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Rafael Macia

Indiana University Maurer School of Law (Student), rmacia@indiana.edu

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The Voice of the People: Public Participation in the African Continent
by Rafael Macia Briedis*

ABSTRACT

Public participation is becoming a more common characteristic of constitutional drafting processes around the world, and Africa has not been an exception in this regard. This paper seeks to survey several of the public participation processes undertaken in a number of African nations, in order to examine the methods followed and the effects produced by such processes. For that purpose, I have analyzed the constitutional drafting efforts in South Africa, Uganda, Eritrea, Zimbabwe, Rwanda, Kenya, and Egypt. These processes all show different circumstances and approaches, with variations in terms of their top-down or bottom-up nature, and, more importantly, in terms of the genuineness behind the attempt to educate and consult the public.

Introduction

There has been a growing trend, especially in recent years, to consider public participation an essential aspect of constitutional enactment. Indeed, involvement of the citizenry in the creation of a constitution is often seen as a legitimizing component of the drafting process, and as fostering public understanding of and support for the process itself. This understanding and support is in turn thought to be transmitted to the ensuing product (the constitution).¹ Not everyone agrees with this assessment, though. Some scholars argue that public participation in the design of a constitution may lead to social instability by generating a fight over resources and by bringing forth latent conflictive ethnic identities. Additionally, they contend that public participation will lead to constitutions based on personal, rather than communal, interests, and that it will generate incoherent documents due to lack of agreement. Finally, they argue that public participation does not guarantee that citizens will feel sufficiently incentivized to meaningfully participate.²

The purpose of the present paper is not to resolve the dispute between supporters and detractors of public participation, but rather to provide a comparative review of public participation in different constitutional drafting processes undertaken in the African continent, so that readers may reach their own conclusions. This work was originally intended as a background research

* JD/PhD Candidate at Indiana University Maurer School of Law, and Managing Affiliate at the Center for Constitutional Democracy.

¹ See Zachary Elkins et al., *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361, 362–63, 370 (2008).

² See, e.g., *id.* at 374 (summarizing some of the skeptical views regarding public participation).

for a larger project. Thus, a number of disclaimers are due. First, as a support document, the paper is not a research work properly speaking. The information contained within it has been obtained almost exclusively from secondary sources, with limited variety, and without relying, for the most part, on primary investigation.³ Therefore, it is more appropriate to consider this paper a compendium of synthesized, descriptive information found in other, more specific works, compiled with the intention of making that information more accessible to those interested in African public participation. Second, this paper is not meant to comprise an exhaustive list of all possible public participation processes undertaken in Africa. There may be other constitutional drafting processes that are not covered here and that may nevertheless still be of interest to the reader. However, I believe that the ones actually included in the present work are the most relevant in terms of their significance and of the variety of perspectives they provide. Furthermore, an effort has been made to analyze states from across the African geographical spectrum, from Egypt in the north to South Africa in the south, although the bulk of the analysis is on sub-Saharan nations.

The method followed in the paper is a country by country description of the public participation processes, along with particular conclusions for each country that put their processes in perspective with the rest. These brief analyses will hopefully provide some comparative insight into the problems and benefits of the different processes surveyed. They should also serve to emphasize the fact that specific national circumstances require a contextual approach to public participation. In line with these goals, I have also included in the final part of the paper a series of conclusions addressing the most relevant considerations that can be extracted from the comparative analysis of the cases. Perhaps the most obvious conclusion is that a distinction can be made between top-down and bottom-up participation processes. The top-down approach presents an already-produced draft to the people and attempts to educate (or convince) them about such draft, while perhaps also obtaining their views on some incidental aspects of the document. The bottom-up approach seeks out and includes (to varying degrees) the views of the citizens from the very beginning of the drafting process, in an attempt to make the whole constitution be influenced by those ideas that a majority of the population may share. The country studies below, however, show that there may be circumstances that particularly warrant the choice of either one of these options over the other. In the end, the legitimacy of the process depends more on the good or bad faith intentions behind the educational and consultative programs than on the initiative (elite-driven or popular) in drafting the original document.

Country Studies

³ In this endeavor, I am especially indebted to the book edited by Laurel E. Miller, *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING*, from which I drew a good amount of information, both on the specifics of several public participation processes, and on the actual countries where such a process took place. Even though this book has been used as one of the main sources for the present paper, I have made an effort to draw from different materials, and to contrast all the information with other sources to ensure objectivity. *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* (Laurel E. Miller eds., 2010).

A. South Africa (1997 Constitution)

1. Background

It may be adequate to start off by stating that, regardless of the uniqueness of each of the analyzed countries' public participation processes, South Africa's can be said with little doubt to be the best example of them all in terms of its effectiveness, thoroughness, and final result. Even though not exempt from problems, it was overall a bottom-up process that genuinely sought the people's views, and in which an active effort was made to include the participation of those who would have otherwise been left out. The process exhibited an important display of manpower and resources, and the final product to a certain extent reflected the views expressed by the citizens.

On May 9, 1994, the National Assembly and the Senate sat jointly to form the Constitutional Assembly, tasked with drafting a permanent constitution for the country.⁴ This was only two weeks after the completion of the nation's first democratic elections that marked the end of the Apartheid rule.⁵ The Interim Constitution, which paved the way for drafting the permanent one, had imposed a time frame of two years for the conclusion of that task, and had laid out thirty-four principles that the permanent constitution had to comply with.⁶

In setting forth the specific guidelines for public participation in the drafting of the new constitution, the Constitutional Assembly specified three distinct categories of participants to be taken into account: political formations, civil society organizations (understood to represent the most efficient way of taking minority interests into account), and the broader public.⁷ In order to ensure the participation of these groups, two departments of the Constitutional Assembly were set up. The first was the Community Liaison Department, which focused on the conceptualization and development of the Public Participation Program.⁸ The other was the Media Department, tasked with developing and implementing the media campaign to inform, educate, and stimulate public interest;⁹ this was achieved through conventional media means (television, radio, and print), along with other methods such as the internet, brochures, bulletins, cassettes, videos, posters, and a constitutional newsletter.¹⁰

Additionally, the Constitutional Committee was also formed.¹¹ This coordinative body dealt with content-related issues and reported directly to the Constitutional Assembly. Its mandate was to negotiate the content of the new constitution, and to discuss the reports issued by six

⁴ SYNNOVE SKJELTEN, A PEOPLE'S CONSTITUTION: PUBLIC PARTICIPATION IN THE SOUTH AFRICAN CONSTITUTION-MAKING PROCESS 13 (Inst. Global Dialogue ed., 2006).

⁵ *Id.*

⁶ *Id.*; Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 UNIV. ARK. LITTLE ROCK L. REV. 809, 813–14 (2001).

⁷ SKJELTEN, *supra* note 4, at 40.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 44–45; Murray, *supra* note 6, at 816–17.

¹¹ SKJELTEN, *supra* note 4, at 49.

subordinate Theme Committees.¹² The Constitutional Committee also included a sub-committee intended to facilitate negotiations among the political parties, as well as a management committee to deal with managerial tasks.¹³

2. Public Participation about Public Participation

An interesting aspect of the South African public participation program is that it included a procedure for the public to submit its views on how the public participation program itself should be conducted.¹⁴ This is for the most part only a curiosity though, for the possibility to make submissions in this regard was limited to a five-day period, and was simply announced through a publication by the Chairperson of the Constitutional Assembly in a newspaper.¹⁵ The result was that citizens submitted few (though admittedly relevant) proposals. On the other hand, however, there was a direct interaction between the Community Liaison Department and various civil society organizations, for the purpose of determining the commitment of the latter to the Public Participation Process.¹⁶

3. The Public Participation Process

The official Public Participation Process was divided in two phases. The first was a pre-draft phase, lasting eleven months, in which the public was invited to make general submissions on the potential content of the constitution.¹⁷ These submissions were forwarded to the respective Theme Committees, which would take them into consideration when submitting their report to the Constitutional Committee.¹⁸ In the end, the Committees received 13,433 substantive submissions, with signed petitions amounting to over two million.¹⁹ It was also during this first phase that the Constitutional Public Meetings (of which there will be more to say below) took place.²⁰ The second phase, lasting five months, involved the creation of a working-draft.²¹ During this period, the public and civil society organizations were invited to comment on the draft.²²

¹² *See id.* These Committees were tasked with receiving submissions from the public in accordance to their specific themes, which were the following: character of the democratic state; structure of the government; relationship among levels of government; bill of rights and human dignity; the judiciary and the legal system; and specialized structures of the government. *Id.* at 50–52.

¹³ *Id.* at 49.

¹⁴ *Id.* at 41–42.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *Id.* at 45.

¹⁸ *Id.*

¹⁹ PHILIPP DANN ET AL., LESSONS LEARNED FROM CONSTITUTION-MAKING: PROCESSES WITH BROAD BASED PUBLIC PARTICIPATION 6 (Democracy Reporting Int'l ed., 2011); Murray, *supra* note 6, at 817.

²⁰ SKJELTEN, *supra* note 4, at 45.

²¹ *Id.*

²² *Id.*; DANN ET AL., *supra* note 19, at 6.

There were three fora of focus during the Public Participation Program: "Affected Interests" (dealing with civil society and sector representatives), "General Public," and the "Area fora" (later called "Constitutional Public Meetings").²³

a. The Constitutional Education Program

The Constitutional Education Program was specifically intended for the general education of the public on constitutional issues, and for the provision of information about the constitutional process in all of South Africa's official languages.²⁴ For this purpose, provincial information offices were established throughout the country. Additionally, the Program included workshops oriented towards educating the public about constitutionalism, human rights, and the drafting process, so as to enable rural, marginalized, and disadvantaged persons to have a say. These workshops (totaling over 1000)²⁵ were especially relevant given the high rate of illiteracy among the population. Furthermore, the workshops were of a participatory nature; therefore, while their principal focus was on education, they also included some public participation features in the style of the Constitutional Public Meetings.²⁶ Once the process moved into the "working-draft phase," however, the workshops focused exclusively on educating the public about the draft, and thus were more explanatory than participatory.²⁷ Another important educational measure was the radio, with broadcasts in eight different languages and an estimated weekly reach of ten million people.²⁸

Overall, more than 95,000 people, mostly located in rural and disadvantaged areas, directly interacted with the provincial coordinators through workshops and meetings.²⁹ Furthermore, a nationwide survey indicated that the media education campaign reached seventy-three percent of adult South Africans, who acquired a fairly high level of knowledge about the constitution.³⁰

b. The Constitutional Public Meetings

The Constitutional Public Meetings (CPMs), to which brief reference has been made already, were an essential part of the Public Participation Process, and to a certain extent constituted its backbone. For these meetings, the members of the Constitutional Assembly themselves travelled to meet citizens directly in their communities and receive their input.³¹ In order for a location to be eligible for holding a CPM, it had to be rural, marginalized, and disadvantaged.³²

²³ SKJELTEN, *supra* note 4, at 42.

²⁴ See DANN ET AL., *supra* note 19, at 6.

²⁵ *Id.*

²⁶ See SKJELTEN, *supra* note 4, at 44, 76, 86.

²⁷ See *id.* at 86–87.

²⁸ DANN ET AL., *supra* note 19, at 6.

²⁹ See SKJELTEN, *supra* note 4, at 87.

³⁰ DANN ET AL., *supra* note 19, at 6; Murray, *supra* note 6, at 817.

³¹ SKJELTEN, *supra* note 4, at 56.

³² *Id.* at 57.

There was an important degree of organization behind these meetings, so that they were not merely spontaneous "field trips" intended to improve the image of the Constitutional Assembly. Prior to the meetings, two "advance teams" would be established; these were responsible for setting up steering committees, designing contingency plans, and ensuring that everything was ready for the meeting.³³

Similar care was taken in the treatment of individual submissions presented during the CPMs. All submissions were recorded, transcribed, and sent to the relevant Theme Committee after being indexed in a computer database.³⁴ Afterwards, the submissions that each Theme Committee dealt with were categorized into subjects and put in volumes that were in turn handed over to the parliamentarians.³⁵ People could even trace by phone the status of their individual submissions throughout the whole process, checking, for example, what Theme Committee was discussing them, and on what date.³⁶

A total of twenty-seven CPMs were held, some of them in extremely remote areas. The total number of participants approximated 20,500, and included 717 different organizations and 200 members of the Constitutional Assembly.³⁷ In general, the CPMs received an overwhelming response from the people, with each meeting becoming a huge event in the community.³⁸ While some concerns persisted, notably the disproportionate male participation, the Constitutional Assembly argued that the meetings achieved a great success and that they had a substantial impact on the final product.³⁹

c. Other Aspects of the Public Participation Process

A number of additional measures were undertaken to enhance the effectiveness of the Public Participation Process.

First, the Constitutional Education Program used plain language, rather than a very technical or excessively legalistic one. And, perhaps more importantly, this language was mirrored in the final constitutional draft itself, for the purpose of ensuring easier access on the part of the public.⁴⁰

Second, even during the final stages of the constitutional negotiation, once both the pre-draft and the working-draft phases were over, the door was left open for individuals to submit additional comments to the Constitutional Committee.⁴¹

³³ *Id.* at 58 (pointing out the emphasis placed on prior consultation with the community leaders, and on generating a sense of co-ownership of the CPM in the attendants).

³⁴ *Id.* at 64; *see also* DANN ET AL., *supra* note 19, at 6.

³⁵ SKJELTEN, *supra* note 4, at 64; *see also* DANN ET AL., *supra* note 19, at 6.

³⁶ SKJELTEN, *supra* note 4, at 64.

³⁷ *Id.* at 70.

³⁸ *Id.*

³⁹ *Id.* at 71–72.

⁴⁰ *Id.* at 93–97.

⁴¹ *Id.* at 139.

Last, once the Constitution was adopted by the Constitutional Assembly and sent to the Constitutional Court for certification (in accordance with the requirements set forth by the interim constitution), civil society organizations, political parties, and individuals were still afforded the opportunity to make submissions to the court, with a total of eighty-four such submissions being sent.⁴²

4. Conclusion

South Africa's public participation process is in most regards the paradigm of popular involvement in the drafting of a new constitution, at least within the African continent, but most likely also in a global context. From the very beginning, the process was a bottom-up one, in the sense that the people were consulted about their thoughts and concerns regarding what the constitutional draft should include in the first place. They were not merely presented with an already drafted document, to be educated about it, but rather were active participants throughout the whole drafting process. There was even a possibility (albeit a constrained one) of providing input on how the public participation process itself should run. This goes a long way in showing the desire to involve the public in every aspect of the process.

It can be said almost with complete certainty that the public participation process was based on a good faith effort, first, to determine the views of the people in order to adapt (with the inevitable limits) the future constitution to those views; second, to educate the public in regards to constitutionalism; and third, to provide the citizens with a sense of ownership over the final document, rather than with a sense of imposition.⁴³ The process does not appear to have been an attempt to simply provide facial legitimacy to an already pre-determined draft.

Finally, public participation was carried out in an effective and organized manner so as to reach the greatest number of people possible, and especially those whose voices would have otherwise been less likely to be heard.

B. Uganda (1995 Constitution)

1. Background

The drafting process that led to Uganda's 1995 Constitution presents a rather contradictory scenario. On the one hand, the process included an extremely widespread public participation program, notable among other things for its unprecedented inclusion of women. On the other, the process was riddled by very important undemocratic characteristics, reflected in the prohibition of party participation that arose out of the ruling National Resistance Movement's (NRM) pretension of representing the interests of all Ugandans. This prohibition became especially relevant given that one of the main issues at stake was the adoption or rejection in

⁴² *Id.* at 139–140

⁴³ DANN ET AL., *supra* note 19, at 6; Murray, *supra* note 6, at 816, 822.

the constitution of a multiparty system (the latter option being the one favored by the NRM). And in this regard the problems started from the very beginning, with the appointment of the twenty-one members to the Constitutional Commission⁴⁴ (the body in charge of the constitutional drafting process): practically all of those members were supporters of the NRM.⁴⁵

2. Public Participation

Regardless of the undemocratic issues, however, the level of public participation during the drafting process was almost unprecedented. It has even been stated that "[i]n Uganda a higher percentage of individuals participated in a larger variety of activities over a longer period of time than in any other participatory constitution-making process worldwide."⁴⁶ Overall, more than 25,000 individual submissions were sent to the Commission throughout the process.⁴⁷ Furthermore, as mentioned above, there was widespread involvement of women; this included not only individual women, but also women's groups.⁴⁸ The engagement with the female part of the population was exemplary not just in the context of Africa, but also at a worldwide level.⁴⁹

The Constitutional Commission held seminars and gathered opinions from leaders and organization representatives throughout the whole country. These seminars and meetings were attended by massive numbers of people, who also participated in the debate. In total, seminars regarding the constitution were allegedly attended by around 30,000 community leaders.⁵⁰ Other seminars were also held at the sub-county level, in which the commissioners explained the constitution-making process. They later returned to each of the 870 sub-counties in order to consult the people through the collection of oral statements and written memoranda, over 25,000 of the latter being analyzed.⁵¹ Other means of involving the public included a student essay contest and continuous discussions in the media.⁵² Overall, the public participation and constitution drafting process took over five years, the Constitutional Commission being established in 1998, two years after the NRM's ascension to power in 1996.⁵³

⁴⁴ Devra C. Moehler, *Participation and Support for the Constitution in Uganda*, 44 J. MOD. AFR. STUD. 275, 281 (2006).

⁴⁵ See Aili Mari Tripp, *The Politics of Constitution Making in Uganda*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, *supra* note 3, at 158, 162–63; Moehler, *supra* note 44, at 282.

⁴⁶ Moehler, *supra* note 44, at 282.

⁴⁷ Tripp, *supra* note 45, at 163.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Moehler, *supra* note 44, at 281; see also MICHELLE BRANDT ET AL., CONSTITUTION-MAKING AND REFORM, OPTIONS FOR THE PROCESS 348 (Interpeace ed., 2011).

⁵² Moehler, *supra* note 44, at 281.

⁵³ BRANDT ET AL., *supra* note 51, at 348; Moehler, *supra* note 44, at 281.

Nevertheless, there has been skepticism as to whether the people's expressed concerns found an actual expression in the text of the constitutional draft.⁵⁴ This is in large part due to the fact that the Constitutional Commission's tour focused more on education about the constitution than on consultation.⁵⁵ It has further been claimed that the public participation process was used as a tool to gain support for the NRM's one-party (or no-party) proposal,⁵⁶ especially because while the advantages and disadvantages of the different possible systems were listed in the guiding questions that set the framework for the public debates, only the one-party advantages were actually presented during those debates.⁵⁷

An additional issue was the controlled nature of civic education regarding the constitutional drafting. In this regard, several difficulties and constraints were imposed on NGOs that intended to take part in the process, difficulties that greatly restricted the participation of civil society.⁵⁸

Last, public participation was negatively affected by the ban on candidates running for the Constitutional Assembly (in charge of reviewing and enacting the proposed constitution)⁵⁹ to use any kind of party affiliation, or to participate in campaign rallies or support activities other than those organized by the government.⁶⁰ Candidates had thus to run as individuals, and not under a party's banner.⁶¹ This restriction suppressed public debate over the draft's most controversial aspects, like the multiparty or one-party choice, since parties favoring an approach that differed from the NRM's were not able to openly support their candidates through the use of the media or other means to assert their views.⁶² Therefore, some political viewpoints were effectively excluded from the public discussion. Ironically (although perhaps foreseeably), the NRM did in fact act as a political party (for all practical purposes) during the elections to the Constitutional Assembly, supporting its own candidates and presenting its own views favorably in the eyes of the public, while not allowing other parties to do the same.⁶³ The NRM's justification for this was once again its purported non-party nature and its claim to represent all Ugandans. One consequence was that part of the electoral process was driven underground, with clandestine campaign events being held at funerals, churches, and other venues, which in turn produced a shift in the nature of the public debate.⁶⁴

3. Conclusion

⁵⁴ Tripp, *supra* note 45, at 163.

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *Id.*; Moehler, *supra* note 44, at 282.

⁵⁸ Tripp, *supra* note 45, at 163–64.

⁵⁹ *Id.* at 165.

⁶⁰ Moehler, *supra* note 44, at 282.

⁶¹ Tripp, *supra* note 45, at 165–66; Moehler, *supra* note 44, at 282 (pointing out claims of unfairness in the Assembly elections).

⁶² Tripp, *supra* note 45, at 165–66.

⁶³ *Id.*

⁶⁴ *Id.* at 166.

The case of Uganda may be the prime example of how a widespread and widely attended public participation program for the drafting of a constitution can be negatively affected by the inclusion of a few, though extremely relevant, undemocratic measures. What would otherwise have been a commendable initiative was greatly misused through its transformation into a tool to produce support for one particular viewpoint (regardless of the possible good intentions of the participants), rather than into a means to determine the genuine will of the people. In this regard, the Ugandan public participation process can to some extent be considered a propaganda mechanism for the NRM and its no-party scheme. The process was (as opposed to South Africa's) ultimately top-down, in which public participation was used to "educate" (at times genuinely, and at times propagandistically) and to convince the people about a desired result, rather than to consult and to adapt the final product to the views of the public. There was also a good deal of genuine education and consultation, however, with an important outreach through a very extensive period of time. This, in the end, may have had at least some positive effects in the population by allowing it to get to some extent involved in the drafting process, and a feeling of public ownership over the constitution has indeed prevailed among a good number Ugandans.⁶⁵

C. Eritrea (1997 Constitution)

1. Background

After Eritrea's independence from Ethiopia in 1993, the country set out to draft a constitution that would serve as the foundation for the government of the state, with a democratic order in mind.⁶⁶ The constitution-drafting process included a program for public participation in which education of the population on constitutional issues became a primary goal. The constitutional process was a successful one, at least in the sense that it generated a final product that was ratified by the Constitutional Assembly in May 1997.⁶⁷ Nevertheless, the ratified constitution was never implemented by the government, and has therefore never found application in practice. The nature of the public participation process, however, makes its study interesting for the purposes of the present paper.

The drafting process was led by a Constitutional Commission established by the government.⁶⁸ This Commission consisted of fifty government-appointed members, including representatives of all nine Eritrean ethnic groups, members of different religions (Christian, Muslim, and Animist), twenty-one women, and a ten-member Executive Committee.⁶⁹ The Commission

⁶⁵ Moehler, *supra* note 44, at 282.

⁶⁶ See Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 279, 284 (1998).

⁶⁷ See *id.* at 293.

⁶⁸ See *id.* at 284.

⁶⁹ See *id.* at 285-286, 304; see also Bereket Habte Selassie, *Constitution Making in Eritrea: A Process-Driven Approach*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, *supra* note 3, at 57, 62-63.

divided the process into four separate steps. First came the logistical phase, which focused on organizing the Commission, raising funds, educating the public, and starting the initial drafting work.⁷⁰ The second phase placed the emphasis on public education regarding the Commission's role and regarding basic constitutional concepts, along with the preparation of a full draft taking public opinion into account where appropriate.⁷¹ The third phase included a broad public debate on the Commission's draft, and the submission of the draft to the National Assembly.⁷² Last, the fourth phase was intended as a furtherance of the public debate to be followed by the submission of the final draft to the Constitutional Assembly for ratification.⁷³

The Constitutional Commission's task placed a great emphasis on direct involvement in the process from people outside the government.⁷⁴ For that purpose, it counted on the help of a Standing Committee on Civic Education and Public Debate, which acted under the guidance of the Executive Committee.⁷⁵

2. The Civic Education Campaign

The low level of education across the nation⁷⁶ made education of the public an imperative issue during the drafting process. With that task in mind, members of the Constitutional Commission, along with more than 400 instructors, were deployed to conduct public seminars in village and town meetings.⁷⁷ Additionally, seven provincial offices and seventy-three local committees were established for the purpose of assisting with public education.⁷⁸ An important initiative, given the low literacy rates among the population, was the widespread use of non-printed means of education. These included, among other things, songs, poetry, short stories, a comic book, mobile theater groups, concerts, and radio programs dealing with constitutional themes.⁷⁹ Moreover, special efforts were made to involve students in the process, especially by means of the radio.⁸⁰ In the end, the education campaign reached more than 500,000 people,⁸¹ and it has been stated that "the Commission introduced people who had never even heard the word 'constitution' to the notion of the primacy of the Constitution, and to the need to respect the rights of those protected by it."⁸²

3. Public Participation

⁷⁰ Selassie, *supra* note 69, at 62–63.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Rosen, *supra* note 66, at 285.

⁷⁵ See Selassie, *supra* note 69, at 67; Rosen, *supra* note 66, at 286 n.112.

⁷⁶ See Rosen, *supra* note 66, at 279.

⁷⁷ See Selassie, *supra* note 69, at 67.

⁷⁸ *Id.*

⁷⁹ See JOANNE WALLIS, CONSTITUTION MAKING DURING STATE BUILDING 49 (Cambridge Univ. Press ed., 2014); Rosen, *supra* note 66, at 296.

⁸⁰ Rosen, *supra* note 66, at 296.

⁸¹ See Selassie, *supra* note 69, at 68; WALLIS, *supra* note 79, at 49.

⁸² See Rosen, *supra* note 66, at 294.

As to public participation properly speaking, it started with the release by the Constitutional Commission of proposals to be submitted to the public for debate (although this was preceded by the translation and dissemination of a number of international documents and compacts for public discussion, during phase one of the process).⁸³ These proposals were divided in two parts: the first part dealt with the principles of the basic constitutional framework, with a special focus on the importance of democracy, diversity, and national unity; the second part proposed specifics of the constitutional order, such as a unicameral legislature, the rejection of federalism, and a five-year presidential term.⁸⁴ Several fundamental rights were included in the initial proposals as well, namely life, privacy, freedom of belief, freedom of expression, and freedom of organization, along with female equality provisions.⁸⁵

Following the release, the members of the Executive Committee launched a series of regional debates about the proposals for a period of four months.⁸⁶ During these debates, the subjects to be discussed were selected and introduced by the Executive Committee members themselves, and the debate sessions included an exchange of questions and answers with the public.⁸⁷ The recording of the debates and the documentation of all the questions and points raised was overseen by the Standing Committee, which also submitted summary reports for consideration by the Executive Committee during the drafting process.⁸⁸ The questions were further analyzed statistically, based on several variables (like gender or region), as a means to support the Commission's duty to produce a draft reflecting public opinion to the greatest possible extent.⁸⁹ These Executive-Committee-sponsored meetings were held in 157 different locations and involved the participation of over 110,000 Eritreans, with the addition of another 11,000 abroad.⁹⁰

Once the members of the Constitutional Commission agreed upon a first draft, after having collected and analyzed the information and opinions raised in the public debates, they forwarded it to the National Assembly.⁹¹ This body approved it with a small number of amendments, and the revised draft was submitted for a new round of public debate (in which approximately 400,000 Eritreans participated),⁹² being lastly finalized and ratified with minor changes by the Constitutional Assembly.⁹³ As mentioned above, however, the new constitution never found implementation following its ratification due to the government's final reluctance, and so the whole process of its drafting became to some extent moot.

⁸³ *See id.* at 295.

⁸⁴ *See* Selassie, *supra* note 69, at 68; Rosen, *supra* note 66, at 290–92.

⁸⁵ Rosen, *supra* note 66, at 292.

⁸⁶ Selassie, *supra* note 69, at 68.

⁸⁷ *See id.*; Rosen, *supra* note 66, at 297.

⁸⁸ Selassie, *supra* note 69, at 68.

⁸⁹ *Id.*

⁹⁰ *See id.* at 69; Rosen, *supra* note 66, at 297 (taking the domestic figure up to 147,000).

⁹¹ *See* Rosen, *supra* note 66, at 293.

⁹² *Id.* at 298.

⁹³ Selassie, *supra* note 69, at 69.

In the end, it was nevertheless unclear whether public participation had any real influence on the actual draft.⁹⁴ Selassie argues that the main value of the process was in the feeling of public ownership that it generated over the constitution, and in potentially providing some inspiration for the drafters⁹⁵ (although, once again, this value was made irrelevant by the non-implementation of the constitution). Genuine influence of the public input on the text of the document was less evident, except in a reduced number of very specific instances such as a softer stance in the declaration of the state as secular, and a different wording for the oath of office.⁹⁶

4. Conclusion

While not as evident as Uganda's case, Eritrea's public participation program appears to have been of a somewhat top-down nature. This conclusion can be drawn from the fact that public debates and the gathering of opinions, however extensive, followed instead of preceded the writing down of proposals for a draft constitution. This may have had part of the responsibility for the lack of inclusion of substantive changes in the final draft. On the other hand, it can be argued that Eritrea's situation, with low educational levels, lack of infrastructures, extreme poverty, and shortly following the nation's war of independence,⁹⁷ might have warranted a process focused, at least initially, on constitutional education rather than on participation properly speaking. In any case, the public participation process seems to have been a good faith one, with a true interest in learning the opinion of the public and in taking it into account, while at the same time generating a valuable sense of popular ownership. The non-implementation of the constitution, however, frustrated the benefits achieved during the drafting process, and may cast doubts as to the intentions behind the process itself.

D. Zimbabwe (2000 Failed Constitution)

1. Background

Zimbabwe went through the process of drafting a new constitution in the year 2000. A draft was approved by President Mugabe after his unilateral addition of some important amendments. In the end, however, due in large part to the excessive presidential involvement in the process, the draft was rejected in a popular referendum. It is worth noting that a new constitution was in fact adopted in 2013, after finding massive support in another referendum. Nevertheless, for the purposes of the present paper I have considered the failed 2000 attempt a

⁹⁴ See Rosen, *supra* note 66, at 308–09 (pointing out and rejecting claims that the drafters ignored popular input).

⁹⁵ Selassie, *supra* note 69, at 69–70.

⁹⁶ *Id.* But see Rosen, *supra* note 66, at 308–09.

⁹⁷ See Rosen, *supra* note 66, at 279.

more interesting case study, precisely due to those circumstances that contributed to its ultimate failure.

The drafting process itself was divided into two parallel, mutually exclusive efforts, official and unofficial. The Constitutional Commission led the official process, which was government-driven and completely monopolized by the ruling party (ZANU-PF), the objective being to ensure presidential control.⁹⁸ The unofficial process, led by the National Constitutional Assembly, was an NGO-driven popular movement. Its goal was to boycott the governmental process, and it placed a greater emphasis on civic education.⁹⁹ Here I will be focusing on the Constitutional Commission process, as the only official one, and as the one that in the end had a real impact on the final draft.

2. The Constitutional Commission's Process: Organization

The Commission was composed of close to 500 commissioners.¹⁰⁰ It included nine Thematic Committees focusing on different constitutional issues. These Thematic Committees were in turn divided into 100 provincial teams (each having nine members, one per theme), which held meetings in which submissions were received from the public.¹⁰¹ Substantive organization and management of the process was undertaken by the Commission's Coordinating Committee.¹⁰²

The Constitutional Commission's process and its results were entirely subject to presidential control.¹⁰³ President Mugabe reserved for himself the power to reject, modify, or stop the process at any time.¹⁰⁴ Furthermore, he put forth a six-month deadline for the completion of the entire drafting process, something that negatively impacted public participation (among other things) due to the scarcity of time.¹⁰⁵

3. The Commission's Public Participation Process

It was under these restrictive circumstances that the public participation process was set to take place. The Constitutional Commission nevertheless intended to make the process both politically and scientifically credible.¹⁰⁶ For that purpose, it relied on a number of different sources to determine the public opinion. These included written submissions; the gathering of views of constitutional experts through an international conference that brought scholars from

⁹⁸ See GWINYAYI DZINESA, *ZIMBABWE'S CONSTITUTIONAL REFORM PROCESS 2–3* (Inst. Justice & Reconciliation ed., 2012).

⁹⁹ See Muna Ndulo, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING*, *supra* note 3, at 185–86; DZINESA, *supra* note 98, at 2–3.

¹⁰⁰ Ndulo, *supra* note 99, at 186.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See DZINESA, *supra* note 98, at 2.

¹⁰⁴ Ndulo, *supra* note 99, at 186.

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 187.

around the world;¹⁰⁷ oral submissions before the commissioners by both individuals and interest groups; and academic publications.¹⁰⁸ In general, a List of Constitutional Issues and Questions guided the process.¹⁰⁹

The Coordinating Committee devised two methods of public participation. The first of these was the "Open Meetings" approach, which included three different forms of participation: public hearings held by the commissioners in provincial locations, with about 5000 meetings taking place throughout all of Zimbabwe's fifty-seven districts;¹¹⁰ written submissions sent by the public to the Constitutional Commission;¹¹¹ and submissions issued through the Commission's website.¹¹²

The second was the "Scientific method," which focused on statistical results. The statistics were gathered through a national opinion poll, and through the administration of a questionnaire to the people around the country.¹¹³

In the end, the numbers declared by the Constitutional Commission regarding public participation were the following: 4,321 public meetings, with 556,276 attendants; 700 special ad hoc meetings, with 150,000 attendants; 4000 written submissions; and numerous TV and radio programs, including several in minority languages.¹¹⁴

4. Conclusion

Overall, Zimbabwe's public participation process can be said to have been a commendable and extensive one, especially taking into account the time limitations. It allowed citizens to openly debate and discuss the proposed constitution. Once again, however, the draft was *proposed* to the public before the people could participate, marking the top-down nature of the process. Furthermore, the process was in the end defective due to its subjection to the President.¹¹⁵ President Mugabe used his control to unilaterally amend the draft on a number of important issues, such as the introduction of compulsory military service, the prohibition of same-sex marriages, and the inclusion of a clause allowing the state to compulsorily acquire agricultural land for resettlement.¹¹⁶ Even though these obstructive features were not part of the public participation program itself, they demonstrate how, similar to what happened in Uganda, a few negative characteristics can make an otherwise legitimate process a nearly worthless one. Here, the President's overtaking of the process took away any sense of public ownership over the constitutional draft, which in all likelihood led to the final rejection of the document.

¹⁰⁷ See DIZINESA, *supra* note 98, at 3.

¹⁰⁸ See Ndulo, *supra* note 99, at 187.

¹⁰⁹ DIZINESA, *supra* note 98, at 3.

¹¹⁰ Ndulo, *supra* note 99, at 186.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ See DIZINESA, *supra* note 98, at 3.

¹¹⁵ See Ndulo, *supra* note 99, at 187.

¹¹⁶ See DIZINESA, *supra* note 98, at 4.

E. Rwanda (2003 Constitution)

1. Background

In post-genocide Rwanda, the mission of rebuilding the country fell in good part upon the shoulders of the Legal and Constitutional Commission (LCC). Using other countries as an example, the LCC prepared a draft constitution, collected thoughts from the public, and explained to the population the meaning of a constitution and the main ideas that comprise it, all within a three-year period.¹¹⁷ The resulting public participation process (only one among the LCC's duties) can be said to have been a widely participatory one, but its elite-driven, somewhat top-down nature (being heavily influenced by the party in government) has generated some controversy.

The composition of the LCC consisted of only twelve commissioners, who were elected by the Transitional National Assembly.¹¹⁸ Of these, eight represented the eight officially registered parties (mostly limited to parties that were willing allies of the ruling RPF),¹¹⁹ one represented the army and the national police, two represented the civil society, and one represented the private sector.¹²⁰

2. Public Participation

The LCC drafters focused on educating the public about the role of a constitution, and on identifying widely held beliefs among the population about general governance matters such as a presidential or a parliamentary system.¹²¹ For that purpose, a Constitutional Training Manual was developed at the beginning of the drafting process for training and sensitizing Rwandans about the constitution.¹²²

After a period to organize itself, the LCC held a constitution-building seminar, which attracted broad participation.¹²³ During the seminar, the commissioners developed an Action Plan to be undertaken in the following sequence¹²⁴: first, the training and sensitization of the population regarding the constitution; second, the consultation of the people on the content of the

¹¹⁷ See PRISCILLA YACHAT ANKUT, *THE ROLE OF CONSTITUTION-BUILDING PROCESS IN DEMOCRATIZATION: CASE STUDY RWANDA* 13 (Int'l IDEA ed., 2005).

¹¹⁸ See Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1045 n.5 (2008); ANKUT, *supra* note 117, at 16.

¹¹⁹ See ANKUT, *supra* note 117, at 16.

¹²⁰ See Banks, *supra* note 118, at 1045 n.5; ANKUT, *supra* note 117, at 16.

¹²¹ See Banks, *supra* note 118, at 1045.

¹²² See ANKUT, *supra* note 117, at 20.

¹²³ See *id.* at 17.

¹²⁴ See LEGAL AND CONSTITUTIONAL COMMISSION, *TOWARDS A CONSTITUTION FOR RWANDA: ACTION PLAN 2002-2003* 3-4 (2002); see also VIVIEN HART, *DEMOCRATIC CONSTITUTION MAKING* 8 (U.S. Inst. Peace ed., 2003).

constitution; third, the writing and validation of the draft text for the constitution; and fourth, a referendum on the text of the constitution as approved by the Parliament.¹²⁵

The LCC adopted several specific methods of public participation. One of them was a sixty-question questionnaire for the public regarding controversial constitutional issues.¹²⁶ However, out of the 50,000 questionnaires distributed, only seven-percent of the responses were analyzed.¹²⁷ For those citizens that were illiterate, and therefore could not fill in the questionnaire, group discussions were facilitated.¹²⁸

In order to obtain feedback from the public, the LCC also made available free telephone lines, an email address, and a website.¹²⁹ In general, feedback and recommendations were encouraged, with the LCC retaining those ideas and opinions that "prevailed over the rest."¹³⁰ Another venue through which feedback could be provided were the larger public meetings held by the members of the LCC.¹³¹ The people were also able to submit independent written comments and proposals.¹³² A different form of reaching out to the public was through TV and radio programs.¹³³

It is worth noting, however, that some sensitive topics such as human rights were not open to public comments and discussion. The drafters of the constitution did not want these questions to suffer alterations, believing that they were too important to be left to the public opinion.¹³⁴

Submissions from the population were recorded and awarded a relevance score according to a scoring system under which expert opinions addressing specific constitutional questions earned two points; opinions expressed by an interest groups earned three points; and detailed memorandums submitted by groups earned four points.¹³⁵ Moreover, the LCC summarized all answers received from the people in a booklet made publicly available.¹³⁶

The drafting period ended with a three-day seminar in which 800 people participated, and a three-month period ensued during which the public could still submit to the LCC further comments and amendments.¹³⁷ Once the finalized draft was sent to the Parliament, and that body made the corresponding amendments, those amendments were also presented to the people for discussion.¹³⁸ Finally, a popular referendum adopted the constitution with an overwhelming support of ninety-three percent of the votes.¹³⁹

¹²⁵ *Id.*

¹²⁶ ANKUT, *supra* note 117, at 17.

¹²⁷ WALLIS, *supra* note 79, at 50.

¹²⁸ ANKUT, *supra* note 117, at 17.

¹²⁹ *See id.* at 18.

¹³⁰ Banks, *supra* note 118, at 1064–1065.

¹³¹ *See id.* at 1064.

¹³² *Id.*

¹³³ *See id.* at 1045.

¹³⁴ *See id.* at 1065 n.126.

¹³⁵ *See* ANKUT, *supra* note 117, at 17–18.

¹³⁶ *See id.* at 18.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

In total, the LCC commissioners (and thousands of their trained assistants)¹⁴⁰ spent six months participating in local programs and debates, under a budget of about \$7 million.¹⁴¹ The public participation process was a carefully staged one, with a considerable commitment of time and resources.¹⁴² Public consultation was not simply structured following existing party lines, and the program for popular participation was initiated before an actual constitutional text was drafted,¹⁴³ thus providing a better opportunity for the people's views to be included in the document.

There were, however, important flaws in the Rwandan public participation process, especially regarding two aspects. The first was the RPF's predominance over the whole process; the second refers to the elite-driven nature of the LCC, and to its small representativeness.¹⁴⁴ Banks argues that the public was excluded from the internal decision-making process within the LCC, which did not represent the interests of all Rwandans, mostly due to its small number of commissioners; the body rarely deliberated substantive issues with the public, and absent a representative within the LCC, or contacts with the government, citizens lacked the opportunity to have the drafters seriously engage their ideas or proposals, so that in the end most people were denied the possibility of substantial participation.¹⁴⁵ Moreover, it has been argued that only RPF members and government sympathizers participated in the forums and debates convened by the LCC.¹⁴⁶ Thus, though the system was one of very significant public participation, it may have been to some degree one of participation without real power to create an impact.¹⁴⁷ Finally, Banks also argues that the LCC's willingness to engage proposals from the public depended on the effect that those proposals would have on the distribution of political power (with only those that did not threaten the status quo being considered).¹⁴⁸

Nevertheless, some interest groups, such as gender equality advocates, managed to achieve the inclusion of the constitutional provisions that they were seeking (in the case of gender equality, these were the prohibition of gender discrimination, the mandate for equal rights, and the reservation of thirty percent of the seats in the legislature for women, among others).¹⁴⁹

3. Conclusion

Rwanda's is probably the most controversial of all the public participation processes analyzed so far, in terms of the lack of unanimity regarding its value; the process has both strong supporters and strong detractors, a disagreement that is evident in the different sources here cited. All in all, it can be said that it was a widely participative but elite-driven process, which in some aspects took a paternalistic turn, by taking some matters outside of the realm of public

¹⁴⁰ *Id.* at 17.

¹⁴¹ See HART, *supra* note 124, at 9.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See ANKUT, *supra* note 117, at 20–22, 26; Banks, *supra* note 118, at 1044–45.

¹⁴⁵ Banks, *supra* note 118, at 1044–45.

¹⁴⁶ See *id.* at 1045 n.5; ANKUT, *supra* note 117, at 21.

¹⁴⁷ See Banks, *supra* note 118, at 1045.

¹⁴⁸ See *id.* at 1064.

¹⁴⁹ See *id.* at 1064; ANKUT, *supra* note 117, at 23–25.

discussion where it was thought that the people were not prepared to address those issues. On the other hand, it may be argued in the LCC's defense that the reality of recent war and genocide warranted the shielding of some especially key and sensitive topics (*i.e.*, human rights). In the end, however, the overwhelming support for the final draft in the referendum gives weight to the conclusion that the public participation process succeeded in generating a sense of ownership over the document, regardless of its somewhat elite-driven, top-down nature.

F. Kenya (2005 Rejected Draft and 2010 Adopted Constitution)

1. Background

Kenya has undergone two recent constitutional drafting processes. The first one, in 2005, produced a draft that was rejected through a popular referendum. The second one, in 2010, resulted in an approved constitution. In between the two processes, a period of widespread violence ensued during the 2008 elections. In this context, it may be adequate to study both attempts at constitution-making in order to understand their differences. Both of them included some degree of public participation, so both of them are relevant to our purposes here.

2. The 2005 Process

The first of the recent attempts to enact a new constitution for Kenya took place in 2005. The drafting process was a participative one, but the proposed constitution was finally rejected in a popular referendum.¹⁵⁰ It thus poses an interesting case study, especially when compared to the successful 2010 process.

To begin with, the Constitution of Kenya Review Act (the Act) established a three-step program for the constitutional review process. The first step consisted in public consultation and an initial drafting by a small review commission;¹⁵¹ thus, consultations preceded the actual draft. The second step focused on the revision of the draft by a national convention.¹⁵² Finally, the third step was the ratification by Parliament, which did not have the power to amend, but only to accept or reject.¹⁵³ The Act, however, emphasized the necessity of consultation with ordinary Kenyans along the whole constitutional process.¹⁵⁴

In order to start off with step one of the process, a Review Commission of twenty-nine members was created.¹⁵⁵ It was empowered to collect and collate the views of the people of Kenya, and

¹⁵⁰ See Grace Maingi, *The Kenyan Constitutional Reform Process: A Case Study on the Work of FIDA Kenya in Securing Women's Rights*, 15 FEMINIST AFR. 63, 66 (2011).

¹⁵¹ Alicia L. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824, 1832 (2007).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1833.

¹⁵⁵ See Bannon, *supra* note 151, at 1833; BRANDT ET AL., *supra* note 51, at 340.

to draft a bill that would alter the existing constitution.¹⁵⁶ It was further required to visit every constituency in the country to collect the citizens' views and to disseminate the draft constitution among the public.¹⁵⁷ At least one public meeting was conducted in every such constituency.¹⁵⁸ Furthermore, the Commission received and analyzed statistically (over a period of several months) more than 36,000 written submissions, making the results available to the public.¹⁵⁹

For step two, a National Constitutional Conference was established to debate, amend, and adopt the Review Commission's report and draft, with the revised draft being sent for approval to Parliament.¹⁶⁰ 699 delegates composed the Conference; these included representatives from every district, from every political party, and from religious, professional, and other civil organizations, thus ensuring public participation (through broad representation) at this second stage as well.¹⁶¹

An important measure for ensuring the relevance of public participation at every stage of the process was the Parliament's inability to amend the draft once it was submitted to it, since this would avoid unilateral modifications contrary to what the people might have expressed.¹⁶²

There were several problems during the drafting process, however. One was that, while the National Constitutional Conference did take place in what became known as the Bomas Conference, it was disrupted after several negotiation stages when various key NGO representatives decided to pull out of the process, thus affecting its representativeness.¹⁶³ Another issue was that, even though the Review Act was amended to require a referendum for approval of the final draft, Parliament was at the same time given the power to introduce amendments to said draft before submitting it to popular vote, thus perhaps undermining to some extent the influence of public participation during the first two steps of the process.¹⁶⁴ As a consequence, the final document as amended by Parliament did not end up sufficiently reflecting the results of the participatory (though disrupted) Bomas draft.¹⁶⁵ In the end, this might have been one of the factors behind the rejection of the document in the popular referendum.¹⁶⁶

3. The 2010 Process

¹⁵⁶ Bannon, *supra* note 151, at 1833.

¹⁵⁷ *Id.*

¹⁵⁸ BRANDT ET AL., *supra* note 51, at 340.

¹⁵⁹ *See id.*

¹⁶⁰ *See* Bannon, *supra* note 151, at 1833.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See id.* at 1837.

¹⁶⁴ *See id.* at 1838–39.

¹⁶⁵ *See* DANN ET AL., *supra* note 19, at 7.

¹⁶⁶ *See id.*

Not long after the failure of the 2005 attempt at constitutional reform, and following the outburst of violence during the 2008 elections,¹⁶⁷ a new Constitution of Kenya Review Act was enacted (the 2008 Act).¹⁶⁸ According to said Act, the drafting bodies were under the obligation to ensure that the review process provided the people with an opportunity to actively participate in both generating and debating the proposals.¹⁶⁹

A Committee of Experts on Constitutional Review of nine members was formed (with three foreigners and six Kenyans),¹⁷⁰ the members being nominated by the National Assembly and appointed by the president.¹⁷¹ Its efforts were mainly aimed at implementing civic education programs and public participation,¹⁷² and it served as the principal technical organ of the process.¹⁷³ However, as opposed to the 2005 attempt, public *consultation* did not play a prominent role before or during the drafting process. Such consultation took place only after the draft had been presented to the public, so that people could propose changes to it.¹⁷⁴

In general, there were two kinds of participation and outreach programs. The first consisted in regional public hearings, while the second comprised sectoral and thematic consultations, with a more specific focus.¹⁷⁵ Once the process of public consultation was completed, the initial draft was accordingly revised and sent to the Parliament.¹⁷⁶ Finally, it was submitted to popular vote through a referendum, and this time it was finally adopted with the assent of the people.¹⁷⁷

4. Conclusion

Kenya, especially its 2005 attempt at constitutional review, offers a good example of how a broad public participation process may not necessarily ensure popular support for, or a sense of ownership over, a constitutional draft, especially where other political issues may get in the way, and where subsequent changes to the draft take away part of the value from participation. It is worth noting that it was the more "bottom-up" draft, in the sense of being the one where participation preceded the drafting effort, that was finally rejected thorough a referendum. On the other hand, the 2010 attempt, which to some extent dispensed with pre-draft consultation, ended up being adopted by the people. This may show how public participation interplays with other factors in generating the necessary sense of ownership over a constitutional document.

G. Egypt (2012 Constitution)

¹⁶⁷ See BRANDT ET AL., *supra* note 51, at 341.

¹⁶⁸ See DANN ET AL., *supra* note 19, at 7; Maingi, *supra* note 150, at 67.

¹⁶⁹ See DANN ET AL., *supra* note 19, at 7.

¹⁷⁰ BRANDT ET AL., *supra* note 51, at 341.

¹⁷¹ Maingi, *supra* note 150, at 68.

¹⁷² See DANN ET AL., *supra* note 19, at 7.

¹⁷³ Maingi, *supra* note 150, at 68.

¹⁷⁴ See DANN ET AL., *supra* note 19, at 7; *see also* Maingi, *supra* note 150, at 69.

¹⁷⁵ DANN ET AL., *supra* note 19, at 7.

¹⁷⁶ *See id.* at 9.

¹⁷⁷ *Id.*

1. Background

After the overthrow of Hosni Mubarak from power and the ascension of the Muslim Brotherhood as the ruling party, Egypt embarked in a process to draft a new, post-revolutionary constitution. Such process was to some degree participatory in all of its stages: the election of the Constituent Assembly, the deliberation process, and the programmed referendum for ratification.¹⁷⁸ It has been argued that the actual issues that arose during the drafting process, and the challenges to its legitimacy, were more the result of lack of agreement among elites over fundamental issues than a result of lack of participation.¹⁷⁹

The issues started from the very beginning, when the original Constituent Assembly became the ground of a number of conflicts and was dissolved by judicial ruling, making an agreement to form a new Assembly necessary.¹⁸⁰ The new Constituent Assembly was composed of thirty-nine members selected from the House of Representatives (dominated by two political parties); six members selected from the judiciary; nine members selected among law experts; one member each from the armed forces, the police, and the justice ministry; thirteen members drawn from the unions; five members selected from the university realm; four members representing the Coptic Church; and twenty-one members chosen from among public figures.¹⁸¹ In some sense, to the extent that an important number of Assembly members came from the elective representative body (the legislature), there was some degree of participation, if only indirectly, in the composition of the drafting body,¹⁸² although there may have been problems regarding the level of representativeness of the Assembly given the predominance of Islamists within the seats allotted to the legislature.¹⁸³

A continuous problem, however, was the hovering threat of dissolution of the Constituent Assembly by the hands of the military and the courts.¹⁸⁴ This threat might have affected the process to an important extent, by limiting the nature of the proposals that the members of the Assembly would have been ready to raise or incorporate. In the end, the constitutional question became moot, even though the constitution itself was adopted, with the military overthrow of the Muslim Brotherhood government, after massive protests on the part of the opposition and an apparently insolvable polarization of the Egyptian society.¹⁸⁵

¹⁷⁸ See TOFIGH MABOUDI & GHAZAL P. NADI, BRINGING THE CONSTITUTION ONLINE: THE STRUGGLE OVER EGYPT'S NEW CONSTITUTION 3 (unpublished, American University).

¹⁷⁹ See *id.* But see JASON GLUCK & MICHELE BRANDT, PARTICIPATORY AND INCLUSIVE CONSTITUTION MAKING: GIVING VOICE TO THE DEMANDS OF CITIZENS IN THE WAKE OF THE ARAB SPRING (U.S. Inst. Peace ed., 2015) (arguing that the non-inclusive nature of the public participation program itself contributed a good deal to the polarization of the Egyptian society).

¹⁸⁰ See MABOUDI & NADI, *supra* note 178, at 12; GLUCK & BRANDT, *supra* note 179, at 7.

¹⁸¹ MABOUDI & NADI, *supra* note 178, at 12.

¹⁸² See *id.*

¹⁸³ See GLUCK & BRANDT, *supra* note 179, at 9.

¹⁸⁴ See MABOUDI & NADI, *supra* note 178, at 12.

¹⁸⁵ See GLUCK & BRANDT, *supra* note 179, at 9.

2. Public Participation

It is important to point out from the start that no law required the Constituent Assembly to take into account the opinions of the citizenry; however, the Assembly was keen to introduce those opinions before, during, and after the drafting process.¹⁸⁶

During the period following the election of the Constituent Assembly, the above-mentioned deliberation phase, the process was fully participatory.¹⁸⁷ The Drafting and Research Committee of the Assembly (one of the five committees under that body) was tasked with receiving suggestions and views from the people and from different experts.¹⁸⁸ The various committees toured the country's regions listening to people's views during consultation meetings, with a total of 160 meetings being held throughout all provinces.¹⁸⁹ Furthermore, a total of 35,000 proposals were received from the public, ranging from one or several constitutional articles to whole constitutions.¹⁹⁰ An innovative initiative was the launch of a website by the Assembly where the citizens could review the proposed drafts and show support or disapproval by voting for each article.¹⁹¹ For that purpose, the public could sign in through their social media accounts (Facebook, Twitter, or email), and give thumbs ups or downs to specific provisions, or comment on the drafts.¹⁹² There were in total an average of 3.4 drafts per constitutional article,¹⁹³ thus providing a range of choices for the participating public. Another innovation was the broadcast of all Constituent Assembly and committee sessions to the public.¹⁹⁴

Once the first constitutional draft was completed, the Assembly launched the "Know Your Constitution" campaign to encourage community dialogue and to allow citizens to familiarize themselves with the constitution.¹⁹⁵ The campaign included television and radio programs explaining the content of the document.¹⁹⁶ Moreover, special panels were set up within this same campaign to discuss, among other things, the reasons why some political and civil groups rejected the draft.¹⁹⁷

In addition, public consultation meetings were held in the post-draft phase in order to receive suggestions on the proposal. These meetings are reported to have received a massive

¹⁸⁶ See Rowida Omar, *Public Participation in Egypt*, in PUBLIC PARTICIPATION AUDIT 21, 22 (Jakob Kirkemann Boensen et al. eds., 2013).

¹⁸⁷ See MABOUDI & NADI, *supra* note 178, at 4.

¹⁸⁸ See *id.* at 14.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *id.* at 14–15.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at 15; Omar, *supra* note 186, at 22.

¹⁹⁶ MABOUDI & NADI, *supra* note 178, at 15.

¹⁹⁷ *Id.*

attendance.¹⁹⁸ At the same time, ninety-five information centers were established nationwide to address the questions of the population.

For its own part, and parallel to the process of the Constituent Assembly, the Muslim Brotherhood launched its own campaign to encourage participation in the referendum, and created its own website to encourage discussion, questions, and suggestions.¹⁹⁹ On the other hand, the opposition also launched awareness campaigns to educate the people about the process, and to explain why under their view the constitution should be rejected.²⁰⁰ This, on its part, shows the degree of polarization that surrounded the process.

Indeed, regardless of the broad participation, the process was not free from conflict, and that conflict ultimately had a profound effect. The Muslim Brotherhood's control over the chairs of all Assembly committees, through the seats reserved for the House of Representatives, along with the lack of representation of women, young people, and Coptic Christians,²⁰¹ led to the withdrawal of many liberal and non-Muslim Assembly members, and a liberal boycott of the Constituent Assembly's process ensued, which in turn affected public participation.²⁰² Some have actually argued that the practical monopolization of the process by the Muslim Brotherhood made public participation almost worthless, with a final product that did not reflect the input received from the people.²⁰³ Furthermore, even though the constitution was approved by 63.8 percent of the voters in the final referendum, only 32.9 percent of eligible voters actually cast their vote, which in turn meant that the constitution received the support of only a small minority of the total population.²⁰⁴

3. Conclusion

The Egyptian scenario may be particularly interesting in that it is one of the most recent ones, along with the rest of the "Arab Spring" processes. It thus offers good examples of innovative methods that differ from other countries' experiences, particularly in the use of more modern means of public involvement through massive online participation. But Egypt is also a prime example of how extreme political and ideological polarization, along with lack of complete representativeness, can negatively affect a public participation process regardless of how wide-reaching that process may be. So much so, that it has been suggested that the drafting process, with the polarization that it generated, might have contributed to the final overthrow of Mosri's Muslim Brotherhood government.²⁰⁵

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* at 15–16.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 16; GLUCK & BRANDT, *supra* note 179, at 7, 9.

²⁰² *See* MABOUDI & NADI, *supra* note 178, at 3 (arguing that statistical data shows that before the boycott the likelihood of change in the drafts decreased as the citizen approval of them through the online system increased, whereas after the boycott predictability in that regard became much lower); *see also* GLUCK & BRANDT, *supra* note 179, at 9.

²⁰³ *See* GLUCK & BRANDT, *supra* note 179, at 9.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

Conclusion

The present paper has briefly surveyed public participation in the constitution-making processes of seven different African countries, in the hope of providing an easy-to-access document from which those interested may find useful information on public participation in the continent, and of presenting a comparative overview of the alternative means of participation. The information, albeit limited, showcases a wide range of those alternatives, which any contemporary constitutional designer seemingly needs to take into account.

This latter assertion (the seeming necessity of making use of public participation methods), however, begs the very first question that we should address here: is a public participation program always necessary for a successful or legitimate constitutional drafting process?²⁰⁶ It is by all means evident that the information contained in the present paper does not even get close to providing the level of knowledge necessary for answering that difficult question.²⁰⁷ For one thing, the paper focuses exclusively on countries in which public participation *has actually taken place*, leaving aside cases of successful yet non-participatory drafting processes. And no set of information can be complete where one whole side of the argument (here, stories of non-participatory constitutions) is missing. I believe, however, that from the case-studies included herein we can at least draw the easy conclusion that public participation is by no means enough in itself to secure the success or legitimacy of a constitutional draft, or even to secure a sense of ownership over it on the part of the people. In this regard, Zimbabwe (2000), Kenya (2005), and Egypt present examples of the outright failure of a proposed constitution regardless of a broad public participation. All of these cases show how political instabilities and encroachments may pose a counterweight to the sentiment of public ownership over the draft and may end up in the overthrow of that sentiment. And similarly, Eritrea's participation program, although leading to an approved draft, never saw its contributions implemented in a working constitution, albeit admittedly due to causes (the government's lack of commitment to the document) outside of the drafting process itself. But also processes that have led to the establishment of a new constitution may see their legitimacy questioned even in the face of an apparently successful public participation program, as was the case of Uganda.

In any event, if we assume (or determine) the adequacy of a public participation program for a given constitution-drafting process, it becomes all the more relevant to draw from the past experience of other nations in order to better understand the possible benefits and drawbacks of the alternative overall directions and specific measures that may be taken for such a program. In this sense, the time frame set forth for a drafting process can have a direct effect on its actual effectiveness, as well as on the effectiveness of the public participation program. This can be seen from the fact that, while Zimbabwe's failed attempt allowed only six months for its completion, South Africa's process, commonly regarded as an exemplary one, took close to two years, with at least sixteen months dedicated to public education and consultation.

²⁰⁶ See generally Moehler, *supra* note 44, for arguments supporting a negative response to this question.

²⁰⁷ See generally Elkins et al., *supra* note 1, for a comprehensive analysis of the hypotheses for and against public participation.

It is of extreme importance, however, to realize that every country presents its own, very unique circumstances at the time of drafting a new constitutional document. Therefore, the measures that may have been successful for some may be inadequate for the particular circumstances of those now affected. Thus, for example, while South Africa's highly successful and outreaching participation program needed enormous human and logistical resources, the situation in Eritrea may not have warranted a similar display of means of consultation. Things such as infrastructure, budget, or previous educational levels of the population may set a limit on what a nation can realistically expect of a drafting process, including the participatory aspect.

Thus, Eritrea may have been justified in its greater focus on education, such focus being perhaps an indispensable requirement in nations where the initial educational level is too low for an informed participation on the part of the people. On the other hand, South Africa and Rwanda show how educational and consultative processes can be undertaken, if not in a parallel manner, at least sequentially. In this regard, it is important to differentiate programs that educate the public about *constitutionalism*, and programs that educate the public about *a particular constitutional draft*. The latter may in fact be associated more with an attempt to *convince* than with an attempt to *educate* properly speaking, at least where no other effort is made to obtain the views of the people, but even also when those views are to some extent consulted. That was once again the case in Uganda, with its (ironically) partisan mode of explaining the advantages of the no-party option. This mode of "education" is more in line with a top-down process, in which the drafting elites take a leading role in the making of the constitution, leaving for public consultation questions of a more incidental nature (that is, questions that may be susceptible to modification even while retaining the core of the original draft). On the other hand, a bottom-up process (such as South Africa's or, under some interpretations,²⁰⁸ Egypt's) involves the people from the very beginning, surveying public opinions on how the constitution should look in the first place, and using those opinions to create, rather than to modify, an initial draft.

But, as with other features, a bottom-up nature may not always be more desirable than a top-down one, at least when the top-down option involves a good faith effort to take the public's views into account in order to make the necessary modifications to the original document. For one thing, Kenya illustrates how a top-down process can succeed where a bottom-up one has failed. Even though the reasons for the respective failure and success of the 2005 and 2010 processes do in all likelihood not rest simply on the nature of the public participation program, the change in approach might have played a role. Indeed, a more top-down process may provide a higher degree of organization and a focus on the kind of issues that the average citizen will be interested in (especially, once again, in developing countries with a lower educational level). Thus, even though South Africa's process was in all respects a bottom-up one, most of the submissions made by the public dealt, not with fundamental constitutional issues, but with day-to-day problems that the people wished to see addressed in the constitution.²⁰⁹ On the other hand, even the people's day-to-day problems may be relevant in terms of the fundamental

²⁰⁸ See generally MABOUDI & NADI, *supra* note 178.

²⁰⁹ See Murray, *supra* note 6, at 818, 822 (citing cases of submissions focused on deep poverty such as "[w]e also need water").

aspects of a constitution, which after all should be drafted in a way so as to improve the lives of the citizens of the nation. Thus, massive lack of access to resources may warrant a greater emphasis on socioeconomic rights, something that may be harder to incorporate where there is an already-circulating draft. Similarly, where whole segments of the population complain about their inability to have their voices heard by the decision-makers, a fundamental alteration of the system of representation may be necessary.

Perhaps more problematic are cases of outright paternalism on the part of the drafting elites, as was the case of Rwanda, where an aspect so fundamental to a constitution as the incorporation of human rights was purposefully left out of the public debate;²¹⁰ and to a lesser extent the case of Eritrea. The obvious rationale behind the exclusion in the case of Rwanda was the consideration of human rights as essential in the post-genocide context, something which in turn made proposals of alternatives to their inclusion undesirable. While thus shielding some aspects considered essential from the possibility of alteration, this paternalism presents issues in terms of its potential for generating a product that may not reflect the views of the people. This, in turn, could (speculatively) contribute to a popular notion of human rights as a foreign element, and to a reduced sense of public ownership over the constitution, with the consequent decrease in the internalization of the document. Furthermore, public discussion may not necessarily lean towards a *rejection* of human rights, but rather, and much more likely, towards the consideration of cultural and other concerns in the assimilation of those rights (which may conversely have been precisely what the drafters sought to avoid). On the other hand, delicate issues such as human rights may in fact produce a certain degree of polarization among the population, and a consequent destabilization of a post-conflict society, which will arguably be itself in a delicate situation. Therefore, as with most other aspects of public participation, it is highly advisable to acknowledge the peculiarities of the society being addressed, and to reject as much as possible categorical presumptions, in order to determine the best possible alternative for a particular constitutional process. Let it be said at least that, in the case of Rwanda, the denial of consultation on human rights matters does not seem to have led to undesirable consequences beyond the lack of consultation itself, and that even regarding the matter of rights there were some relevant contributions on the part of the public, as the later inclusion of women's rights clauses showed.²¹¹

From all the above the conclusion may be drawn that some circumstantial factors do warrant the choice in favor of a more top-down, or even paternalistic, approach to participation. In this regard, we should differentiate the more "legitimate" (assuming that meaningful participation is an element of legitimacy) top-down processes, in which elites only take the initiative at first but leave a substantial ground for public participation, and are willing to implement the modifications pertinent to that participation, from the less "legitimate" ones, in which public participation is used only as a legitimizing or face-saving tool, with no intentions of actually taking the people's views into account; or, at best, as a tool to educate and convince the people about a particular draft. Eritrea's, Rwanda's, and Kenya's (2010) processes seem to fall under the former ("legitimate") category, whereas Uganda's probably stands at the borderline of the

²¹⁰ See Banks, *supra* note 118, at 1065 n.126.

²¹¹ See *id.* at 1064; ANKUT, *supra* note 117, at 23–25.

latter. It is important to note, in any case, that even these rather top-down participatory processes are significantly less so (top-down) than the ultimate top-down drafting efforts; that is, those that do not include any sort of public participation. Among the factors that could warrant the choice of a (legitimate) top-down participatory process may be, as we have seen, low levels of education, unavailability of infrastructures or resources, and post-conflict instability and the need to shield some constitutional clauses from debate and alteration (leading to potential conflict). It must be pointed out, however, that even under these circumstances there seems to be little harm in obtaining the views of the public in an *a priori* fashion (that is, before the drafting of an initial constitutional proposal), thus greatly enhancing the legitimacy of the process in the eyes of those taking part in it (so long as the *a priori* consultation remains a good faith one).

Overall, the trend in the African nations surveyed seems to show a preference for a somewhat more top-down approach, in varying degrees. There are some exceptions, namely South Africa, Kenya (in its original 2005 plan), and (arguably) Egypt. Of the rather top-down processes, Uganda's and Zimbabwe's (2000) were perhaps the most problematic, being as they were under the absolute control of the ruling party and of the president respectively. Education is for the most part preferred over consultation, at least during the initial stages, which may make sense in the context of developing nations with little popular knowledge of legal and constitutional concepts. It is worth noticing that out of the processes analyzed, only South Africa's, Uganda's, Rwanda's, and Kenya's (2010) led to established constitutions, whereas the Eritrean, Zimbabwean (2000), Kenyan (2005), and Egyptian constitutions ultimately failed at one stage or another. The diversity among both the failed and the successful processes shows the impact that external circumstances can have on the effectiveness of a public participation program, and the enormous variety of methods that can be followed to conduct such programs. Furthermore, not all the participation processes carried the same weight in their respective constitutional draft, with Eritrea, Uganda, and Zimbabwe scoring perhaps the lowest in this regard.

All-in-all, what can be concluded from these country studies is that for public participation to remain meaningful, the situation of a nation must be stable enough, politically and otherwise, so as to afford the people an opportunity to express their views, and to have those views taken into account. But even more importantly, there must be a good faith desire, genuinely supported by adequate resources, to educate and consult the public, so that they may have an informed and substantive say in the drafting of a constitution that is after all meant to guide the future of their nation. Only then could such constitution be deemed to truly represent the voice of the people.