

Kenya's New Constitution

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On 4 August 2010, Kenyans voted overwhelmingly in a national referendum to adopt a new constitution. The culmination of a process that began two-and-a-half years earlier when UN secretary-general Kofi Annan brokered a resolution to the violent conflict that followed the disputed December 2007 general election, the passage of the constitution marked a watershed for the East African country of 39 million people. By reducing the power of the executive, devolving authority to subnational units, and formally guaranteeing a host of social and economic rights to women, minorities, and marginalized communities, the constitution has the potential to transform Kenyan politics—not least by diminishing the role that ethnicity plays in the country's affairs.

The referendum drew about 70 percent of the country's twelve-million registered voters. Thanks to the support of most of the Kenyan political elite—including President Mwai Kibaki and Prime Minister Raila Odinga, the bitter rivals from the 2007 presidential race—the constitution passed with 68 percent of the vote. In marked contrast to the violence and disorder that broke out the last time that Kenyans went to the polls, the referendum took place in an atmosphere of remarkable calm. In Rift Valley Province, where postelection violence had been particularly severe (and where opposition to the proposed constitution ran the highest), the outcome was accepted without major incident. The “No” coalition, led most visibly by the ethnic Kalenjin Higher Education Minister William Ruto, conceded defeat and encouraged opponents of the new constitution to accept the results.¹ On August 27, three weeks after the official

announcement of the referendum outcome, President Kibaki officially signed the new constitution into law, marking the beginning of the transition to a new constitutional order for Kenya.

Set against the backdrop of both the bloody postelection strife that cost roughly a thousand lives between late December 2007 and February 2008 and the decades-long effort to bring about constitutional reform in the country, the peaceful promulgation of the new—and decidedly liberal and forward-looking—constitution marks a defining moment in Kenya’s democratic development. Set more broadly against the backdrop of Africa’s history of unfettered executive authority and weakly protected civil liberties, Kenya’s success also represents part of a larger trend toward the increasing institutionalization of political power in the region.

The Road to a New Constitution

In the immediate postindependence period, and during the lengthy interval of single-party rule that spanned from the late 1960s to the resumption of competitive elections in 1992, Kenya’s constitution served principally as a tool that presidents Jomo Kenyatta and Daniel arap Moi and their party, the Kenya African National Union (KANU), could use to consolidate and expand their powers. Only after the introduction of multiparty politics in the early 1990s did pressure build from opposition parties and civil society groups for constitutional reforms that might reign in the powers of what had developed into an “imperial presidency.” The constitution that came into force in August 2010 was the end product of this protracted process—one that both reflected and shaped the country’s deep political divisions.

The first efforts to reform the constitution began in 2000 with the creation of the Constitution of Kenya Review Commission (CKRC). After broad public consultations, the

CKRC produced a draft that envisaged a mixed executive with a strong prime minister and a directly elected president, a system of proportional representation (PR) for parliamentary elections, and extensive devolution of power to subnational units. Although President Moi had initially tolerated the CKRC's formation, he scuttled the reform process by dissolving parliament before it could consider the CKRC's draft.

It did not take long, however, for the second phase of the constitutional-reform process to begin. Just weeks before the December 2002 elections, the Liberal Democratic Party (LDP) and its charismatic Luo leader, Odinga, signed a Memorandum of Understanding (MoU) with the National Alliance of Kenya (NAK), a coalition that included the Democratic Party, led by Kibaki, a former vice-president, presidential aspirant, and prominent Kikuyu. The MoU established the National Rainbow Coalition (NARC), which at last united the opposition to challenge KANU's long grip on power in the upcoming presidential and parliamentary elections.

Constitutional change was at the heart of the agreement between Odinga and Kibaki—indeed, in many ways it was a necessary condition for their alliance—and emerged as a centerpiece of NARC's campaign platform. The MoU called for a new constitution to be adopted within a hundred days after a turnover of power, and further stipulated that any new basic law should provide for a stronger premiership and a weakened presidency. It was agreed that the former post would be held by Odinga and the latter by Kibaki. On the basis of this agreement, Odinga and his partners agreed to support Kibaki's presidential candidacy. Kibaki ultimately won the 2002 election with 61 percent of the vote. The NARC also took control of parliament, with 125 of the 210 elected seats.

After the elections, however, Kibaki reneged on his commitments regarding both the pace and the substance of constitutional reform. Whereas Odinga's LDP faction continued to favor a

system with a dual executive and a strong prime minister, Kibaki's NAK faction shifted its position to support a system with a single executive president. These divergent positions were products of differing strategic calculations about how best to secure power. As the leader of the largest ethnic group (about 22 percent of the total population) in a country where people tend to vote along ethnic lines, Kibaki stood to benefit from a centralized, majoritarian system. As the leader of the smaller Luo ethnic group (which makes up about 13 percent of Kenya's population), Odinga would have greater trouble winning the plurality of the vote necessary to capture the presidency, so he preferred a system with a strong prime minister appointed through a parliamentary majority more subject to political bargaining and cross-group coalition building.

The two factions were equally divided on the subject of devolved government. Kibaki and his Kikuyu allies opposed decentralization, in part because of fears that too much power devolved away from the center would threaten Kikuyus living outside their home area of Central Province—particularly those living in the Rift Valley, where Kikuyus reside in substantial numbers but would be minorities in most devolved units. By contrast, Odinga and others, particularly Kalenjin leaders such as Ruto, had long been strong supporters of a system that devolved much power away from the center.²

The draft constitution that ultimately emerged resembled more closely the system preferred by the LDP and its new and somewhat unlikely KANU allies. This so-called Bomas Draft—named for the cultural center and museum where the major drafting meetings took place—called for a dual executive with a largely ceremonial president and a strong prime minister, first-past-the-post parliamentary elections in single-member districts, an extensive system for devolving governance functions to districts and regions, and a new Senate, including representatives from each district, that would be responsible for coordinating interdistrict affairs.

Unhappy with the Bomas Draft, Kibaki and his allies pushed successfully for legislation that would allow parliament to amend the proposal by simple majority vote before presenting it to the public in a referendum. This led to yet another draft constitution, the Wako Draft, named for Attorney-General Amos Wako, the government's point man in the work of revising the document. The Wako constitution weakened the premiership vis-à-vis the presidency, provided for a much more limited system of devolved government, and added an unspecified number of seats based on party-list PR to the National Assembly. After receiving parliamentary approval, the Wako Draft was presented to the Kenyan people for approval in a national referendum in 2005.

The cleavages prominent in the NARC coalition largely structured the referendum campaign. Opposition to the draft served as the basis for a new alliance between Odinga's allies and the KANU opposition in parliament—an alliance that gave birth to the Orange Democratic Movement (ODM), which went on to challenge Kibaki in the 2007 elections. The referendum campaign was highly contentious, and it resulted in the document's rejection by 58 percent of those voting. The campaign also reshaped the contours of Kenya's coalitional politics and laid the groundwork for the alliances that would compete in the 2007 elections—and then fight in its aftermath.³

The third phase of Kenya's constitutional-reform process began with the negotiations that ended the postelection violence early in 2008. The February power-sharing agreement between Kibaki and Odinga featured a plank (Agenda Item 4) that singled out constitutional reform as crucial to hopes of averting more violence. A follow-up law created a Committee of Experts (CoE)—comprising mostly Kenyan legal scholars but including several non-Kenyans with constitution-drafting experience—whose job would be to write a “harmonized” constitution

pulling together elements of the CKRC, Bomas, and Wako drafts. The CoE was also charged with identifying unresolved “contentious issues” and making recommendations on different proposals for how to deal with them. The harmonized draft and discussion of the contentious issues would then be submitted to parliament, where a Parliamentary Select Committee (PSC) would convene to reach consensus on the contentious issues, make appropriate changes to the proposed draft, and send it back to the CoE, which could then choose whether to accept or reject these changes.

The PSC’s membership was split between the Party of National Unity (PNU)—Kibaki’s alliance that contested the 2007 elections—and the Orange Democratic Movement. Heading into the January 2010 PSC retreat at Naivasha in the Rift Valley, it appeared that the political disputes which had undermined previous attempts at constitutional reform were likely to resurface. The PNU, much like the NAK before it, was intent on instituting a centralized presidential system with only limited devolution. The ODM, on the other hand, much like its LDP and KANU predecessors, was solidly in favor of a dual executive with a strong prime minister and extensive devolution. This time, however, the key players proved more willing to compromise.

In contrast to the position that they had taken earlier, a number of ODM members on the PSC supported a PNU proposal to adopt a strong presidency instead of the dual executive specified in the harmonized draft. The revised PSC draft ended up omitting the premiership altogether.⁴ The reasons for this shift are several. First, the ODM may have hoped to use its acceptance of a presidential system as a bargaining chip in the negotiations over devolution, a goal that at least some of its members valued more highly than any particular way of structuring the executive.⁵ Second, several prominent ODM members harbored presidential ambitions and

may have had mixed feelings about constraining the powers of a post that they hoped one day to fill. Third, tensions within the ODM coalition may have undermined its ability to maintain a united front on the issue. In particular, the relationship between Ruto and Odinga had become strained, with Ruto moving closer to his old KANU ally, Deputy Prime Minister Uhuru Kenyatta.⁶ Odinga's own backtracking might be explained by his recognition that objecting to the elimination of the prime minister would risk derailing a process that the public strongly wanted to see completed, thereby jeopardizing his frontrunner status for 2012. Moreover, Odinga had learned in 2007 that he could win an honest presidential election, so he was likely disinclined to dilute presidential power.

At Naivasha, as in the past, the structure of devolved government proved another contentious topic. The ODM had hoped to establish a three-tiered system featuring 74 counties grouped into fourteen regions, as outlined in the Bomas draft. The PNU, by contrast, opposed a system with so many regional governments, worrying that it would foster ethnic enclaves—and presumably threaten Kikuyu and other non-Kalenjin groups living in the Rift Valley. As discussed above, the ODM seems to have agreed to the presidential system in the hopes of strengthening its position on devolution. Why, then, did it acquiesce in a two-tier system outlined in the Revised Harmonized Draft—a position much closer to the PNU's vision than to its own?

The answer seems to lie in a mix of the political and the practical. On the political side, the PSC simply could not form a consensus within its own ranks on the structure of a three-tier system, with strong disagreements surfacing about the exact number of devolved units and their boundaries. On the practical side, the three-tiered system seemed too costly to operate and the 74 counties all too small to be viable even in the barest administrative sense—much less able to act as counterweights to the power of the central government. Also, the timeline imposed by the

power-sharing agreement forced the committee to move forward before consensus could be reached. The PSC thus agreed to the least controversial position: a two-tier system with 47 county governments whose boundaries would be congruent to the country's pre-1992 districts.⁷

After reviewing the PSC revisions, the CoE submitted the proposed constitution to parliament for approval. After a month-long debate during which various members proposed a total of 150 amendments—none of which passed—parliament approved the proposed constitution on 1 April 2010, setting the stage for the referendum on August 4.

The Referendum

Although the political disputes that characterized the drafting process revolved around the structure of the executive branch and the nature of devolution, the most heated issues during the referendum campaign involved two very different topics: the claim by the draft's opponents that the proposed constitution favored abortion, and the constitution's recognition of the Kadhis' courts, which govern personal issues such as marriage, divorce, and inheritance for Muslims.⁸ The first charge was puzzling, since the PSC had deliberately inserted a clause that read "The life of a person begins at conception" in order to address religious groups' concerns that the new constitution not become a vehicle for legalizing abortion. The second spoke to fears that, by specifically acknowledging the role of the Kadhis' courts, the constitution was unfairly recognizing one religion over others. Both issues rallied the Christian establishment against the draft and may have accounted for a significant share of "No" votes recorded against the constitution.

A third important issue was the constitution's establishment of a National Land Commission with the power to investigate historical injustices surrounding land ownership. Several prominent politicians—including former president Daniel arap Moi—were thought to have opposed the constitution out of fears that the creation of the land commission would put at risk thousands of hectares of public land that they had acquired over the years under questionable circumstances.⁹

Kibaki and Odinga were united in their support of the draft constitution, and frequently appeared together to stump for it. Matters within their respective coalitions, however, were more contentious. The ODM split openly. Along with the religious opposition, the most prominent foes of the draft were Ruto and other former KANU politicians who had joined forces with Odinga and the ODM during the 2005 referendum campaign and the 2007 elections. Ruto, who has stated his intention to contest for the presidency in 2012 despite being named by the International Criminal Court (ICC) for his alleged role in the 2007 post-election violence, clearly saw the referendum campaign as an opportunity to demonstrate his ability to mobilize his Kalenjin support base.

For its part, the PNU publicly supported the document. Yet some observers believed several prominent PNU leaders, including Deputy Prime Minister Kenyatta, another 2012 presidential hopeful named by the ICC for his alleged role in the post-violence, and Vice-President Kalonzo Musyoka, to be “watermelons”—green (the color of the “Yes” campaign) on the outside, and red (the color of the “No” campaign) on the inside. The “watermelons” were formally in the “Yes” camp but made only weak efforts for it and—or so some charged—even secretly funneled money to the “No” campaign.

In merciful contrast to previous electoral exercises in Kenya, the referendum campaign was peaceful and lacking in overt ethnic mobilizations. The Interim Independent Electoral Commission, which oversaw the voting, did a much better job than it had in 2007 in securing, transporting, and counting the votes. Yet both sides did display questionable campaign tactics. In particular, the “Yes” campaign improperly harnessed state resources in support of the proposed constitution. Odinga declared the passage of the proposed constitution a government project. Kibaki dispatched civil servants to their home areas to campaign for the “Yes” side. On several occasions during the campaign, Kibaki (illegally) promised the creation of new administrative districts—and in one case even a new university—in exchange for a strong local “Yes” vote.¹⁰

The “Yes” campaign had hoped to receive at least two-thirds of the vote in order to highlight the breadth of support for the new constitution and bolster its international legitimacy. The hope was fulfilled when 68 percent voted “Yes.” As Figure 1 makes clear, support for the new constitution was strong in most of the country’s provinces. Opposition sentiment largely came from the populous Rift Valley, home to prominent “No” campaigners Ruto and Moi. Of the 2.7 million “No” votes cast nationwide, about 37 percent came from the Rift Valley. Of these, fully 78 percent came from the predominantly KANU constituencies that Ruto’s and Moi’s supporters had carried for the ODM back in 2007.

Regional patterns aside, what motivated individual voters’ decisions in the referendum? To answer this question, we conducted a pair of surveys: one in late July and the first few days of August 2010 (just before the August 4 referendum), and one afterward in October and November.¹¹ The “after” survey featured an open-ended question asking respondents why they had voted as they did. Among self-described “Yes” voters, the most frequent response (about 20 percent) mentioned a simple desire for change. Other frequently cited reasons included support

for the system of devolved government (just under 20 percent), the hope that the constitution would reduce corruption (11 percent), and support for the creation of the land tribunal (10 percent). Respondents also mentioned their expectation that the new constitution would help to curtail tribalism, promote human rights, and end politicians' impunity. Thirteen percent of "Yes" voters were unable to give a single reason for their vote (though two very honest respondents confessed that they had voted as a politician had told them to!). "No" voters were driven by entirely different considerations. Whereas only a handful of "Yes" voters mentioned religion or abortion, almost 30 percent of "No" voters cited religion as a factor motivating their voting decision, while 25 percent mentioned abortion; 23 percent of "No" voters mentioned land issues; 10 percent were unable to provide a reason.

Implications for Kenya

The success of the new constitution will be judged in terms of its ability to deal with the issues that are broadly understood to have caused the violence that followed the 2007 election. The first is the centralization of national power in the office of the president—a circumstance that tends to make victory at the polls a do-or-die matter. The second is the ubiquity of corruption and the impunity that power holders enjoy, which also raises the stakes of controlling the government. The third is the country's deepening cross-regional and cross-generational socioeconomic inequality (fully 42 percent of the populace is age fourteen or under), which fueled the resentments that made the postelection violence so widespread and so deadly, costing

an estimated 1,000 lives. The fourth is the politicization of ethnicity, which makes the other three problems worse by causing them to be seen through lenses of tribalism and intertribal rivalry.

With respect to the question of presidential authority, there is reason for cautious optimism. Although the constitution does not provide for a prime minister to counterbalance the president, the president's power is nonetheless curtailed, and parliament's strengthened, through new rules governing the presidential appointment of cabinet ministers. Like many African presidents, Kenyatta, Moi, and Kibaki used cabinet appointments as instruments of patronage and tools for exerting control over parliament.¹² The new constitution reduces this source of presidential leverage by requiring that cabinet members be drawn from outside parliament, by giving parliament authority to approve all cabinet appointments, and by limiting the cabinet's size to a maximum of 22 ministers (at the end of 2010 there were more than thirty, with another three-dozen assistant ministers). The constitution also empowers parliament to compel the dismissal of a cabinet secretary by majority vote.

Executive power is further constrained by the devolution of authority to the counties. Under the new constitution, at least 15 percent of the national government's revenues must go to the 47 county governments, which will have a range of duties in areas such as the provision of primary health care, the implementation of agricultural policy, and the management of county-level transportation issues. Each county is to have its own directly elected governor and lawmaking assembly. Decisions about resource allocations to the counties will be made in the new Senate—composed of representatives drawn from the counties—rather than in ministries controlled by the executive, further reducing presidential discretion in the allocation of resources.

Although controlling corruption is less about the content of formal rules than about their enforcement, the new constitution holds promise of improving matters in this area as well. The

constitution establishes an independent ethics and anti-corruption commission and includes provisions to shield the commission from inappropriate political interference. The constitution also calls for an independent Auditor-General and a Controller of the Budget. Each of these critical institutions of horizontal accountability will include a chairperson and members appointed by the president and approved by the National Assembly. In addition, constitutional provisions for reforming and bolstering the independence of the judiciary may strengthen this notoriously corrupt institution.

In order to address the issue of socioeconomic inequality, the constitution recognizes an extensive set of rights, including such “second-generation” rights as health care, food, education, and housing. These provisions are, however, largely aspirational and are less likely to have an impact than other constitutional requirements that are more feasibly enforced. For example, the new constitution tackles gender inequalities by improving marriage, inheritance, and land-ownership rights for women, and by mandating certain minimal levels of female representation in national and county assemblies. It also explicitly extends special economic and social rights to other vulnerable groups including seniors, children and youths, persons with disabilities, and members of certain traditionally marginalized ethnic, religious, or cultural communities. The devolution of power to the counties will make a tangible difference as well by providing for greater equality in the allocation of resources across localities.

The problem of politicized ethnicity presents a special challenge in Kenya. One response contained in the constitution is, effectively, to declare that tribal distinctions do not (or should not) matter. Thus, the Bill of Rights enshrines freedom from discrimination, including discrimination practiced on the basis of ethnic or social origin; Article 44 protects linguistic rights; Article 49 makes hate speech and incitement to violence illegal; Article 91 requires that

political parties have a “national character,” stipulating that they cannot be founded on any religious, linguistic, racial, ethnic, gender, or regional basis; Article 130 requires that the national executive reflect Kenya’s regional and ethnic diversity; Article 131 gives the president special responsibility for promoting respect for regional and ethnic diversity; and Article 232 requires that the composition of the civil service be representative of such diversity. More important, however, are the provisions meant to give politicians incentives to appeal across ethnic and regional lines. Key elements in this regard include the requirements that the winning presidential candidate garner at least half the votes in a quarter of the 47 counties, and that each candidate name a running mate for the office of deputy-president.

Devolved government is also supposed to improve interethnic relations by diluting the all-or-nothing atmosphere that surrounds presidential elections. If an ethnic group fails to win the presidency, it may still look forward to controlling its county assembly and electing one of its own as county executive, for instance. And with resources going out to the counties by fixed formula rather than presidential discretion, the question of which group controls the presidency becomes somewhat less pressing.

The Challenge of Implementation

Whether the constitution can solve these difficult problems will depend on the extent to which its provisions can be fully implemented—something that is likely to prove no small feat in areas such as the devolution of power to county governments, which will require large-scale capacity building and the successful completion of complex negotiations between the different levels of government over how to divide power and responsibility for a host of public services.

Given the extent of these and other challenges, the ambitious timetable for phasing in the constitution—which calls for a phased transition over the next five years—must be considered extremely optimistic.

The key to the success of the document may lie in the speed with which Kenyans' hopes for it can be brought into line with their experience of life under it. In our surveys, almost 70 percent of those questioned say that they believe the new constitution is likely or very likely to make their country more democratic. Just over three-quarters believe that it is likely to prevent violence in the 2012 elections. Roughly two-thirds believe that the document is unlikely or very unlikely to give any ethnic group an advantage over other groups. These responses reflect extremely high expectations.

Despite this optimism, the Kenyans we surveyed are realistic. Only 50 percent believe it is likely or very likely that they will have more influence over elected politicians (more than 40 percent believe that this is unlikely or very unlikely). Fewer than half (47 percent) believe that the new constitution is likely or very likely to reduce corruption, while an equal number believe that corruption is unlikely or very unlikely to be reduced. Finally, almost 50 percent believe that it is likely or very likely that “nothing will change for people like them.” Thus, though expectations of the future are high in many respects, most respondents are also quite realistic about prospects for sweeping changes.

Public expectations aside, the process of change will not be easy. The Kenyan political class has shown great skill at adapting to new conditions while perpetuating the underlying status quo. Much of the old guard has managed to thrive in the Kenyatta, Moi, and multiparty eras, and will no doubt seek to perpetuate “politics as usual.” Indeed Kenya's particular brand of politics is already influencing the transition process, with the ODM and PNU factions in the government

battling over appointments to the key implementation and transitional commissions. And though the political class has been set back on its heels by a recent wave of high-profile anticorruption investigations and the ICC's announcement that several cabinet ministers—including Ruto and Kenyatta, two potential challengers to Odinga for the presidency in 2012—may be indicted for their role in the violence that broke out after the 2007 election, it is too soon to tell whether basic change is in the offing or the old elite is merely adjusting to a new playing field.¹³

Institutionalizing Political Power

Kenya's adoption of a new constitution takes on greater meaning against the backdrop of a broader trend toward the institutionalization of political power in Africa—a context in which formal constitutional rules are increasingly consequential. Although not every African country can be said to be plainly moving toward greater constraints on executive authority, the overall shift in this direction is discernible and marks the most important development in the last two decades of African politics. In many countries—Kenya being but one example—the unfettered “personal rule” that used to characterize the politics of the region is slowly being displaced by a more rule-bound, institutionalized political order.

Describing this trend, Daniel N. Posner and Daniel J. Young trace what happened between 1990 and 2005 when African presidents encountered constitutional prohibitions on seeking third terms in office.¹⁴ Of the eighteen presidents who faced a two-term limit during this period, half stepped aside voluntarily while half tried to change the constitution to permit a third term (six succeeded and three failed). Viewed in comparison to the history of nearly unconstrained power that characterized African rulers from independence through the 1980s,

Posner and Young argue, the decision of half the term-limited leaders to step down quietly—to say nothing of the failure to remain in office of a third of those who would not do so—signals the growing force of constitutional limits.¹⁵

Has this trend continued? Figure 2 brings Posner and Young’s analysis up to date (italicized countries are those whose categorizations have changed since their article).¹⁶ Since 2005, four additional countries have seen a president run up against term limits. In Sierra Leone, President Ahmad Tejan Kabbah stepped down of his own volition in 2007. But in the three other cases, sitting presidents attempted to alter the constitution to permit another term. In Cameroon, Paul Biya successfully amended the constitution so that he could run again in 2011, despite violent protests against the change. In Djibouti, parliament voted to remove term limits so that President Ismail Omar Guelleh could seek a third term in 2011.

Niger’s Mamadou Tandja provides the only example since 2005 of a president who tried but failed to extend his rule. Elected in 1999 and 2004, Tandja was constitutionally barred from seeking reelection in 2009. Faced with this situation, he proposed holding a referendum to eliminate term limits, but Niger’s constitutional court rebuffed him. When he responded by declaring that he would simply rule by decree—a move often used by African presidents of earlier eras—strikes and protests ensued, and eventually the military stepped in and removed him from power. That the military would intervene on behalf of, rather than against, constitutional limits, is emblematic of the changed environment in the region.

The updated record is therefore largely unchanged from 2005. Yet if we double-count countries in which *two* presidents have faced term limits since 1990 and voluntarily stepped aside—as happened in Ghana when John Kufuor chose not to seek a third term in 2008 and as presidents in Cape Verde, Kenya, Mali, Mozambique, and São Tomé and Príncipe have pledged

will happen when their respective second terms expire in the coming years—then the record of progress toward limiting executive authority in Africa looks even stronger. Although we cannot completely rule out the possibility that some of these presidents may yet renege on their commitment to leave office, it would appear that, once a president decides to abide by term limits, his successor is extremely likely to follow suit when his time comes. Thus far, it has happened, or appears very likely to happen, in every case.¹⁷ The institutionalization of political power in Africa seems to be deepening. What makes the promulgation of Kenya’s new constitution so momentous is thus not just the enlightened provisions that it contains. It is also that it is coming into force in an era in which formal constitutional rules matter in Africa much more than they once did.

¹ Ruto has since been forced to step aside as higher-education minister while he answers charges in a corruption investigation.

² The issue of devolution in Kenya dates back to the run-up to independence in 1963. Daniel arap Moi, then the leader of the Kenya African Democratic Union, joined other Rift Valley politicians in backing *majimboism* (regional autonomy), while Jomo Kenyatta and his Kikuyu allies supported centralized rule.

³ For a discussion of the flawed 2007 elections, the violence that followed, and the February 2008 power-sharing agreement that ended the violence, see Michael Chege, “Kenya: Back from the Brink?” *Journal of Democracy* 19 (October 2008): 125–39.

⁴ The PSC did, however, add several constraints on presidential power. These included parliamentary approval of ministerial appointments and a requirement that members of parliament resign before joining any presidential cabinet.

⁵ Thus it was Ruto, a strong, longtime proponent of devolving power to the subnational level, who led the KANU faction of the ODM toward accepting the presidential system.

⁶ The source of the rift lay in Odinga’s support for the recommendations of the Committee of Inquiry into the Post-Election Violence that a special tribunal be set up to try perpetrators of the election violence. Ruto, along with several other politicians who feared being targeted, strongly opposed the creation of the tribunal.

⁷ One of the most controversial other issues taken up by the PSC was the question of judicial reform. The CoE document called for all sitting judges to be vetted by an independent commission as part of the judicial-reform process. Under intense pressure from sitting judges, the PSC rejected this plan, claiming that the judges were likely to boycott it and thus create major problems for the courts and the broader administration of justice. The CoE, however, did not find this logic compelling, and the proposed constitution ultimately found a middle ground: It required that parliament, within one year, should establish a process for vetting all sitting judges and magistrates. The PSC also scaled back the CoE’s proposed dissolution of the system of Provincial Administration (the PSC merely called for it to be reformed and harmonized with the new system of devolved government—a position ultimately adopted by the CoE), expanded the number of parliamentary

seats from 210 to 290, and added language to the Bill of Rights that life begins at conception and that abortion would be legal only in cases where medical professionals deemed a mother's life to be in danger.

⁸ Before independence, Jomo Kenyatta signed a formal agreement between the (soon-to-be) government of Kenya and the Sultan of Zanzibar in which Kenyatta agreed to acknowledge the authority of the Kadhis' courts and to protect the freedom of Muslims to worship. In exchange, the coastal strip, which had before colonial rule been under the jurisdiction of the Sultan of Zanzibar, would become part of the independent Kenyan state. In part because of this agreement, all draft constitutions since the CKRC draft had formally recognized the Kadhis' courts.

⁹ Consistent with this interpretation, it is noteworthy that the PSC made the National Land Commission completely dependent on parliament and deleted all its responsibilities except for managing public land. The CoE, however, restored all the language that the PSC deleted. The transfer of public lands as a political reward during the Moi years is described in detail in the report of the Ndung'u Commission; *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Nairobi: Government Printer, June 2004).

¹⁰ The distribution of administrative districts was a particularly puzzling campaign tactic, since the devolution provisions contained in the new constitution would limit the influence of, and even eliminate, district governments.

¹¹ The first survey (N=345) was conducted in the greater Nairobi area, where support for the proposed constitution was relatively high; the second (N=643) took place in the Nairobi area and in three political constituencies around Eldoret Town in western Rift Valley Province, where opposition to the proposed constitution was greatest. Although the surveys were not nationally representative, they are nonetheless suggestive of the range of understandings that Kenyans have about the new constitution and their motivations for supporting or opposing it.

¹² Leonardo R. Arriola, "Patronage and Political Stability in Africa," *Comparative Political Studies* 42 (October 2009): 1339–62.

¹³ The ICC's involvement followed parliament's failure to establish a domestic tribunal in which to try organizers and perpetrators of the 2007 post-election violence. After ICC Prosecutor Luis Moreno-Ocampo announced the six high profile suspects in December 2010, the Kenyan government has begun a campaign

to defer the indictments on the grounds that the cases should be tried domestically, a position which has been backed by the African Union. The parliament has also since voted to withdraw from the ICC (in a non-binding motion). Should the ICC pre-trial chamber issue summonses to the suspects—the chamber is currently reviewing the evidence—trials could move forward before the 2012 election, which would almost certainly eliminate Kenyatta and Ruto from contention and strengthen Odinga’s chances of victory.

¹⁴ Daniel N. Posner and Daniel J. Young, “The Institutionalization of Political Power in Africa,” *Journal of Democracy* 18 (July 2007): 126–40.

¹⁵ Posner and Young, “Institutionalization of Political Power in Africa.”

¹⁶ As in Posner and Young’s analysis, we exclude Africa’s five parliamentary countries—Botswana, Ethiopia, Lesotho, Mauritius, and South Africa—because they do not directly elect their presidents. Angola’s new constitution, enacted in 2010, ends the direct election of the president, so we exclude Angola for analogous reasons. We also exclude Comoros (because of its rotating presidency), Somalia (because it has lacked a clear executive during the period under study), Swaziland (because it is a kingdom), Eritrea (because it has never held national elections), and Sudan (because of ambiguity about which constitution should apply). We code Zimbabwe as not having a constitution that provides a two-term limit because the clause that provided for such a limit was changed before 1990, the starting point of our analysis, and no term limits have been formally implemented since.

¹⁷ In Benin (where Yayi Boni will not run for his second term until 2011), Malawi (where Bingu wa Mutharika will not reach the end of his second term until 2014), Nigeria (where Goodluck Jonathan only came to power in 2010), Tanzania (where Jakaya Kikwete was reelected to his second term in 2010), and Zambia (where Levi Mwanawasa’s death in 2008 reset the clock), it is too soon to tell what will happen when the two-term limit is reached.