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SNAPSHOT

Turning the Corner in Kenya

A New Constitution for Nairobi

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In a historic referendum on August 4, nearly 70 percent of Kenyan voters approved a draft for a new constitution, an outcome that raises the prospects for peace and stability in East Africa's anchor state and in the surrounding region. Ratification of the new constitution also returns Kenya to the path of democratization and economic growth -- a path that was disrupted by the mass violence that threatened the viability of the state following the disputed presidential election in December 2007. In contrast to that election, the referendum was peaceful and well run by the country's reconstituted election commission.

The new constitution is undoubtedly the best of the multiple proposals and drafts that have been considered in Kenya since the early 1990s, when the nation returned to multiparty politics after nearly three decades of single-party rule. Since then, democratic activists have viewed a new constitution as essential for the consolidation of democracy. As in South Africa after the fall of apartheid, protracted discussion and negotiations -- and no doubt some fatigue -- led to a grand compromise supported by most prominent members of Kenya's political class. These include President Mwai Kibaki and Prime Minister Raila Odinga, bitter rivals in 2007 who came together to form Kenya's power-sharing government to halt the postelection violence. Their agreement, brokered by former UN Secretary-General Kofi Anan in February 2008, included the promise of a new basic law that would address long and deeply held ethnic grievances over land and the distribution of state resources. In an alliance unimaginable six months ago, Kibaki and Odinga barnstormed the country together to support the passage of the new constitution.

In at least four respects, the new constitution is a major improvement over the current one, which has governed Kenya since 1964. First, it vests coherent executive authority with the president rather than splitting authority between the president and the prime minister, as is the case in the current power-sharing government. However, it strips the presidency of the powers and patronage that fueled dictatorial rule and kleptocracy under former President Daniel arap Moi in the 1980s and 1990s. All major presidential appointments -- including members of the cabinet, the judiciary, senior bureaucrats, and ambassadors -- now require confirmation by the National Assembly. The size

of the cabinet will be cut in half and limited to 24 members. The president will no longer have the power to suspend or dissolve the National Assembly, as its members will be elected to fixed five-year terms. The election commission will also be truly independent and beyond presidential control.

Second, the constitution greatly enhances the power of parliament in relation to the president. The assembly will have the power to summon cabinet ministers and senior civil servants for hearings, significantly increasing its oversight of the executive branch. Also, the legislature will now have the discretion to impeach the president. The National Assembly -- 90 percent of whose members are currently male -- will have at least 47 elected women, one from each county (18 members, or 27 percent, of the newly created Senate will be women).

Third, by creating 47 elected county governments that will be guaranteed revenue from the center, the constitution provides for a financially viable system of devolved government to address the long-standing inequities among Kenya's 42 ethnic groups. This devolution of power will protect the interests of the smaller ethnic groups while assuring accountability for the larger ones. And by providing for a more equitable sharing of national resources, such an arrangement will diffuse the basis for the ethnic strife that has bedeviled Kenya since independence in 1963. Devolution is also likely to break up the concentrations of power wielded by Kenya's largest ethnic groups, particularly the Kikuyu, the Kalenjin, the Kamba, the Luo, and the Luhya -- who together comprise 70 percent of the country's population.

Fourth, the constitution, patterned on South Africa's, contains an ambitious bill of political, economic, and social rights. It includes provisions to protect women, marginalized groups, and people with disabilities. It also calls for the creation of a commission to address the historically contentious issue of land rights and land ownership, which has been a perennial source of conflict since the colonial era.

Despite these undeniable advances, the proposed constitution was opposed by two well-financed elements: politicians whose ambitions are likely to be thwarted by the more democratic basic law, and the church. The former group included William Ruto, the minister of higher education and a prominent ethnic Kalenjin, who is suspected of directing the violence that followed the 2007 election. He is an opportunist and ethnic demagogue who intends to run for president in 2012. Backed by former President Moi, Ruto captured the loyalty of Kalenjins in the Rift Valley who voted overwhelmingly against the draft because it was supported by Kibaki (who cannot run for a third term in 2012) and Odinga, Ruto's principal rival and arguably Kenya's most popular political leader. Moi and Ruto had another incentive to oppose the constitution: its provisions for devolution will break up their power base in the present Rift Valley Province. Voters there were the only ones who did not ratify the draft, rejecting it by a margin of 67 to 33 percent. The end result is that Ruto and Moi, whose political obituary can finally be written, marginalized themselves and their fellow Kalenjins. But this outcome could provoke renewed violence in 2012 if Kalenjin grievances, especially over land, are not addressed.

Other prominent politicians who aspire for the presidency gave lukewarm support for the constitution because it was backed by Odinga. Uhuru Kenyatta, a Kikuyu and the minister of finance, was largely silent in the run-up to the referendum. Like Ruto, he is suspected of fueling the violence that followed the 2007 poll; both men are expected to be indicted by the International Criminal Court for their roles in the crisis, which will certainly complicate their

respective quests for the top job. Vice President Kalonzo Musyoka, a prominent Kamba leader and born-again Christian opposed to abortion, campaigned half-heartedly for a "yes" vote. Support for the proposed draft in his native Eastern Province was 57 percent, the lowest in the seven of Kenya's eight provinces that endorsed the draft.

The church was a somewhat more puzzling opponent of the constitution. Once highly respected for its vigorous opposition to authoritarian rule during Moi's reign, the Christian clergy seized on two benign provisions of the draft: a ban on abortion and the retention of Muslim Kadhis courts. Unlike the old constitution, which was silent on abortion, the new law unequivocally bans abortion except to save the life of the mother. Yet this was not strict enough for some rabidly pro-life clergy in Kenya. With the financial support of evangelical groups in the United States, they campaigned against the document.

The Kadhis courts, meanwhile, only regulate civil matters such as marriage between Muslims. But the clergy, particularly the country's evangelicals, falsely claimed that the courts will introduce sharia law. This is utter nonsense -- the Kadhis courts have worked without problem in Kenya for more than a century. Indeed, a failure to retain them would have radicalized the country's Muslims -- particularly those on Kenya's coast and the Kenyan Somalis on the border with Somalia -- who have long been skeptical of the government in Nairobi. Rejecting the courts would have made some Muslims more susceptible to the sort of Islamist terror networks that have struck Kenya before, and are suspected of carrying out the recent bombings in Uganda. It is, therefore, not surprising that the "yes" vote in Coast Province was 79 percent, and over 95 percent in the Somali region of the country. Much like those presidential aspirants who opposed or tepidly supported the draft, the churches that opposed the constitution emerged from the referendum diminished in stature.

In the run-up to the vote, the role of the United States and the international community became a subject of controversy. The "no" camp tried to portray the United States as meddling in Kenya's internal affairs. Although it has limited leverage in Kenyan policy, the United States is widely admired by most Kenyans, who regard President Barack Obama as one of their own. Obama's endorsement of the proposed constitution in May, followed by Vice President Joe Biden's visit to Nairobi in June, was big news in Kenya. The official U.S. position was that Kenyans must make their own decision on the new constitution, but Obama and Biden, as well as Assistant Secretary of State for African Affairs Johnnie Carson, made clear that passage would benefit Kenya at home and abroad. The United States supported efforts by the National Democratic Institute and by Kenyan civil society organizations to carry out monitoring and parallel vote tabulation of the referendum.

In contrast to the U.S. effort during the run-up to and following the botched presidential elections of 2007 -- when the U.S. embassy in Nairobi failed to anticipate fraudulent electoral procedures yet endorsed the disputed poll -- the State Department and USAID acquitted themselves well, laying the groundwork for what all hope is a similarly well-run and peaceful poll in 2012. The challenge now for Kenya and its friends -- especially the United States -- is to ensure that the new constitution is fully implemented to foster democracy, grow the economy, and maintain peace.