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POPULAR AUTHORSHIP AND CONSTITUTION MAKING: COMPARING AND CONTRASTING THE DRC AND KENYA

JAMES THUO GATHII*

INTRODUCTION

African countries have produced a torrent of new constitutions since 1989.¹ In addition to these new constitutions, there has been an exponential growth of nongovernmental organizations monitoring compliance of African governments with the new constitutional requirements.² What is more striking is that constitution making in countries like Kenya involved the most widespread discussion among ordinary citizens, outside of nongovernmental groups. In many countries with new constitutions, vigorous discussions on the need for a commitment to and compliance with the rule of law and respect for human rights “infus[es] the capillaries of everyday life” in a manner unimaginable in the repressive political climate of two decades ago.³

* Governor George E. Pataki Professor of International Commercial Law, Albany Law School. This Article was written before the December 2007 general elections in Kenya that were followed by a spate of violence. It remains to be seen whether the mediation talks between the Government and the opposition led by former U.N. Secretary-General Kofi Annan will produce a new constitution. If this happens, then it will show once again how much easier it is to have significant constitutional reforms following a crisis.

1. I counted at least twenty-five new constitutions and many more that were amended in Africa to allow plural politics in the World Fact Book. See CIA, *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Feb. 22, 2008) [hereinafter World Factbook].

2. See, e.g., U.N. Directory of African NGOs, <http://www.un.org/africa/osaa/ngodirectory/index.htm> (last visited Feb. 27, 2008) (listing NGOs by country or action area).

3. See John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 24-26 (Jean Comaroff & John L. Comaroff eds., 2006); see also Rosalind C. Morris, *The Mute and the Unspeakable: Political Subjectivity, Violent Crime, and “the Sexual Thing” in a South African Mining Community*, in *LAW AND DISORDER IN THE POSTCOLONY* 57, 57-101, *supra*.

In conflict-ridden countries, constitutions have come to symbolize a commitment to make a complete break with the past.⁴ This means in the DRC, a break from Mobutuism; in Uganda, a break from the legacy of Idi Amin; in South Africa, a break from apartheid;⁵ in Eritrea, a break from the repressive constraints of Ethiopia; and so on. The use of a constitution to symbolize a break from the past was aptly dramatized by the South African Constitutional Court in its very first decision.⁶ According to the court in a subsequent decision:

The South African Constitution ... represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁷

Yet notwithstanding the commitment to make a complete break with the past, some continuity with the conflicts of the past and of repressive authoritarian practices has been evident in countries as diverse as Uganda, the DRC, and Ethiopia. Although symbolizing the effort to break with the past, constitutions in several countries,

4. See Ugo Mattei, Paper Presentation at the International Conference on African Constitutions: Patterns of African Constitutions in the Making (Nov. 27, 1998), available at <http://www.jus.unitn.it/cardozo/Review/Constitutional/Mattei-1999/Patterns.html> (last visited Feb. 22, 2008) (arguing that the constitutions of Ethiopia, South Africa, and Eritrea were "responses to genuine revolutionary moments").

5. See, e.g., *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) ¶ 8 (S. Afr.), available at <http://hei.unige.ch/~clapham/hrdoc/docs/soobramoney.pdf>. The court observed that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.

Id.

6. See Constitutional Court of South Africa: The First Hearing, <http://www.concourt.gov.za/site/thecourt/history.htm#judgment> (last visited Feb. 22, 2008).

7. *S v Makwanyane* 1995 (3) SA 391 (CC) ¶ 262 (S. Afr.) (discussing the constitutionality of the death penalty).

including the DRC and Uganda, have also legitimized—through electoral processes—political leaders who were once warlords. The DRC, which has witnessed the birth of two new constitutions in the last five years,⁸ is a good example of a country that continues to experience disorder, lawlessness, and war alongside its new constitution. By contrast, the Constitution of the Republic of Kenya has survived a complete overhaul following several years of constitutional drafting, redrafting, and minimal amendments.⁹ Eventually, a new constitution was rejected in a referendum in November 2005 following a broadly consultative, participatory, and contentious drafting process.¹⁰ This is all expected to change sometime in 2008, however, following the eruption of violence in the wake of the disputed election at the end of 2007. A political settlement being debated will require major constitutional reforms.

The constitution-drafting process and its approval in the DRC was a significant part of a peaceful political solution to war. As such, the constitution as a charter limiting the authority of the executive and separating power between the branches of the government was not a primary motivation for the adoption of the constitution. Rather, in this Article I argue that the 2005 Constitution was seen as symbolizing a break from the past, and that the people of the Democratic Republic of the Congo seized a rare opportunity to end the wars in their country by overwhelmingly adopting a constitution that they had not participated in writing.

In both Kenya and the DRC, constitutional drafting was dominated by the incumbent parties. Interestingly, in Kenya, where there was more widespread discussion of the drafts, the constitution was resoundingly defeated in the referendum of 2005.¹¹ By compari-

8. See World Factbook, *supra* note 1, at Congo, Democratic Republic, <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last visited Feb. 22, 2008).

9. See James T. Gathii, *Kenya's Legislative Culture and the Evolution of the Kenya Constitution*, in *LAW AND DEVELOPMENT IN THE THIRD WORLD* 78-93 (Yash Vyas et al. eds., 1994). In *Njoya v. Attorney General*, (2004) 1 K.L.R. 261, 286 (Kenya) (discussed *infra* note 112), Justice Ringera noted that “[s]ince independence, there have been thirty-eight (38) amendments to the Constitution. The effect of all these amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration on the basic structure or features of the Constitution.”

10. See Alicia L. Bannon, Note, *Designing a Constitution-drafting Process: Lessons from Kenya*, 116 *YALE L.J.* 1824, 1830-41 (2007) (describing the movement for a new constitution, the review process and drafting, and the unsuccessful referendum vote).

11. See *id.* at 1840-41.

son, the much less widely discussed 2005 DRC Constitution was approved by an overwhelming 84 percent in a referendum.¹² This contrast may arise from the fact that constitution drafting in post-conflict nations like the DRC during internationally supported transitions is likely to be dominated by incumbent leaders but, nevertheless, be widely approved. On the other hand, countries not experiencing significant conflict exhibit more political openness, but may experience difficulties in the approval of a constitution limiting the power of an incumbent government in a referendum. It may very well be that when people “find themselves with all the time they need to find a good solution, no solution at all may emerge,”¹³ as the Kenyan experience so far seems to suggest. By contrast, the dueling parties in the DRC conflict literally had their backs against the wall, and although the constitution drafting process commenced in a manner that did not allow popular authorship, the urgent need to address the longstanding conflicts in the country accounts for the overwhelming approval in a referendum of the 2005 Constitution.¹⁴

This Article proceeds as follows: In Part I, I examine the factual background to constitution making in the DRC and Kenya. In Part II, I compare and contrast questions of constitutional legitimacy, validity, and efficacy in the constitution-making processes of the DRC and Kenya. I end with the conclusion that whereas in Kenya widespread participation and consultation resulted in voting down the constitution, in the DRC minimum participation did not affect its overwhelming approval.

12. For an excellent discussion of the DRC Constitutional Referendum of 2005, the official results broken down by province, drafts of the DRC Constitution, and links to the relevant constitutions, documents, and agreements (many of which are in the official French language text), see DR Congo—Constitutional Referendum, Posting of Renee Dopplick to Inside Justice, http://www.insidejustice.com/law/index.php/intl/2005/12/21/dr_congo_new_constitution (Dec. 21, 2005, 18:36 EST) [hereinafter DR Congo—Constitutional Referendum Discussion].

13. Jon Elster, *Forces and Mechanisms in the Constitution-making Process*, 45 DUKE L.J. 364, 394-95 (1995).

14. On how urgency may inform constitution making, see *id.*

I. BACKGROUND TO CONSTITUTION MAKING IN THE DRC AND KENYA

A. *Constitution Making in the DRC*

The writing and promulgation of the DRC's new constitution was provided for by international agreement; the new constitution replaced the transitional constitution enacted on April 4, 2003, which arose from the Pretoria Agreement.¹⁵ The Pretoria Agreement provided for ending the five-year war in the DRC and also called for a constitutional referendum and national elections within three years, with the possibility of two six-month extensions.¹⁶ Under this agreement, a new constitution was to be written and promulgated, and national elections were to be held by the end of July 2006.¹⁷

The constitutional commissions that drafted the 2003 transitional constitution were appointed by President Kabila.¹⁸ This followed an agreement on March 11, 2003, among parties to the inter-Congolese dialogue, to begin a program for the drafting of the new constitution and for a future unified army.¹⁹ The transitional constitution and army were to last for a period of a national transitional government eventually leading to national democratic elections—which eventually were held in July 2006.²⁰ Drafting began soon after and was finalized by the Congolese Constitutional Commission in October 2004 after a high-level European Union official flew to Kinshasa to dissuade President Kabila from endorsing an authoritarian constitution.²¹ It was finalized at a retreat in Kisangani in October

15. See DR Congo—Constitutional Referendum Discussion, *supra* note 12. The agreement is also known as the Global and All-Inclusive Agreement on the Transition in the DRC, signed on December 17, 2002, in Pretoria, South Africa. See, e.g., Press Release, U.N. Security Council, Secretary-General Hails Pretoria Agreement as Political Milestone for Peace in Congolese Conflict, U.N. Doc. SC/7479 (Aug. 8, 2002).

16. See Press Release, U.N. Security Council, *supra* note 15.

17. See DR Congo—Constitutional Referendum Discussion, *supra* note 12 (discussing the transitional constitution, voter registration, and drafting the referendum).

18. See Congo Chronicle XI (Oct. 27–Nov. 9, 1997), available at <http://www.congoned.dds.nl/chroni11.html>.

19. See *id.*

20. See DRC—Belligerents Agree on Constitution, Unified National Army, NEW AM. MEDIA, Mar. 11, 2003, available at http://news.newamericamedia.org/news/view_article.html?article_id=fc2ea699e8d34e90ac021dc79148952e (last visited Feb. 22, 2008).

21. See DR Congo—Constitutional Referendum Discussion, *supra* note 12.

2004.²² The constitution was thus drafted in approximately 1.5 years.²³ Only the larger political parties were represented in the commission and participated in the drafting of the new constitution,²⁴ indicating that there was little widespread discussion of the draft. In fact, to the extent there was consultation, it appeared that the views of the people were ignored. For example, a Senate committee prior to the enactment of the constitution found widespread opposition to the death penalty, but the senators ignored these public views and inserted provisions allowing the death penalty for certain offenses.²⁵

The DRC drafted the constitution with the assistance of France, Mauritius, Belgium, and the United States.²⁶ International organizations also assisted in the drafting process, including the Electoral Institute of South Africa (EISA),²⁷ the Konrad Adenauer Foundation (KAF),²⁸ USAID,²⁹ UNDP,³⁰ and the United Nations office in the DRC.³¹ The U.S.-based National Democratic Institute

22. *See id.*

23. For a brief overview of this process, see Report for the Mission in Democratic Republic of Congo (Oct. 25-Nov. 4, 2004), available at http://cnapd.be/_CNAPD1.1/DocATelecharger/rapport%20mission%20rdc%2025%20oct%205%20nov%2020041.htm (article title and text translated from French by author). For an argument that popular consultation was not necessary in the DRC, see P  p   Mikwa, *Constitution: Congolese Want a Unitarian State*, SYFIA GRANDS LACS, AGENCE DE PRESSE, Jan. 20, 2005, <http://syfia-grands-lacs.info/index.php5?view=articles&action=voir&idArticle=351> (article title and text translated from French by author). On acrimony among the writers and senators drafting the constitution, see *Draft of DRC Constitution Adopted in the Senate*, AGENCE FRANCE-PRESSE, Mar. 17, 2005, available at <http://www.peinedemort.org/document.php?choix=1303> (article title and text translated from French by author).

24. The Independent Electoral Committee (CEI), the committee charged with conducting the elections, only included representation from the major political parties. See First Carter Center Pre-Election Statement on Preparations in the Democratic Republic of Congo (June 6, 2006), <http://www.cartercenter.org/news/documents/doc2374.html>.

25. See DRC: "The National Assembly Can Still Abolish the Death Penalty," AFRIK.COM, Apr. 6, 2005, <http://www.afrik.com/article8259.html> (article title and text translated from French by author).

26. See DR Congo—Constitutional Reform Discussion, *supra* note 12.

27. *See id.*; see also EISA Homepage, <http://www.eisa.org.za/> (last visited Feb. 22, 2008).

28. See DR Congo—Constitutional Reform Discussion, *supra* note 12; see also Konrad Adenauer Foundation: Philippines, <http://www.Kaf.ph/> (last visited Feb. 22, 2008).

29. See DR Congo—Constitutional Reform Discussion, *supra* note 12; see also U.S. Agency for International Development, <http://www.USAID.gov/> (last visited Feb. 22, 2008).

30. See DR Congo—Constitutional Reform Discussion, *supra* note 12; see also U.N. Development Programme, <http://www.undp.org/> (last visited Feb. 22, 2008).

31. See U.N. Mission in DR Congo, <http://www.monuc.org/> (last visited Feb. 27, 2008).

for International Affairs (NDI) supplied technical support in addition to recommending changes to the draft constitution.³² The Justice and Peace Commission of the Catholic Church, joined by USAID, developed and distributed a precursor draft of the new 2005 draft constitution.³³

As the first step toward enactment, the draft constitution was presented to the Senate and the President of the Chamber of Parliament on October 29, 2004.³⁴ The draft was then adopted by the DRC transitional parliament—known as the National Assembly—on May 13, 2005, and submitted to the popular referendum.³⁵ The referendum was held on December 18-19, 2005.³⁶ According to official results, 84 percent of voters approved the constitution, which was officially promulgated on February 18, 2006.³⁷ The country's first national democratic elections in over forty years took place a few months later, on July 30, 2006.³⁸

The constitutional referendum and subsequent national elections were widely considered procedurally successful. Before the referendum, the Independent Electoral Committee (CEI) circulated over 500,000 copies of the proposed constitution—about one for every fifty voters.³⁹ Additionally, the constitution was not translated into all spoken Congolese languages, including Kingwana, a broadly spoken dialect of Swahili.⁴⁰ As a result, despite their awareness of the campaign, many voters were unaware of the constitution's content. Many voters, however, relied on the Kabila-led transitional government's assurances of social improvement.⁴¹

32. See DR Congo—Constitutional Reform Discussion, *supra* note 12; see also National Democratic Institute, <http://www.ndi.org/> (last visited Feb. 22, 2008).

33. See DR Congo—Constitutional Reform Discussion, *supra* note 12.

34. See *id.*

35. See *id.* This process was in accordance with Article 104 of the transitional constitution. The text of the Constitution of the DRC is available in French at: <http://www.presidentrdc.cd/constitution.html>.

36. See DR Congo—Constitutional Reform Discussion, *supra* note 12.

37. U.S. Dep't of State, Background Note: Democratic Republic of the Congo, <http://www.state.gov/r/pa/ei/bgn/2823.htm> (last visited Feb. 22, 2008).

38. See *id.*

39. See DR Congo—Constitutional Reform Discussion, *supra* note 12.

40. See *id.*

41. See *id.*

B. Constitution Making in Kenya

The debate on reforming the Kenyan Constitution started in earnest in the late 1980s and peaked in the early 1990s. The authoritarian governance of the Moi regime and its tinkering with the constitution against the backdrop of the end of the Cold War, coupled with dramatic changes in Eastern and Central Europe, gave impetus to calls for a constitutional overhaul to end one-party rule. An amendment to the constitution in 1982 making Kenya a one-party State was often cited as a clarion call for immediate change.⁴² In 1986, another amendment made by the one-party parliament removed the security of tenure from the offices of the Attorney General and the Controller and Auditor General.⁴³ The Moi government argued in support of removing these protections on grounds that they were colonial hangovers with no place in modern Kenya.⁴⁴ Further justification for overhauling the constitution was an amendment in 1988 extending the power of the police to hold suspects in capital cases without charges for fourteen days.⁴⁵ Most importantly, this amendment removed the security of tenure for judges of the High Court, the Court of Appeal, and the Public Service Commission.⁴⁶

Following heavy criticism, the parliament reversed course and in 1990 returned the security of tenure to the members of the Public Service Commission and judges of the Court of Appeal and High Court, as well as the Attorney General, Controller, and Auditor General.⁴⁷ Finally, under heavy pressure from civil society groups—particularly lawyers, the bishops of the Catholic Church, the Hindu Council of Kenya, the Supreme Muslim Council of Kenya (SUPKEM), the National Council of Churches of Kenya (NCCCK), the National Convention Executive Council (NCEC), and donors—the one-party parliament in December 1991 ended the *de jure* one-party status the ruling party had enjoyed since 1982.⁴⁸ The end of one-

42. See Bannon, *supra* note 10, at 1830-32.

43. See Gathii, *supra* note 9, at 87.

44. See *id.* at 89.

45. See *id.* at 90.

46. See *id.* at 100.

47. See *id.*

48. See *id.* at 92-93.

party rule began a new but uncompleted phase of overhauling the constitution. The 1992 multi-party general elections exhibited the continuing vitality of the independence party, the Kenya African National Union (KANU), which had clung to power because multi-party politics were conducted within the authoritarian strictures of a one-party constitution with an especially powerful and unaccountable president. This state of affairs resulted in an opening for a new constitution to be implemented through a people-driven process.⁴⁹

In 1997, the Moi government acquiesced to the enactment of the Constitution of Kenya Review Commission Act (the Review Act), which was negotiated by an Inter-Party Parliamentary Group.⁵⁰ The appointment of the Review Commission by the Moi government without consulting opposition parties or other stakeholders, however, undermined its image as a representative body.⁵¹ As a result, between June and October 1998, negotiations began in earnest between the Review Commissioners and a civil society group, the Ufungamano Initiative, which had established the People's Commission of Kenya (PCK).⁵² A consensus between the two groups in 2001 resulted in an amended law to facilitate constitutional review that combined the Moi appointed commissioners with those of the Ufungamano Initiative.⁵³ The review team

49. See Bannon, *supra* note 10, at 1830-32.

50. In 1997, general elections were held. Similar to the 1992 elections, the 1997 elections were preceded by constitutional amendments. These amendments were the result of the Inter-Party Parliamentary Group (IPPG) negotiations reflecting a consensus around a set of minimum—rather than comprehensive—reforms to balance the electoral playing field and give opposition parties more political room. These amendments included an agreement on a more independent electoral commission. See generally WILLY MUTUNGA, CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997 (1999). For other accounts and analysis of constitution making in Kenya, see THE ANATOMY OF BOMAS: SELECTED ANALYSIS OF THE 2004 DRAFT CONSTITUTION OF KENYA (Kithure Kindiki & Ososo Ambani eds., 2005); INFORMING A CONSTITUTIONAL MOMENT: ESSAYS ON CONSTITUTION REFORM IN KENYA (Morris Odhiambo, Osogo Ambani & Winnie V. Mitullah eds., 2005).

51. See Mutunga, *supra* note 50, at 217 (discussing characteristics that would make a Commission “independent and impartial” according to Kenyan cultural norms).

52. For more on the Ufungamano Initiative, including how it structured its commissioner selection process and its critique of the “anti-people” government, see ANNE MURAGU NYABERA ET AL., SETTING THE PACE: THE 1999/2000 FIDA ANNUAL REPORT ON THE LEGAL STATUS OF KENYAN WOMEN (2000); see also Athena D. Mutua, *Gender Equality and Women's Solidarity Across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 13 WM. & MARY J. WOMEN & L. 1, 44 (2006).

53. See Laurence Juma, *Ethnic Politics and the Constitutional Review Process in Kenya*,

consulted the public widely, collated their views, and came up with a draft constitution (called by many the "Zero Draft").⁵⁴ The Zero Draft was preceded by the Commission's efforts in widespread civic education, visits to all electoral constituencies to listen to and collect views, receipt of over 35,000 written memoranda, and the availing of information on the constitution in district documentation centers throughout the country.⁵⁵

In spite of these efforts, President Moi scuttled the constitution-making process just before the 2002 elections by dissolving Parliament. He did so prior to the meeting of the National Constitutional Conference that was required to discuss and then adopt or reject the draft constitution.⁵⁶ The 2002 elections ousted the ruling party from power and brought to power a coalition of opposition parties.⁵⁷ The National Rainbow Coalition (NARC) party promised to deliver a new constitution within one hundred days after its December 2002 inauguration.⁵⁸ There was, therefore, optimism in the air when the review process was reconvened in 2003.

The National Constitutional Conference was an unwieldy assembly of over 600 members composed as follows: all 223 members of Parliament; 210 representatives of districts elected by county councils; 29 members of the Review Commission as non-voting members; 41 persons each representing a political party; 12 representatives of religious, professional, and women's groups; trade unions; nongovernmental organizations; and other interests selected by the Review Commission.⁵⁹

Though the Conference was very inclusive, there were many rifts within it. For example, problems existed between parliamentarians and the rest of the conference delegates,⁶⁰ between members of the

9 TULSA J. COMP. & INT'L L. 471, 524-26 (2002).

54. See CONSTITUTION OF KENYA REVIEW COMM'N, NAT'L CONSTITUTIONAL CONFERENCE, DRAFT CONSTITUTION OF KENYA 2004 (Oct. 20, 2004), available at <http://www.scribd.com/doc/438024/bomas-draft-2004>.

55. See THE PEOPLE'S CHOICE: REPORT OF THE CONSTITUTION OF KENYA REVIEW COMM'N 4 (Sept. 18, 2002) [hereinafter THE PEOPLE'S CHOICE].

56. See Bannon, *supra* note 10, at 1834.

57. See *id.* at 1835-36.

58. See *id.* at 1835.

59. See THE PEOPLE'S CHOICE, *supra* note 55, at 2.

60. See, e.g., Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 180 (2004).

ruling NARC coalition party, which began to disintegrate over the 2002 post-election power-sharing arrangements,⁶¹ and so forth. These disagreements resulted in judicial challenges to the role of the National Constitutional Conference. This Article will discuss these challenges in greater detail in relation to issues of legal validity in the next Part. Suffice it to say here, one of the contentious issues in the review was whether the National Constitutional Conference or Parliament had the power to enact a new constitution to replace the preexisting constitution.⁶²

As a result of the legal challenges to the competence of the National Constitutional Conference, the Constitution of Kenya Review Act was amended to provide for a referendum as the appropriate manner to enact a new constitution.⁶³ This amendment reflected the outcome of the legal skirmishes to the effect that the people of Kenya had the constituent power to enact a new constitution.⁶⁴ Following this amendment to the Review Act, Attorney General Amos Wako amended the draft constitution that emerged from the National Constitutional Conference (NCC).⁶⁵ These amendments to the NCC draft were agreed upon by parliamentarians in meetings in Naivasha and Kilifi.⁶⁶ These amendments reflected the controversy over whether Parliament or the NCC had the last word on the draft of the constitution.⁶⁷ The result of these amendments, known as the Wako Draft, was then submitted to a referendum in November 2005.⁶⁸ The draft constitution was defeated by a 58 percent vote against it; only 42 percent of those voting in the referendum would have approved it.⁶⁹

61. *Id.*

62. *See infra* Part II.B.

63. *See generally* Bannon, *supra* note 10.

64. *See id.*

65. *See* PRESTON CHITERE ET AL., KENYA CONSTITUTIONAL DOCUMENTS: A COMPARATIVE ANALYSIS 4 (2006), available at <http://www.cmi.no/publications/file/?2367=Kenya-constitutional-documents>.

66. *Id.* at 1, 4.

67. *See id.*

68. *See id.* at 4.

69. *See Kenya's Verdict: Orange Triumphs*, E. AFR. STANDARD (Kenya), Nov. 22, 2005, available at <http://www.eastandard.net/archives/?mnu=details&id=32558&catid=4>; *see also* Michael Ole Tiampati, *Maasai-led Grassroots Education Efforts Prove Essential to Referendum Defeat*, WORLD INDIGENOUS NEWS, Feb. 8, 2006, available at <http://www.cs.org/publications/win/win-article.cfm?id=2840&highlight=>

Raila Odinga, a leading opposition politician who advocated against the Wako Draft, noted in an editorial that “seven out of eight provinces and 152 out of 210 constituencies voted for the same cause. And for the second time in three years, Kenyans have inflicted heavy political defeats on the governments of the day.”⁷⁰ Odinga was referring to a major by-election a few months before in which the ruling NARC party lost seats in Parliament.⁷¹ The defeat of the Wako Draft was in striking contrast to the NARC Coalition electoral victory in 2002, when President Kibaki led the party with support from all over the country.⁷² Barely three years after NARC’s electoral victory, deep ethnic divisions emerged in the country, as reflected in the referendum vote.⁷³ Only Central Kenya, which is predominantly Kikuyu and the same ethnic group as President Kibaki, overwhelmingly voted for the draft constitution, while most of the rest of the country rejected it.⁷⁴

The rejection of the draft constitution demonstrated how well organized the opposition, the Orange Democratic Movement (ODM), had become since splitting from the NARC coalition.⁷⁵ Not all the arguments that ODM politicians used to lobby for the defeat of the Wako Draft accurately reflected its contents, however. For example, they misled their supporters on what the draft constitution provided for on the very controversial subjects of inheritance by girls of their father’s property, as well as on religious courts and, in particular, Islamic courts.⁷⁶

70. Raila Odinga, Editorial, *President Learnt Little from Poll Defeat*, DAILY NATION (Kenya), Dec. 6, 2005.

71. For more information about opposition leader Odinga, see Bannon, *supra* note 10, at 1835-36.

72. See Makumi Mwangi, *Issues, Problems, and Prospects in Managing the Diplomatic Services in Small States*, FLETCHER FORUM WORLD AFF., Winter 2006, at 193 (noting that “[t]he NARC government rode to power on the back of an overwhelming Vote of Confidence”).

73. See generally Bannon, *supra* note 10.

74. See Njoroge Kinuthia, *AAGM: Kenyans Reject Proposed Constitution*, DAILY NATION (Kenya), Nov. 22, 2005; Francis Soler, *President Kibaki Plays His Last Card*, INDIAN OCEAN NEWSL., Nov. 26, 2005.

75. See Kinuthia, *supra* note 74.

76. See Michael Chege, *Weighed Down by Old Ethnic Baggage, Kenya Races to Another Historic Election*, CSIS AFR. POL’Y FORUM (June 22, 2007), <http://forums.csis.org/africa/?p=40> (“In practice, the referendum was won by the ODM’s skillful exploitation of other issues: fears of violation of ethnic land rights among pastoralists by a proposed land commission; cultural and sexist antipathy to the supposedly un-African idea enshrined in the draft constitution of equal inheritance rights between sons and daughters; appeals to Muslims, who felt short-

The defeat of the Wako Draft was also regarded as a verdict against the foot dragging of the Kibaki administration, particularly in fighting high-level corruption.⁷⁷ Most important, the defeat of the constitution showed how polarized the country had become, particularly between the Kikuyu of the Central Province and the rest of the country.⁷⁸ Although the NARC government had come to power representing ethnic groups from around the country, its support—especially in Nyanza, most of the Rift Valley, the Coast and Western provinces—has since ebbed away significantly.⁷⁹

Finally, the defeat of the Wako Draft is evidence that in Kenya, the constitution has continued to be a political football passed between those vying for political power and those defending it.⁸⁰ From this point of view, there seems to be no genuine commitment to having a constitution to lay down a general framework for governance among the political class in the country. The art of compromise and coalition politics that had characterized the original NARC in 2002 seems to have given way to political divisions, which reflect a deepening of ethnic politics as politicians postured for the 2007 election.

Several efforts by President Kibaki's government to restart constitutional reform talks since November 2005 have not produced much progress. His appointment of the Kiplagat Panel of Eminent Persons came up with a report calling for "national healing," but this and its other recommendations were not implemented ahead of the controversial elections of December 2007.⁸¹ In that election ODM

changed by the absence of tough constitutional guarantees for their traditional kadhi courts").

77. See, e.g., *Kenyan Constitution Vote Is Referendum on Leadership*, USA TODAY, Oct. 20, 2005, at 10.

78. See Soler, *supra* note 74.

79. See Chege, *supra* note 76 ("In November 2005, the government lost the constitutional referendum by a decisive 57 to 43 percent vote. Kibaki accepted the verdict. But the results polarized the country on ethnic lines, with the bedrock of the government's support being confined largely to heavily Kikuyu Nairobi and central Kenya, the Kikuyu heartland to the north of the capital.")

80. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 3, 6-19 (Issa G. Shivji ed., 1991) (exploring this theme at greater length).

81. Otiende Amollo, *The Committee of Eminent Persons: Saviour or Pawn?*, E. AFR. STANDARD (Kenya), May 1, 2006, available at <http://www.eastandard.net/archives/index.php?mnu=details&id=1143951793&catid=4>.

pushed for minimum constitutional reforms to level the political playing field.⁸² One observer summarized the stakes in the latest round of constitutional reform proposals by noting that proposals to form a consultative assembly, “a grander version” of the National Constitutional Conference, “will surely end up as a noisier Tower of Babel ... [and] we cannot spend all our time talking and arguing about a constitution that will never be.”⁸³ Given the political crisis and violence that followed the 2007 presidential election, however, the Kofi Annan-led mediation talks ongoing as of mid-February 2008 between ODM and the government promise the best chance for constitutional, political, and institutional reforms as one part of resolving the crisis.

II. LEGITIMACY, VALIDITY, AND EFFICACY IN CONSTITUTION MAKING IN THE DRC AND KENYA

A few years ago, David E. Apter and Carl G. Rosberg argued that the reality of conflict-ridden, poverty stricken countries “pre-dispose[d] one to reconstitute power by authoritarian and coercive means.”⁸⁴ In other words, they argued that “massive developmental change [was] extremely difficult to realize under acceptable political conditions.”⁸⁵ Is it plausible to make the case that the drafting and adoption of the 2005 DRC Constitution is consistent with Apter and Rosberg’s thesis—that strong-arm rule may be acceptable to reconstitute political authority after a major conflict? If so, what is the fate of constitutionalism when a constitution is adopted by excluding popular participation in its drafting, and it is nevertheless

82. See Makau wa Mutua, *Why Minimum Constitution Reforms Don't Make Sense*, DAILY NATION (Kenya), Sept. 21, 2006 (arguing that “[m]inimum constitutional reforms are now being supported by people who opposed comprehensive constitutional reform under Moi”). According to Mutua, “Mr Kalonzo Musyoka, Mr William Ruto, Mr Mutula Kilonzo, Mr Henry Kosgey, and Mr Musalia Mudavadi stood in the long struggle for a democratic constitution. These men stood steadfastly with the Moi-Kanu regime as it brutally persecuted reformers.” Makau Mutua, *AAGM: Yesterday's Villians Are Today's Heroes*, DAILY NATION (Kenya), Sept. 13, 2006.

83. Gitau Warigi, *Calling Timeout on Endless Talks*, SUNDAY NATION (Kenya), Sept. 17, 2006. For a comprehensive examination of the review process, see Bannon, *supra* note 10.

84. David E. Apter & Carl G. Rosberg, *Changing African Perspectives*, in POLITICAL DEVELOPMENT AND THE NEW REALISM IN SUB-SAHARAN AFRICA 1, 39 (David E. Apter & Carl G. Rosberg eds., 1994).

85. *Id.*

adopted overwhelmingly in a referendum? Is constitution drafting of an entirely new constitutional document only possible under conditions of political, economic, and social turbulence as the DRC experience shows? How different are the constitutions accepted in return for independence in the post-independence era from those adopted in countries like the DRC as a transition from war to peace? Does drafting constitutions for peace suggest as one of the outcomes less of an assurance for a homegrown constitution? These are the questions I seek to address in this part of the Article.

A. Legitimacy and Efficacy

The approval of the DRC Constitution undermines the classical understanding that constitutions are inaugurated in a constitutional moment representing a radical break with the past.⁸⁶ This is consistent with the fact that few constitutions live up to the mythical notion of a transforming revolution.⁸⁷ It is also consistent with the widely accepted proposition that impoverished regimes do not consolidate democratic regimes very well.⁸⁸ This is especially true where democratic transitions have primarily involved the establishment of political institutions without simultaneously addressing the socio-economic basis of instability.⁸⁹ The overwhelming approval of the 2005 DRC Constitution in a referendum, especially in the war-torn Eastern provinces, suggests that war wariness, more than widespread public involvement in the drafting of the constitution, accounted for its high approval rating. So even

86. See Andr  Saj , Remarks on Constitution Making and Amending (unpublished manuscript), available at http://www.cpbac.nccu.edu.tw/tra/CRND/papers/panel2_1.pdf (last visited Feb. 23, 2008) (arguing that only the United States in 1789, Belgium in 1830, and South Africa came close to this ideal of a truly transformative constitution).

87. See *id.*

88. See generally TRANSITIONS FROM AUTHORITARIAN RULE: PROSPECTS FOR DEMOCRACY (Guillermo O'Donnell, Philippe C. Schmitter & Laurence Whitehead eds., 1986).

89. Commentators have argued that "the essence of democracy is that the allocation of the costs and benefits of reform is the subject of bargaining among competing groups. Sometimes such bargaining is inefficient and fails to produce economically optimal outcomes, which makes it tempting to limit or defer the democratic control of policymaking." Stephan Haggard & Steven B. Webb, *Introduction*, in VOTING FOR REFORM: DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT 1, 31 (Stephan Haggard & Steven B. Webb eds., 1994). For a critical view, see WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION AND HEGEMONY 344 (1996).

while war continued in parts of the DRC, the constitution was regarded as important enough to the country's transition from war to receive widespread public approval. This experience undermines the view that people are more likely to approve a constitution because they were involved in drafting it or because the people who enacted it had title to do so.⁹⁰

A high approval rating of a constitution, however, may not predict its efficacy,⁹¹ especially where conditions of war continue. In addition, although a high approval rating of a constitution may point to its legitimacy or its public acceptance, especially in heralding the return of peace after war, such a constitution does not approximate well to the desire for an autochthonous or indigenously-generated constitution.⁹² In fact, it is paradoxical that new constitutions like the 2003 DRC Transitional Constitution are adopted with significant backing of an internationally negotiated and supported peace process eerily similar to the involvement of departing colonial powers in the adoption of post-independence constitutions.⁹³

Clearly then, although seeking an autochthonous constitution with widespread public participation in its drafting and approval is an important goal, the DRC experience shows that seeking to draft a constitution on a clean slate to make a complete break with an undesirable past carries forward some of that past. For example, the warring parties become part of the government or the opposition.⁹⁴ The past that is sought to be superseded invariably frames a new constitutional order one way or another.

The DRC experience raises another challenge. Whereas the importance of popular sovereignty and political self-government in

90. For a discussion of these modes of constitutional bindingness, see Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605 (1999).

91. By efficacy, I am referring to the empirical question of following the commands and restrictions of the constitution. *See id.* at 1616 (discussing constitutional normative authority).

92. *See, e.g.*, J.B. Ojwang, *Autochthony, Nationhood and Development: A Review Article*, 2 AFR. URB. Q. 454, 454-57 (1987); *see also* Ruth Gordon, *Growing Constitutions*, U. PA. J. CONST. L. 528, 528-32 (1999) (arguing that constitutions in failed states are best built "from the bottom up").

93. *See* Isaak I. Dore, *Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach*, 41 ST. LOUIS U. L.J. 1301, 1302-06 (1997) (describing "constitutional failure" in certain African countries from the beginning of its existence up to the contemporary era).

94. *See* Michelman, *supra* note 90, at 1628 (arguing that in such circumstances "political interactions ... were already framed, when they occurred").

determining constitutional legitimacy cannot be overstated, the efficacy of a new constitution is not solely dependent on the actual involvement of the people in its drafting and/or acceptance.⁹⁵ By efficacy, I mean the extent to which the constitution forms the basis for predicting political behavior and sanctioning office holders for violating it.⁹⁶ To argue that legitimacy arises from popular drafting alone is to inaccurately suppose that legitimacy similarly predicts the efficacy of a constitution.

B. Legal Validity

Besides efficacy and legitimacy, concerns about the legal validity of a newly drafted constitution often arise. These questions may arise when there is a preexisting constitutional order, such as in Kenya. The legal validity of a newly drafted constitution, particularly in commonwealth African countries, is assumed to be necessarily traceable to another norm—the preexisting constitution. In essence, it is presupposed that the constitution itself contains its ultimate “rule of recognition” or acceptance.⁹⁷ Tracing the validity of one constitution to another ignores whether the preexisting, or indeed newly drafted, constitution has legitimacy or efficacy. Consequently, one must also pay attention as much to the process of making or approving the constitution as to the reasons besides participation in drafting and/or approving it that factually demonstrate that it is indeed binding or efficacious.

This Article’s claim is that another way in which the forcefulness of a constitution may be established—in addition to or in place of its authorship by the people—is its acceptance *in fact*⁹⁸ by the people and the political leadership in at least two senses. First, efficacy can be traced by examining whether the constitution constrains the power of political leaders. Second, in multi-ethnic societies like Kenya, the efficacy of a constitution may arise by examining the extent to which it helps establish a political environment that encourages the emergence of inter-ethnic political alliances, political moderation and cooperation, and minority accommodation, with a

95. *See id.* at 1616-19.

96. *See supra* note 90 and accompanying text.

97. *See Michelman, supra* note 90, at 1616.

98. I am heavily influenced and persuaded by Frank Michelman. *See id.* at 1617-19.

view to de-emphasizing cleavages along destabilizing axes such as ethnicity or religion.⁹⁹ Constraining ethnic divisiveness will in turn contribute to the success and endurance of a constitution. A successful constitution is, in part, one that is self-enforcing.¹⁰⁰

The foregoing analysis suggests that it is perhaps more important to ask whether the 2005 DRC Constitution has efficacy by looking at how the citizens and their leaders behave in relation to it, rather than by only examining those who enacted or approved it. Kenya's debate on whether the people or the Parliament were the ultimate bearers of the right to approve the Wako Draft in November 2005 is also instructive on the question of what makes a constitution legally binding—its authorship and approval by the people in the National Constitutional Conference, on the one hand, or by Parliament, on the other. The question of where the authority to approve the Wako Draft lay was part of the larger and equally divisive debate in the country regarding whether the National Constitutional Conference was truly as representative as a constituent assembly would have been.¹⁰¹ This Kenyan debate, therefore, acutely raised the crucial question: who is the “constitutional subject” eligible to draft a new constitution?¹⁰²

The Kenyan High Court was asked to decide whether Parliament or the people in a referendum were eligible to approve a constitution drafted and negotiated by the National Constitutional Conference in the case of *Onyango v. Attorney General*, also known as the *Yellow*

99. Here I follow Paul Brass when he argues that “political accommodation in democratic societies is an art not a system, and one that has to be pursued persistently in the face of changing circumstances.” PAUL R. BRASS, *ETHNICITY AND NATIONALISM: THEORY AND COMPARISON* 342 (1991). Brass argues that “[c]onsociationalism is a device for freezing existing divisions and conflicts and reducing the art of political accommodation to formulas that can work only as long as processes of social, economic, and political change do not upset them.” *Id.*; see also Donald L. Horowitz, *Ethnic Conflict Management for Policymakers*, in *CONFLICT AND PEACEMAKING IN MULTI-ETHNIC SOCIETIES* 115, 122 (Joseph V. Montville ed., 1990) (noting that a “device that creates incentives for cooperative interethnic relations” is one of the mechanisms of managing ethnic divisions in a democratic setting).

100. See Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul ...: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139 (2008) (arguing that to be enforceable, a constitution must be self-enforcing).

101. See MUTUNGA, *supra* note 50, at 217 (discussing representative characteristics in Kenyan culture).

102. See generally Sajó, *supra* note 86, at 6 (arguing that a discussion of who represents “constitutional subject” is a “dangerous public discussion”).

Movement case.¹⁰³ The case pitted those who argued that the process established to rewrite the Kenyan constitution should be people-driven against the Attorney General's view that it was the prerogative of Parliament under the existing constitution to approve a new constitution.¹⁰⁴ The Attorney General's position was that the legal validity of the new constitution could only be established by another norm: the constitution that was sought to be replaced, as well as by parliamentary legislation concerning the modalities of exercising a parliamentary mandate.¹⁰⁵ Although both sides of the debate represented opposing political elites, the framing of the debate as one between authorship by the people and authorship by the Parliament raises the question once again: what makes a constitution binding? Both sides of the debate in Kenya—people-driven through a referendum preceded by a popularly elected constituent assembly versus parliamentary approval—were informed by the narrow question regarding where to locate agency or legal title to make the constitution legally binding. Neither of these opposing sources of the bindingness of the constitution were centered on factual or other circumstances that might have contributed to the actual efficacy or effectiveness of any resulting constitution.¹⁰⁶

Counsel for the people-driven view “exhorted” the court to make it possible to have a “people friendly constitution and deliver our people from the current mine-field of constitution making,”¹⁰⁷ referring to the acrimonious and litigious nature of the drawn-out process of constitution making that had started several years earlier.¹⁰⁸ Counsel further argued that the mandate or power to approve the draft constitution produced by the National Constitutional Conference resided with the people, rather than Parliament, because “Constitution making is not a legislative process” and thus

103. Patrick Ouma Onyango et al. v. Att'y Gen., (2005) eKLR 1 (Kenya), available at <http://kenyalaw.org/eKLR> (click “Case Search” tab; then enter “Patrick Ouma Onyango” in “Case Parties” box).

104. *See id.*

105. *See id.*

106. It is, however, fair to presuppose that each side imagined that their method of approval guaranteed a better chance for the efficacy of the approved constitution.

107. *Onyango*, (2005) eKLR at 18-19.

108. For various accounts of constitution making in Kenya, see MUTUNGA, *supra* note 50; Makau Wa Mutua, *Taming the Leviathan: Post Colonial Trauma and Constitutionalism in Kenya* (on file with author).

the people of Kenya have “the inherent power to constitute and reconstitute their state and government.”¹⁰⁹

The court rejected the Attorney General’s claim that the constitution conferred on Parliament the power to adopt the new constitution and in part observed that the questions involved were “larger than the Constitution itself.”¹¹⁰ Relying on an earlier related case,¹¹¹ *Njoya v. Attorney General*,¹¹² the court held that the constituent power resided in the people of Kenya and as such, “by virtue of their sovereignty,” they had “the power to constitute or reconstitute the framework of government” by making or remaking the constitution.¹¹³ Parliament had no such power, the court held.¹¹⁴

The real issue in the *Njoya* case was on what legal title the court would affirm the authority of the unelected and unrepresentative National Constitutional Conference to draft a new constitution, even if it was eventually to be approved by the people in a referendum. In *Njoya*, Justice Ringera predicated his decision not only on a principled basis of legitimate authorship, but also, as he said, on “the colossal amount of time and resources expended on the process so far and the fact that all shades of political opinion and various social formations and interests had seats there.”¹¹⁵ In other words, the legal validity of constitutional drafting by the National Constitutional Conference—as opposed to a constituent assembly, which the court suggested would have been more representative—was not founded on the purity of constitutional authorship by the people.¹¹⁶ Rather, according to the court, the fact that the people would ultimately approve the constitution in a referendum was contemplated by the fact that the existing constitution recognized that sovereignty resided in the people of Kenya.¹¹⁷ As such, even if the

109. *Onyango*, (2005) eKLR at 12.

110. *Id.* at 21.

111. *See id.* at 8-9.

112. (2004) 1 K.L.R. 261 (Kenya).

113. *Onyango*, (2005) eKLR at 26 (quoting *Njoya*, (2004) 1 K.L.R. at 296).

114. *See id.*

115. *Njoya*, (2004) 1 K.L.R. at 284. Justice Ringera also noted that the constitution confirmed that sovereignty arose from the people and that it was primordial. Thus the people, Justice Ringera held, had the authority in the exercise of their constituent power in enacting a new constitution. *See id.*

116. *See id.*; *see also Onyango*, (2005) eKLR at 29 (finding some uneasiness in the fact that the National Constitutional Conference was composed of only one-third elected members).

117. *See Njoya*, (2004) 1 K.L.R. at 282 (“[T]he sovereignty of the people necessarily

new constitution was drafted by a largely unelected body, the fact that Kenya was making a constitution during peace time, unlike a situation in which there was a “revolutionary climate or ... cease-fire,” was a primary factor to be considered in upholding the power of the National Constitutional Conference to draft the constitution.¹¹⁸

Whereas the *Njoya* court was willing to look at the facts on the ground in testing where the legal title rested for drafting and eventually approving the constitution, those facts related as much to popular authorship as to the political necessity of having closure on a long, drawn out, and expensive constitution-making process. No one, however, was asking any questions about the efficacy of the new constitution because the people and the leaders believed it would be binding on them, and, more importantly, because the new constitution promised to address endemic ethnic cleavages in national politics.¹¹⁹ In other words, it appeared that the court did not consider its role as one of assisting the political class to buy into the constitution-making process and its product at that time.¹²⁰ Instead, the *Njoya* court argued the existing constitutional order was the place to trace the locus of legal title that enabled the people to ratify the constitution drafted by the National Constitutional Conference, because the existing constitution recognized that sovereignty belonged to the people.¹²¹

It is remarkable that both the *Njoya* and *Onyango* cases grounded the bindingness of a new constitutional order on its compliance with

betokens that they have a constituent power—the power to constitute and/or reconstitute ... their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution.”).

118. *Id.* at 284.

119. See Yash Pal Ghai, *A New Approach Is Required To Move Forward the Review Process*, DAILY NATION (Kenya), Aug. 13, 2006 (criticizing the *Njoya* judgment as “lacking merit and based on no precedent or general practice,” especially to the extent that the court did not consider the “desirability of a referendum in a multi-ethnic state”).

120. It is notable that the *Njoya* and *Onyango* decisions came soon after a major purge of the judiciary after allegations were revealed of high level corruption among over one-third of all the judges in the High Court and Court of Appeal. See 1 REPORT OF THE INTEGRITY AND ANTI-CORRUPTION COMMITTEE OF THE JUDICIARY OF KENYA (THE RINGERA REPORT) ¶ 4:2:0 (Sept. 2003), available at http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf.

121. According to Justice Ringera, the new constitution could only be made “without compromise to major principles and it must be delivered in a medium of legal purity.” *Njoya*, (2004) 1 K.L.R. at 285.

the preexisting constitutional and legal order's recognition of the sovereignty of the people, even while that order was itself widely disapproved for legitimizing an imperial presidency and was the subject of an overhaul in the review process.¹²² In essence, the courts in these cases were proceeding from the view that Kenya's ultimate rule of recognition for its constitutional order was based on another rule. The courts glossed this reasoning by invoking the necessity for political closure of the constitutional review process.¹²³ This commitment to legal validity, in my view, demonstrates an overriding commitment to a Kelsenian positivism widely subscribed to in commonwealth constitutional jurisprudence.¹²⁴ Kelsenian positivists argue that the constitution is the grundnorm upon which the validity of all other laws depends.¹²⁵ In its post-independence incarnation, Kelsenian positivism was argued to prevent popular authorship of constitutions since the principle of parliamentary supremacy conferred on parliaments the power to amend the constitution.¹²⁶ Such an argument gave incumbent regimes that dominated one-party parliaments immunity from broad ranging constitutional reform through referenda.

122. See, e.g., Ababu Namwamba, *This Cannot Be a Referendum, It Is a Political Duel*, AFR. NEWS, Aug. 22, 2005 (comparing the referendum movement to being fed a spiced snake, but being told it is a fish).

123. See generally Patrick Ouma Onyango et al. v. Att'y Gen., (2005) eKLR 1, 37 (Kenya) (reporting counsel's assertions that the constitution-making process is a political one and the court should not intervene); *Njoya*, (2004) 1 K.L.R. at 285-86 (arguing that the process of constitutional review is "people driven").

124. As one observer noted, when confronted with the overthrow of a constitutional order, commonwealth courts "swallowed Kelsen hook, line and sinker." S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONT. L. REV. 93, 102-03 (1968); see also J.M. Eekelaar, *Principles of Revolutionary Legality*, in OXFORD ESSAYS IN JURISPRUDENCE 23 (A.W.B. Simpson ed., 2d ser. 1973). On the Kenyan case, see J.O. Rachuonyo, *Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case*, in LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 416-30 (3d quartal 1987). Rachuonyo concludes that Kenya's Constitution as amended until 1969 formed the grundnorm, or the source of authority, of all other laws in the country.

125. Rachuonyo, *supra* note 124. See generally Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365 (2003) (discussing Kelsen's arguments that legal interpretation concerns non-empirical norms).

126. See, e.g., Rachuonyo, *supra* note 124, at 416-30; see also Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 53-54 (1994) (noting that "[w]hile some courts [have] adopted Kelsen's proposition that efficacy of a coup [and constitutional order] bestows validity in an adulterated form, others modified this with or substituted it by doctrines of state necessity, implied mandate, and public policy. Kelsen's language permeates judicial pronouncements").

First, in the incarnation that Kelsenian positivism took in the *Njoya* and *Onyango* cases, the grundnorm is now argued to allow constitutional changes through referenda rather than exclusively through parliaments. In both its past and present incarnations, however, Kelsenian positivism is still wed to the idea of tracing legal validity to the constitutional document, rather than to the facts regarding its efficacy in relation to how the constitution informs political behavior. In addition, the *Njoya* and *Onyango* cases fetishized popular authorship through referenda while ignoring recent instances in which constitutions in countries as diverse as South Africa, Uganda, Tanzania, and Afghanistan had been adopted without referenda. The kind of positivism displayed in these cases surrounding the question of authorship demonstrates how a focus on authorship understates related debates about the character of the constitutional order, such as the manner in which executive accountability is provided for, as a condition of its legitimacy and legal validity.

Second, the holding in the *Onyango* case is predicated on the view that constitution making in a stable political environment like Kenya, unlike in an unstable environment following a major crisis, must not be approved expediently because it must comply with the existing legal constitutional order. In this view, constitutions in countries like the DRC may be adopted without regard to a prior legal or constitutional order because existing order has broken down, giving way to new law. The strong suggestion here is that where a prior grundnorm has broken down, the imprimatur of the people is not as necessary to validate the new constitution, unlike the situation in which there is a valid existing constitutional and legal order. This Kelsenian commitment to basing the legal validity of a new constitutional order on a preexisting constitutional order is narrowly legalistic, even when such a preexisting order, although legally valid, is widely regarded as being illegitimate.

Third, Kelsenian positivism places hope that legal validity could be derived from the revolutionary nature of a new constitution rather than its authorship by the people, its legitimacy, or even its efficacy. There are limitations to the manner in which Kelsenian positivism validates new constitutions that arise from revolutionary constitution making, rather than authorship by the people. Under Kelsenian positivism, war like a coup d'état authorizes the exercise

of political power to rebuild a society torn by conflict, in part, by creating a new grundnorm—the new constitutional order.¹²⁷ In this respect, transition constitutions written after a war share similarities with post-independence constitutions. Post-conflict constitutions are an important part of the effort to transition from war to peace, whereas post-independence constitutions are intended to hand over power to post-independence rulers, thus signaling an end to colonial rule. In both instances, however, there are striking continuities from the past that the constitutions are intended to supersede.

For example, in Kenya the post-independence constitution legitimized the ownership of white settler land and white settler citizenship, thus preventing a return of the stolen lands that had been a centerpiece of the war for independence.¹²⁸ Consequently, the Kenyan Independence Constitution was regarded as a betrayal of a significant nationalist demand. Similarly, the South African constitutional experience has been argued to have forgone completely transforming the inequalities of wealth created by the apartheid state as evidenced by the rejection of a radical program of economic redistribution.¹²⁹ In this sense, there is continuity from the past to the present. The question arises, however, whether such continuity is necessary for a constitution to be efficacious, particularly given that those in the political class who continue to identify strongly with the prior constitution would be permanently alienated under the new constitutional order.¹³⁰ Ultimately, a primary function of post-conflict constitutions is to constitute a stable governmental structure that is acceptable to the broad populace and political class, particularly in an ethnically divided society such as

127. See Green, *supra* note 125, at 407-08; see also Mahmud, *supra* note 126, at 53-54.

128. See Gary Wasserman, *The Independence Bargain: Kenya, Europeans, and the Land Issue, 1960-1962*, at 11 J. COMMONWEALTH POL. STUD. 99 (1973). After several parliamentary amendments to the Kenyan Constitution to undo the compromises agreed to during the negotiations with the departing British colonial government in Lancaster, the then-Attorney General announced that the 1969 Constitution represented the will of the people and, thus, represented a fundamental break from the past; yet this rewritten constitution reestablished the authoritarian structure of colonial governance. See Gathii, *supra* note 9, at 78-83.

129. See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997). For a more optimistic take on the potential of using the final constitution of South Africa for a transformative project, see Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998).

130. See Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213 (2008).

Kenya. An awkward and perhaps ineffective way of achieving such post-ratification cohesion is to subject the guarantees of individual liberty to extensive limitations and derogations in the name of national security, public order, and public morality.¹³¹ This was certainly the case with the 2003 DRC Transitional Constitution. The 2005 DRC Constitution also reflects this approach to limit greatly individual rights as a result of the ongoing war in parts of the country.

Ultimately, the important lesson that emerges from the Kenyan case is that questions over constitutional authorship primarily focus on issues of process over substance. The process issues that have been so central to constitution making in Kenya have included: (1) whether membership to the national constitutional conference should be elected, rather than appointed or nominated; (2) how large or small its membership should be; (3) how representative, inclusive, or exclusionary the Conference should be; (4) how the process would be conducted; (5) whether the Constitutional Review Commission could conduct civic education; (6) whether the review process was consistent with the preexisting constitution; and (7) whether foreign experts should be consulted.¹³² The constitutional review process in Kenya was therefore subject to several court challenges, as well as a series of legislative interventions and ad hoc political agreements, in order to keep it moving when there was widespread disagreement and the threat of discontinuation by the government was worsening by the day.

My point is not that these issues of process are secondary in the constitution-making and drafting processes; rather, they seem to have crowded out other equally important and equally contentious issues—such as the character of devolution that should be adopted in the new constitution, how to balance values of liberal equality with those of traditional customary law, how to have a decisive but accountable executive, and so on. Although the process of consultation and participation in drafting and enacting a constitution are undoubtedly important,¹³³ the Kenyan experience demonstrates how crucial the many contentious issues were in the arguments made in

131. See Sajó, *supra* note 86, at 1 (subscribing to this view of constitutions).

132. See, e.g., *id.* at 4.

133. See Jennifer Widner, *Constitution Writing in Post-conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008).

favor of or against approving the Wako Draft in the unsuccessful referendum of November 2005.

Notably, in the DRC the question of legal title to participate in the political process is reflected in the Nationality Law promulgated on November 12, 2004, which forbids non-Congolese citizens from participating in national politics, including holding seats in the National Assembly. This Nationality Law is a reflection of the DRC's effort to root out from within its country foreigners with whom the violence in the country was associated.¹³⁴ This law has been associated, however, with stripping DRC citizenship of thousands of Banyamulenge and others in the efforts to cleanse the DRC of those who are perceived as sources of ethnic violence.

C. The Promise and Fate of Revolutionary Constitutionalism

Newly drafted constitutions often promise revolutionary transformations heralding a new future in which a bill of rights and limited government will prevail over the authoritarianism and chaos of the past. Revolutionary constitutionalism may, for example, promise revolutionary justice where ousted authoritarian leaders are subjected to prosecutions for their misdeeds. Yet, as we have seen above, the promise of revolutionary constitutionalism embedded within commonwealth jurisprudence gives little or no guidance to the crucial questions of legitimacy, authorship, or the efficacy of the new constitutions.¹³⁵ In this section, I address yet another reason why revolutionary constitutionalism, understood as requiring revolutionary justice, may pose a challenge to constitution making in post-conflict societies and constitution making in general.

Here, the experience of some Central and Eastern European countries is instructive. In Poland and Hungary, for example, new constitutional orders were created at a moment when the old legal and political regimes sought to be changed were intact.¹³⁶ Such a transition allowed the preexisting regimes to agree on a new constitutional dispensation without fearing "revolutionary justice

134. See Tom Tshibangu, *Monuc Press Review*, AFR. NEWS, Feb. 1, 2007.

135. See *supra* text accompanying notes 119-31.

136. See generally Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

and revolutionary populism” should a new regime take power.¹³⁷ By preventing the triumph of revolutionary logic, new constitutional orders were, therefore, inaugurated with the support of groups with significant political power.¹³⁸ Political agreement among adversarial parties and the eventual adoption of a new constitution by a legislature that had not been democratically elected in Hungary “laid the foundations for the peaceful transition to multi-party democracy founded on respect for human rights and the rule of law and for the creation of a social market economy.”¹³⁹

Similarly, the South African Constitutional Court rejected the triumph of revolutionary justice in the *Biko* case.¹⁴⁰ Steve Biko’s family challenged the amnesty provisions enacted in the South African transition that extended conditional amnesty to those who confessed to having engaged in egregious human rights violations during the apartheid era.¹⁴¹ The South African Constitutional Court rejected this challenge and noted that:

For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a “democratic society based on freedom and equality.” If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge [the Constitution] itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.¹⁴²

137. *See id.*

138. *See* Andrew Arato, *Dilemmas Arising from the Power To Create Constitutions in Eastern Europe*, 14 *CARDOZO L. REV.* 661, 674 (1993).

139. Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy*, 42 *INT’L & COMP. L.Q.* 332, 337 (1993).

140. *See Azanian Peoples Org. (AZAPO) et al. v President of Republic of S. Afr. & Others* 1996 (8) BCLR 1015 (CC) (S. Afr.), available at <http://www.doi.gov.za/trc/legal/azapo.htm>.

141. *See id.*

142. *Id.* ¶ 19.

The South African and Hungarian experiences caution against a punitive type of revolutionary constitutionalism. The drafting of the 2005 DRC Constitution seems to have been influenced by some form of revolutionary constitutionalism to the extent that President Kabila excluded his political opponents from the drafting process and locked them out of the political process after the constitution was ratified in the referendum. The 2005 DRC Constitution therefore arguably was tainted by the chaos of the past. In my view, the inability of the contending groups to agree on a new constitution in Kenya was in part informed by the lack of an agreement to prevent the triumph of a punitive revolutionary justice.¹⁴³ The lack of such an agreement was nevertheless guaranteed by the new Kibaki government 2002.¹⁴⁴ This political understanding was crucial to allowing President Daniel Arap Moi to give up the reigns of political power in 2002.¹⁴⁵

Ultimately, punitive sanctions are not the only way to achieve justice arising from prior authoritarian and rights abusive regimes. There are now an array of examples of retributive and deterrent responses that give victims “a more complete account of the past and vindicate [their] accounts of their own mistreatment” that can be used instead of revolutionary constitutionalism.¹⁴⁶ Both the DRC and Kenya could learn from these alternative experiences.

CONCLUSION

Constitution making in the DRC and Kenya provides some similarities and contrasts. Although there has been more widespread debate on constitutional reform in Kenya than in the DRC, a draft constitution in Kenya was defeated in a referendum in

143. The Task Force for the Establishment of a Truth and Reconciliation Commission in Kenya recommended the establishment of a truth commission with broad ranging powers, which some feared would be inconsistent with the Kibaki administration's decision not to reopen abuses of the Moi regime. For a discussion of the Task Force Report, see Mutua, *supra* note 60.

144. See, e.g., Steve Mkawale & Vitalis Kimutai, *Kibaki Dishes Out Another District*, DAILY NATION (Kenya), May 11, 2007 (“Meanwhile, the President has said his Government has no intention of removing the names of his predecessor from public institutions. He said former President Daniel Moi had done a lot for the country and could not just be wished away.”).

145. See *id.*

146. Chandra Lekha Sriram, *Transitional Justice Comes of Age: Enduring Lessons and Challenges*, 23 BERKELEY J. INT'L L. 506, 508 (2005) (book review).

November 2005.¹⁴⁷ By contrast, a much less widely discussed constitution was overwhelmingly approved in the DRC the same year.¹⁴⁸ Perhaps war wariness in the DRC accounts for the overwhelming approval of the constitution, whereas the relative political stability in Kenya provided no similar incentive for approving the Wako Draft. In both the DRC and Kenya, a revolutionary constitutionalism that would have endorsed punitive measures against the former regimes did not triumph, although the fear that it would in Kenya was a factor in the debate on whether the constitution should have been approved or rejected in the referendum. In addition, in both the DRC and Kenya, the question of the efficacy of the new constitutions was backgrounded by discussions of popular authorship in Kenya and of ending the civil war in the DRC. In Kenya, unlike in the DRC, the process of approving a new constitution was subjected to judicial challenges that reflected that constitution making without a major crisis may not produce a new constitution after all. Finally, it is noteworthy that in Kenya, the debate on reforming the constitution failed to provide an opportunity for designing institutions that accommodated its ethnic diversity. The debate on ratifying the constitution in a referendum in particular left the country more ethnically divided than the immediate period before. By contrast, in eastern DRC, the continued violence—particularly the low-scale violence that does not rise to the level of an international conflict—may have precipitated a coming together of the people of eastern DRC in overwhelmingly ratifying the constitution.¹⁴⁹ For different reasons in Kenya and the DRC, participatory constitution making was not crucial to the outcome. Whereas in Kenya widespread participation and consultation resulted in voting down the constitution, in the

147. See Jillo Kadida & David Mugonyi, *Mwai Kibaki Loses Kenya Referendum*, AFR. NEWS, Nov. 22, 2005 (“Kenyan President Mwai Kibaki has conceded defeat after a clear majority voted against a new constitution in Monday’s referendum. The result was a humiliation for Kibaki who led the “Yes” campaign (Bananas) against a spirited fight from the “No” campaign (Oranges) headed by five of his senior ministers, including Roads minister Raila Odinga”).

148. See *Congo-Kinsasha: Official Results Show Overwhelming Support for New Constitution*, AFR. NEWS, Jan. 12, 2006 (“The results reflect, in part, a firm rejection of an appeal by veteran politician Etienne Tshisekedi, for a boycott of the process.”).

149. For an excellent analysis of how low-scale local violence, though important, is ignored by international agencies, see Severine Autesserre, *Local Violence, International Indifference: The Politics of the Peace Process in Eastern Congo* (Dec. 2004) (unpublished paper, on file with author).

DRC minimal participation did not affect its overwhelming approval. Consequently, although participatory constitution making may give rise to a sense of ownership of the product, it is by no means a *sine qua non* to having a constitution that has efficacy on the ground.

POSTSCRIPT

This Article was written to contrast the difficulties of constitution making during peacetime with the case of a country facing a conflict where constitution making is not as daunting. While the Democratic Republic of Congo (DRC) represented the conflict-torn country, Kenya was the peaceful case. Since the Article was written, however, a spate of violent ethnic cleansing gripped the country following hotly disputed presidential elections in December 2007. The Kenya National Dialogue and Reconciliation talks being mediated by a team led by Kofi Annan has outlined an agreement between the Orange Democratic Movement (ODM) and President Kibaki's Party of National Unity (PNU) to, among other things, undertake political reforms to address the causes of the chaos following the elections. These reforms will include comprehensive constitutional, legal, judicial, and electoral reforms, as well as the establishment of a truth, justice, and reconciliation commission.¹⁵⁰ These reforms were not undertaken prior to the 2007 elections but if these reforms are legislated, Kenya, like the DRC, will show once again how a crisis can spark comprehensive reforms that were difficult during peacetime.

150. See Kofi Annan, Fmr. U.N. Sec'y-Gen., Speech at the Serena Hotel Describing the Progress of the Kenya National Dialogue and Reconciliation Talks: What We Have Agreed On So Far (Feb. 16, 2008), available at http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=116958.