup>38</sup>



Second, in contrast to earlier election-related turmoil in Kenya, the referendum campaigns and polling went relatively smoothly. A few violent incidents early in the campaigns led to nine deaths, but the resulting fear of an escalation of violence may have served to rein in some of the more extreme advocates on both sides. Religious communities prayed daily for calm, and politicians from both sides called for cooler heads. In the end, the referendum itself was peaceful and the balloting was open and fair. At polling stations around Kenya, police chatted under trees while voters waited their turn in line. Observers were welcomed into voting sites and the counting of ballots was shown live on television. Even after the referendum, when the president sacked his cabinet and prorogued parliament, opponents expressed their discontent through newspaper columns and radio talk shows rather than violence. Kenyans repeatedly asserted that, despite the political uncertainty, there would be no conflict in the country; unfortunately, these assurances would be proven tragically wrong just two years later.

Third, it became clear through the referendum and its immediate aftermath that Kenyans expected political differences in Kenya to be resolved through the democratic process. Twice, democracy had worked. In 2002 and 2005, Kenyans freely expressed their wishes through the ballot box and rejected the choice of the sitting government; in both cases, the president (first Moi, then Kibaki) respected the results. Just because voting was largely along ethnic lines does not mean the outcome was undemocratic. In the perennial Kenyan struggle between the people and the politicians, the people felt that they had won this round and looked forward to the next opportunity to exercise their democratic right in 2007. As politicians positioned themselves for that election, some stars were rising, while others were shimmering less brightly, but things change quickly in politics. The point is that people seemed to have accepted the rules of the game, which most agree is a necessary step toward democratic consolidation.

Despite its flaws and controversies, therefore, the constitutional referendum in Kenya raised hopes about the consolidation of democracy there. Kenyans participated in wide-ranging debates about the structures of power, and ultimately had the opportunity to reject the proposed constitution at the polls. In other contexts, it has been found that negotiations surrounding the drafting of new constitutions can help consolidate democratic institutions (Kornblith 1991; Stanger 2004). In addition, Lindberg (2006) argues that the very process of holding competitive elections in Africa improves the quality of democracy. The Kenyan case suggests that these findings are relevant for referendums as well, with the process of voting giving citizens more democratic 'practice'. In this sense, then, the outcome of the referendum was less important than the fact that citizens voted and the results were respected.<sup>39</sup> The procedural success of the referendum thus generated optimism about the future of democracy in Kenya.

For this reason, the controversy surrounding the 2007 presidential election was all the more frustrating for many Kenyans. The 2002 election and the 2005 referendum fostered a sense that Kenya had turned a corner and that democracy was there to stay. These polls also created the (false) impression that the country could become a liberal democracy without changing fundamentally the way power was organised, and particularly the concentration of authority in the 'imperial presidency'. But in December 2007, when an electoral commission whose members were appointed unilaterally by the president announced his re-election, despite clear

irregularities in the vote counting process, these hopes came crashing down. Disappointment and anger fuelled the violence that followed. As government and opposition politicians were forced to the negotiating table, their talks soon focused on the need to share power and to write a new constitution. Indeed, until political power is clearly restructured through a new constitutional order, it is unlikely that the longstanding desire of the Kenyan people for democracy will be realised. And thus, the saga of constitutional reform in Kenya continues.

## Notes

1. For a detailed account of the politics underlying constitutional changes in the 1960s, see Okoth-Ogendo (1972).
2. By the 1990s, President Moi (a Kalenjin) had managed to reconstitute his former KADU alliance of smaller ethnic groups in KANU; meanwhile, leading Kikuyu, Luo, and Luhya politicians had started their own opposition parties. Thus, having opposed *majimboism* in the earlier period, KANU was its leading proponent in the 1990s.
3. For an examination of this process during the 1960s, see Okoth-Ogendo (1972).
4. Cliffe (2006) describes the constitutional debates as a 'three-way struggle' among the government, opposition politicians, and civil society organisations.
5. As Cottrell and Ghai (2007, 6) mention, 'people-driven' was 'a phrase that inspired many, though prompting ridicule from a few'.
6. The Parliamentary Select Committee formed to spearhead the review process was chaired by then-presidential ally Raila Odinga, a Luo politician who would eventually become a leading figure in the 'no' campaign.
7. Named after the building where it was formed.
8. Several opposition figures and civil society representatives still opposed the merger of the two processes, in part because they feared the politicians would dominate; their concern would turn out to be quite prescient.
9. Odinga's support was crucial to the success of the NARC coalition because of his influence among Luo voters. Most believe Kibaki would not have won the election without Odinga's support.
10. For more on the opposition victory in 2002, see Ndegwa (2003) and Brown (2004).
11. In the first Afrobarometer survey conducted just months after the election, Kenyans offered strongly positive assessments of government performance, the quality of democracy, and national economic conditions. The survey also found overwhelming levels of support for constitutional reform to strengthen democracy in the country (Wolf et al. 2004).
12. Kibaki's most loyal advisors are primarily from the Kikuyu, Embu and Meru communities near Mt. Kenya.
13. The Bomas draft had proposed four levels of government (national, regional, district, and locational); the Wako draft proposed just two (national and district).
14. Such favours were reported by the media almost every day in October 2005.
15. Like a previous 'Middle Ground Group' that tried unsuccessfully to unite opposition candidates against Moi in 1992 and 1997, the 2005 group included Nobel Laureate Wangari Maathai.
16. The referendum results were reported by the electoral commission of Kenya both on its website and in the *Daily Nation* newspaper.
17. These groups were culturally and politically affiliated through the Gikuyu, Embu, Meru Association (GEMA).
18. The so-called KAMATUSA include the Kalenjin, Maasai, Turkana, and Samburu.
19. All constituencies in the province except 10 that are home to the ethnic Kisii community.
20. This term refers to the Kamba-dominated constituencies in the southern part of Eastern Province.
21. National voter turnout was 53%, lower than the 1997 and 2002 elections. Reasons for the low turnout include ineffective voter education, limited relevance to average Kenyans, and a general frustration with politics.

22. This split would become even more apparent in the aftermath of the controversial 2007 presidential elections.
23. The Orange campaigners adopted this name after the referendum.
24. This suggested that no-campaigner Mudavadi continued to hold some sway in Western Province, despite having lost his parliamentary seat there (and his vice-presidential bid as Kenyatta's running mate) in 2002.
25. The second Afrobarometer survey found that satisfaction with 'the way democracy works in Kenya' dropped to 53% in 2005 from 79% just two years earlier. Assessments of government performance in the fight against corruption in particular plummeted to just 40% approval from 85% in 2003 (Logan et al. 2007).
26. The results of the Steadman Group poll were reported in the *Daily Nation*, 22 October 2005.
27. While many claimed to reject this approach, the GEMA groups clearly endorsed a practice that benefited them.
28. In the months surrounding the referendum, the authors got caught up in discussions about the proposed constitution everywhere they went. One author's fluency in Kiswahili allowed for conversations with people from a range of socio-economic and educational backgrounds. Although ad hoc and informal, these interviews painted a broad picture of the factors influencing the results. The authors are grateful to many students, colleagues, and acquaintances who offered their views.
29. Martha Karua was elevated from Minister of Water to Minister of Justice and Constitutional Affairs, making her an important player in any subsequent review process. Raphael Tuju was given the foreign affairs portfolio after breaking with voters in his Luo constituency.
30. Attention focused especially on Minister of Health Charity Ngilu and Minister of Local Government Musikari Kombo, whose parties were the other major components of the original NAK coalition (along with Kibaki's) that had joined with LDP to form NARC. They felt they should have been consulted more extensively and that their parties should get more senior posts. Kombo was especially interested in the vice-presidency, a position that his party held until Michael Wamalwa's death in 2003.
31. An exception was the Nobel Peace Prize winner Wangari Maathai, who refused to resume her position as assistant environment minister until Kibaki sought to build bridges with the Orange campaign leaders.
32. As leader of the opposition under Moi, Kibaki stated that a cabinet need not have more than 15 ministers.
33. Artur Magaryan and Artur Sargasyan first captured headlines in March 2006, when government officials denied allegations that they were involved in the raid on the *Standard* newspaper. The situation became stranger when one of the men confessed his love for Winnie Wangui Mwai, a young woman whose mother is a close personal friend (and rumoured second wife) of President Kibaki. After an incident at Nairobi airport during which the men brandished guns in a secure area, they were deported (rather than being arrested and charged). A raid on their home found weapons, government licence plates, and other suspicious items. In 2007, a parliamentary report concluded that the two men enjoyed high-level government protection during their time in Kenya.
34. Although the move was within the president's existing constitutional powers, critics noted that Kibaki had been a strong proponent of the 1997 IPPG agreement that required then-President Moi to appoint several opposition nominees to the commission.
35. Observers estimated that the turnout was roughly 70%.
36. The mismatch between tallies announced at polling places and final results reported by the commission contributed to the conclusion by international observers that the election was not free and fair.
37. After the agreement was signed, as parliament moved to enact enabling legislation, there continued to be tense debate about what executive powers the new prime minister would have.
38. For this reason, Kenyans were particularly concerned about the subsequent raid on the *Standard* in March 2006.

39. Scranton (1993) offers a similar conclusion about a 1992 referendum in Panama in which voters rejected a constitutional reform package.

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