New Constitution, Same Old Challenges:

Reflections on Kenya's 2013 General Elections

Edited by Fred Otieno

NEW CONSTITUTION, SAME OLD CHALLENGES:

REFLECTIONS ON KENYA'S 2013 GENERAL ELECTIONS

Uraia
Kenya's National Civic Education Programme

SID
Society for International Development

Edited by Fred Otieno

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Preface

Since 1963, Kenya has held fairly predictable, periodic and sometimes contentious General Elections, with five uninterrupted multiparty elections having been conducted since the reintroduction of multi-party politics in 1992. However, the impact of these elections on Kenya's governance and social cohesion has been varied. The experience from each of the past General Elections not only provides important lessons for democratic consolidation in the country but have also consistently exposed fissures which in many instances have resulted in reversals of democratic gains. Each cycle of elections has had its unique opportunities and challenges that are worthy of documentation. The lessons gained from these elections are very important for the country's efforts to consolidate its democracy, strengthen the rule of law and uphold the rights of its citizens to elect leaders of their choice.

The most recent elections held in 2013 marked a significant milestone as they were the first ones to be conducted since the promulgation of the Constitution of Kenya 2010. Thanks to provisions made in the new constitution, there were notable improvements in the conduct of the elections, before, during and after the polling day itself: attempts by the Registrar of Political Parties to regulate party primaries, by the Political Party Dispute Resolution Tribunal to arbitrate disputes and by the judiciary in timely electoral dispute resolution. Despite these improvements, a number of concerns were also noted: chaotic party primaries, confusion over the voters' roll, opaque campaign financing environment, failure of technology and the legal questions raised from the judiciary's handling of electoral petitions.

The reforms carried out in key institutions in the run up to the 2013 elections created the expectation that this first elections under the new constitution would be credible and the outcome would gain legitimacy in the eyes of most Kenyans. In light of the challenges highlighted, the jury is still out whether the 2013 elections were truly free and fair. For this reason it is imperative that a comprehensive analysis be done on the 2013 elections. This book is our humble contribution to this discourse. As the first elections under a new constitutional framework, there are compelling reasons to provide both a retrospective and a prospective analysis. A retrospective analysis provides the opportunity to test the assumptions of institutional promises going into the 2013 elections while a prospective one aims both at consolidating areas in which the institutions performed to citizens' expectations while identifying those areas which must be improved in the run up to the 2017 General Elections. The book is inspired by the belief that by identifying possible areas of electoral reforms before the next cycle of elections in 2017 the publication will be useful both to scholarship and policy.

This book project is a product of a series of consultative meetings convened by a group of civil society actors in Kenya that saw the need to capture the lessons learnt from Kenya's 2013 General Elections into a publication that provides an academic interrogation of the actors and factors involved. Building on its experience in publishing a similar book after the 2007 General Elections[1], Society for International Development (SID) with support from Uraia Trust convened an elections study group that brought together academics and practitioners to analyze the 2013 elections from different perspectives. In addition to the consultative meetings, an Advisory Group including SID, Uraia Trust, South Consulting and Open Society Initiative for Eastern Africa (OSIEA) was constituted. The Advisory Group provided overall guidance to the book project. It met regularly to review progress and provide feedback to the various authors.

From the outset, the Advisory Group meetings emphasized the need to set up a consultative publication process that would bring as many voices as possible into the book chapters. Pursuant to this desire, and in addition to the earlier consultative meetings, the book project was guided through a 4 point plan: First, several consultative review meetings with chapter authors were held to get the authors to internalize the conceptualization of the book and develop a common thread across different chapters. Second, chapter authors were provided with a team of research assistants to gather primary and secondary data relevant to the chapters. Third, all the chapters were put through a peer review process in which either academics or practitioners critiqued the chapter drafts. Finally, once all the initial chapter drafts were ready, the publication process organized six regional public forums each in which two authors presented their chapters for feedback. The regional forums were conducted in Nairobi, Kisumu, Eldoret, Karatina and Kilifi in partnership with university departments at the University of Nairobi, Maseno University (Kisumu City Campus), Catholic University of Eastern Africa (Eldoret Campus), Karatina University and Pwani University. The forums which involved students, faculty and neighbouring communities not only created platforms for public engagement on broad electoral issues related to the 2013 election but also provided invaluable feedback to the authors which was later incorporated in the chapters. Further to this, it is the desire of the Advisory Group that this publication shall be distilled into various products that will be used by diverse groups to propagate the culture of democratic elections in Kenya. We wish to sincerely thank all individuals and institutions that were involved in the development of this publication especially the authors, independent reviewers, editors and the Advisory Group Members.

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1   *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Election*

The publication is organized into thirteen chapters covering different thematic areas: institutional reforms, integrity of elections, election observers, the judiciary, the deep state and electoral management, election financing, the civil society, media, security, political parties, women, youth and the international dimensions of the 2013 elections. It is our sincere hope that the arguments, conclusions and recommendations raised in each of the thirteen chapters on Kenya's 2013 General Elections will inform policy debate as the country prepares for the next cycle of elections in 2017.

Ali Hersi   Grace Maingi

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Acknowledgments

Introduction

Ali Hersi holds an MA in Peace and Justice, which he completed on Fulbright and Rotary International Ambassadorial Scholarship, and another MA in International Relations from Warsaw University, Poland. He has been Associate Director of the Society for International Development (SID), Nairobi Office, since November 2011. Ali has also been involved in futures working and scenario building. He was a key member of SID's Kenya and East Africa Scenarios Projects between 1998 and 2008 and is currently working on initiating futures work in Somalia and South Sudan. He has also been the Senior Strategic Planning Facilitator for USAID Kenya's external consultations as part of the development of its new strategy for 2010 – 2018 and is currently involved in a similar exercise with the USAID Mission in South Sudan. Ali is fluent in English, Somali, Kiswahili and Polish

Fred Otieno holds Masters' Degree in Pan-African Studies from Syracuse University, New York. He was a Fulbright scholar at Yale University affiliated to the Jackson Institute for Global Affairs and The Council on African Studies with an interest in Democratization and Democracy Promotion in 2010-2011. Fred is certified by *EC-UNDP Joint Task Force on Electoral Assistance* as an electoral assistance expert. He currently works at Society for International Development (SID) Nairobi office. Fred has previously worked as a research associate for the United States Institute for Peace and New York University project on *Youth Aspirations and Peace or Conflict in Kenya*. His academic and research interests revolve around democratization, with specific bias to electoral issues in sub Saharan Africa; devolution and democratization. Fred is also an adjunct faculty at The Catholic University of Eastern Africa.

Chapter 1

Elections after Reforms: The Promise of Institutionalism in Kenya's 2013 General Elections - *Ali Hersi and Fred Otieno*

On 4 March 2013, Kenya conducted the fifth in its uninterrupted cycle of elections since the re-introduction of multiparty politics in 1992. A fifth consecutive multiparty election is significant considering that in democratic transition and consolidation literature, the mere holding of regular elections is considered a significant achievement. The 2013 elections were the second non-incumbent one since 2002 when a loose opposition outfit—National Rainbow Coalition (NARC) - unseated KANU which had been in power since independence. Arguably, an optimistic lens could stretch Huntington's 'two-turnover test', at least partially to situate Kenya's democratic transition and anticipated consolidation after the 2013 election. Huntington (1991) considers a democracy consolidated once a polity has gone through two democratic and peaceful turnovers of ruling parties. That is, the peaceful change of government through elections means that factions of political elites have won and lost power at one point, thereby fully internalizing the rules of electoral contests. In the Kenyan case, this is debatable largely because in 2013, no government was being removed, yet factions of the political elite who had previously contested, lost or won power were competing in a non-incumbent election in which all the leading contenders had been a part of the outgoing consociational arrangement. The premium on the election was therefore colossal, where if the election achieved a peaceful transition, Kenya's democracy should in theory be considered successfully consolidated.

In reality, however, even with five uninterrupted cycles of elections and two instances where different parties have taken over political power since the first multiparty general elections in 1992, a remarkable drift towards institutional guarantees is still hard to discern. In all but the 2002 election, there remain persistent concerns about the fairness of the electoral process and by extension the credibility of electoral outcomes. This unfortunately raises a fundamental concern about the future of the country's electoral democracy even when the Kenyan polity seems to have institutionalized the culture of periodic elections.

Viewed through a lens of democratic consolidation, the fifth cycle of election in Kenya was unique in two main ways. First, the 2013 elections were held under the cloud of post-election violence experienced after the 2007 elections. The country was under intense observation, both by its citizens and international observers anxious to see whether there would be a repeat of the violence seen in 2007. Following the traumatic events of 2007 the country was forced into fast-tracking long overdue comprehensive political reforms. The process of comprehensive reforms began in February 2008 when the leaders of the two factions of the political elite embroiled in the electoral dispute signed a National Accord, effectively entering into a consociational arrangement that led to the creation of the first ever coalition government in Kenya. These reforms, midwifed by the African Union's Panel of Eminent African Personalities took place within the framework of the Kenya National Dialogue and Reconciliation (KNDR) (Kanyinga, 2014). Through KNDR, the parties to the dispute agreed to a four point agenda: immediate stop to the ongoing violence and restoration of fundamental human rights and liberties; immediate action to address the humanitarian crisis and forge national reconciliation; overcoming the political crisis and; addressing the long-term issues underlying the conflict. Agenda Four of the KNDR focused on addressing underlying long-term issues related to the post-election violence of 2007.[1] Thus the country embarked on a painstaking state (re)building project.

Second, it was a test on the country's ability to conduct a transparent and peaceful election. Although all the previous multiparty elections in Kenya have been characterized by some violence (Klopp, 2001), the preceding General Elections in 2007 ended up in violence whose magnitude and consequences were unprecedented. In fact, some scholars have described the resulting violence as just falling short of a civil war (Oucho, 2010).

State (re)building was anchored on two pillars. First, the promise of institutionalism—that, as Adam Pzerworski argues, strong and independent institutions would influence our norms, beliefs and actions thereby guaranteeing a peaceful and democratic polity (Pzerworski, 2004). These reforms targeted such institutions as the electoral management body, the judiciary and security sector. Second, an assurance that the consensus reached by the political elite provided the perfect opportunity to spur a final push to initiate the long overdue political reforms. The hallmark of such reforms was the promulgation of Constitution of Kenya 2010. The new constitution promised among other things a robust institutional framework capable of not only delivering free, fair and credible elections but also buffering Kenyans from any future election related violence. The jury is still out on whether relevant institutions delivered

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1   *See KNDR website*

on either of the objectives. Moreover, doubts still linger as to how much credit, if any, the institutions should claim for the relatively peaceful election observed in 2013.

Another dimension of the ongoing debate about the 2013 elections is: how well placed is the trust Kenyans have in institutions and legal frameworks established under the new constitution. True to the adage that when one has a hammer every problem is a nail, Kenyans have historically tended to take recourse in the passing of new laws and establishment of new institutions to deal with every problem encountered. The same is observed whether the problem at hand relates to elections or corruption or even a health scourge afflicting society such as drugs or HIV Aids.

Against such a background, a number of questions important to the democratic cause abound. For example, to what extent did the 2013 General Elections in Kenya meet (or fail to meet) the expectations of the institutional framework in which it was conducted? Going into the next cycle of elections, in which areas will Kenya need to improve in order to cushion the country against any reversal while consolidating the democratic gains, if any? Should Kenyans continue on the path of enacting more laws and setting up new institutions or should they look elsewhere for the solution to the persistent problem of election-related violence? To attempt to answer these questions, one has to analyze more keenly issues at the nexus between democratization and elections.

Democratizing Power of Elections?

Whereas there is consensus among scholars who study democratization that elections in themselves are not sufficient for democracy, nonetheless, both the procedural minimum conceptualization outlined by Robert Dahl and other expanded definitions view elections as a fundamental component, in fact, the cornerstone of any democracy (Dahl, 1971; Collier and Levitsky, 1997). However, the actual causal mechanism through which elections democratize remains contested. Building on Rustow's (1970) argument that democratic behavior—in this case the practice of holding elections, cultivates democratic values, proponents of 'the democratizing power' of elections consider repetitive series of elections as to have a net democratizing effect on countries conducting the elections. Staffan Lindberg posits that repetitive elections, their quality not withstanding appear to expand human freedom while also inculcating democratic values (Lindberg, 2006. Indeed, a survey conducted by Afrobarometer showed that alternation in power through elections correlates favorably with citizen's support for democracy and the overall democratic culture (Bratton, 2004).

On the converse, critics of the democratizing power of elections, as recently summed up by Bogaards (2013) raise concerns with the theoretical inconsistencies in democratization through elections, suggesting possible spuriousness between repetitive elections and degree of freedom in countries. These critics also observe that just like not all the cases in Africa fit the theory, empirical evidence from other regions such as the Middle East, South America and Eastern Europe, repetitive undemocratic elections do not appear to have the democratizing power. More recent studies suggest that democratic consolidation is taking place at a slower pace than that at which elections are taking place in Africa (Opalo, 2012).

While in Africa the democratizing power of elections remains contested, empirical evidence shows that elections actually do matter depending on the type of regime conducting elections (Roessler and Howard, 2009). Specifically, Roessler and Howard's work show that under electoral democracies—defined as regimes characterized by 'competitive, inclusive and high integrity elections but which fall short of civil liberties and rule of law' (Møller and Skaaning, 2013), there is evidence of the 'democratizing power' of elections.

To this publication therefore, an important intersection of the arguments posited by these two camps of scholars is the implicit conclusion that to arrive at electoral democracies where the democratizing effect of elections matter, countries must already have a culture of conducting elections. By interrogating the electoral process, highlighting areas of success and failure Kenya's 2013 General Elections, this publication contributes to the cautious optimism that African countries can register democratic consolidation through elections, once those elections, now fairly regular as in the case of Kenya, become competitive, inclusive and of high integrity. Such optimism is perhaps the most compelling justification for why efforts must always be made to document experiences at each cycle of election, picking lessons and informing policy debates on subsequent electoral reform agenda. In this, it is critical to ensure that citizens do not get disillusioned in the process and that gains being made after each cycle are clearly communicated and the resultant benefits highlighted. It would be tragic if the average citizens withdraw from participating in elections – as seen in established democracies - even before they fully benefit from the democratic dividend.

The Outline of the Book

It is in the light of this cautious optimism that the Society for International Development (SID) convened a small group of civil society actors to reflect on the 2013 elections and draw lessons that could inform future election cycles. This effort builds on a similar initiative SID undertook to document lessons from the 2007 elections.

This book has fourteen chapters including this introduction. The chapters are divided into four thematic areas: In Search of Credibility: Whose Views Count?, Shaping Electoral Outcomes: Visible and Invisible Institutions at Play, Choreographing for Victory: Parties, Women, Youth and Money and Vultures, Spoilers and Spectators: Influencing Campaigns from the Periphery. The thematic areas cover electoral issues generally but with particular reference to how each of them played out during Kenya's 2013 General Election.

The present chapter provides the context of the 2013 elections, with focus on democratic transition and consolidation. In the second chapter, Muthoni Wanyeki assesses the model of the post 2007 state-building that Kenya embarked on with support from the international actors and explanation of the international election observers' acquiescence to an arguably flawed electoral outcome.

In Chapter Three, Seema Shah focuses on the question of credibility of elections. She argues that local public assessments and international standards ought to be reconciled considering that it is the local opinion which actually matters and which legitimizes elected governments.

Chapter Four of the book delves into the conduct of election observers. Here, Fred Otieno and Nicholas Ondoro pose the contradictions that have characterized the work of observers—a fairly nascent strategy in democracy promotion. The chapter pegs its assessment of the observer missions involved in Kenya's 2013 election on recent statistically robust theories on determinants of observers' behavior.

Chapter Five of the book focuses on the judiciary. Here, James Gondi and Iqbal Bassant assesses the role of Kenya's reformed judiciary in electoral dispute resolution by analyzing selected election petitions filed in different courts. The chapter argues that realization of the progressive values and abstract ideals contained in Kenya's new constitution require judicial activism.

In chapter Six, Nicholas Ondoro and Fred Otieno delve into the security sector reform processes that emerged after the 2007 post-election violence and specifically assess the conduct of the security sector in the 2013 General Elections. Locating security sector reforms within the power-sharing arrangement agreed upon by the rival factions of the political elite between 2008-2013, the authors argue that the power-sharing arrangement, though helped promote security sector reforms, created a competitive political stage in which the reform process, particularly police reforms were ensnared in disputes before the 2013 General Election.

In Chapter Seven, George Kegoro brings in the notion of the 'Deep State' as a useful lens with which to wade into the post-election diagnosis of the promise of the formal institutions established before the 2013 elections. The chapter questions the dominant assumption within Kenya's democratization discourse that only formal institutions play a role in the management of elections and that by clarifying the rules that govern those institutions, the desired accountability will be achieved in relation to the management of elections.

Chapter Eight focuses on political parties, partisan identities and mobilization strategies in the 2013 election. Here, Patrick Asingo builds a conceptual framework for understanding how voters acquire the kind of partisan orientation that enabled them to identify with certain political parties and candidates. Using the official results announced by the electoral management body, it then examines in great details the aggregate national as well as regional distribution of partisanship and party strengths in the 2013 elections. The chapter shows that while ethnic identity significantly accounts for party support, it does not provide a complete explanation of party support.

In Chapter Nine, Elizabeth Adika assesses the performance of women in the 2013 General Election against a background of a new constitutional dispensation that held promises of increasing number of women in political representation. Placing these constitutional promises in the context of the historical struggle for women's representation in politics, the chapter argues that half-hearted commitment by various duty bearers to implement the constitution might explain the dismal performance of women in the 2013 election. Chapter Ten focuses on youth and the 2013 General Elections. Here, Michael Orwa and Charles Wafula begin by revisiting the historical context of youth and political participation in Kenya. The chapter observes a fairly improved performance by the youth in the election explained by other factors not the buzzy digital rhetoric which did not necessarily translate into gains for the youth.

In Chapter Eleven, Attiya Waris examines the question of election campaign financing, by attempting a broad critique that includes contextualizing election campaign financing within the nature of the fiscal state and implications to national, regional and international economy. Although concrete data on this subject is, understandably so, difficult to access, the chapter collates readily available secondary data and selected interviews with current and former politicians, legal experts and 2013 campaign staff to elucidate on the financing of the 2013 election. The chapter finds evidence of an unprecedentedly expensive but extremely opaque election campaign under a new constitution.

Chapter Twelve focuses on the role of the media in the 2013 General Elections. In the chapter, Denis Galava examines how Kenya's print and broadcast media applied Johan Galtung's

concept of peace journalism in the coverage of the 2013 general election. It argues that the coverage fell short of Galtung's characterization of peace journalism as an advocacy and interpretative approach that creates opportunities for society at large to consider and to value nonviolent responses to conflict.

Chapter Thirteen primarily discusses the role of civil society in the 2013 elections and the challenges it faced. Here, Michael Oloo highlights the important involvement of civil society in areas of voter education, peace messaging and election observation while also providing a critique of the involvement of civil society in the elections. The chapter documents a number of critical interventions made by CSOs towards the election but suggests that they could have been better with electoral cycle approach programming, clear synergies and sustained funding.

The final chapter examines the internationalization of 2013 elections orchestrated by the 'ICC factor'. In this chapter, Abdullahi Boru opines that the 2007 botched election and subsequent indictment of two prospective presidential candidates—who would later form a coalition for the presidential race, inevitably internationalized Kenya's 2013 general elections. It argues that despite the foreign policy debates that arose out of the internationalization of the 2013 election by the ICC factor, Kenya is still firmly in the orbit of the West even though the Chinese interest in Africa dating back before ICC involvement in Kenya could change things in future.

It is imperative to remind the readers that this book neither claims to cover all electoral issues nor does its perspective on the election reflect the only way through which an election can be analyzed. Instead, it presents an analysis of a set of possible electoral issues which it hopes will spur constructive debate on electoral reform in Kenya.

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In Search of Credibility: Whose Views Count?

Lynee Muthoni Wanyeki is pursuing her doctoral studies with the Department of Politics and International Studies at the School of Oriental and African Studies (SOAS), focusing on the African Union (AU). She has an MPA in public affairs (cum laude) from L'Institut d'etudes politiques (Sciences Po) in Paris and a BA in political science and French (Hons) from the University of New Brunswick and Simon Fraser University in Canada. Before returning to school, she served as the Executive Director of the Kenya Human Rights Commission in Nairobi. She is currently Amnesty International's Regional Director East Africa covering East Africa, the Horn of Africa and the Great Lakes.

Seema Shah holds a PhD in Political Science and Government from UCLA. She served as a researcher and analyst at the Africa Centre for Open Governance in Nairobi, Kenya from 2012 to 2014. In that capacity, she developed informational reports and analyses on the Kenyan electoral process. She helped to advocate for more transparency during the electoral process in Kenya and moderated public debate on the election through the "People's Court" website. Her research focuses on electoral politics, electoral integrity and ethnic violence.

Nicholas Ondoro is a career researcher and security sector practitioner. He holds a PhD in Peace Studies from the University of Bradford UK, where he was an associate researcher at the John and Elnora Ferguson Centre for African Studies. He was also a Chevening Scholar (2011) at the same university before proceeding for his doctoral studies. His research focuses on security sector reform in transitional and post-conflict societies, with an emphasis on police and intelligence reform and the interactions between security sector reform and politics of power-sharing.

<u>Chapter 2</u>

See No Evil: Reform and Observation of Kenya's 2013 Presidential Elections - *Muthoni Wanyeki*

Introduction

On 9 April 2013, Uhuru Kenyatta was sworn in as Kenya's President, with William Ruto as his Deputy President. At the time of their swearing in, both were charged with crimes against humanity in respect of the violence that followed the 2007 General Elections, charges against the President have since been withdrawn while the Deputy President's trial is going on. Despite new integrity provisions in the Constitution of Kenya, 2010, the two were not only able to run for the highest public offices but were, on the face of it, successful in doing so.

Yet Kenya's General Elections of 2013 were marred by problems similar to those of the General Elections of 2007. The Independent Electoral and Boundaries Commission (IEBC)'s voter registration, counting and tallying processes were challenged before Kenya's new Supreme Court by both political parties under the Coalition for Reform and Democracy (CORD) and civil society through the African Centre for Open Governance (AfriCOG) and the Kenyan Asian Forum (KAF). The Supreme Court's unanimous decision dismissing those electoral petitions has done nothing to silence the questions it chose to leave unexamined and unanswered.

Given those questions, what explains the external observation sign-off on the General Elections of 2013? What does that external observation sign-off, in turn, portend for the promise of greater accountability symbolized by the promulgation of the new Constitution? If that promise has been broken, what are the implications for liberal institutionalism in Kenya—and the liberal peace brokered by the 2008 Kenya National Dialogue and Reconciliation (KNDR)?

This chapter begins by defining accountability, given that greater accountability was the promise and purpose of the structural and institutional reforms catalyzed by the KNDR in 2008. It situates the KNDR within the liberal peace tradition of state-building as peace-building. It

then reviews the evidence submitted in the civil society electoral petition and critically assesses the Supreme Court's addressing of that evidence, together with the broader accountability implications of the Supreme Court's unanimous decision to dismiss that evidence. Against that background, it proceeds to review the responses of external actors and observers of Kenya's General Elections. Finally, it assesses those responses against contradictions, dilemmas and tensions inherent to liberal peace. It concludes with the argument that those responses have undermined liberal institutionalism in Kenya—with future consequences for the liberal peace.

The Liberal Institutionalist Promise of Greater Accountability

Accountability relates to the liberal institutionalist concern with good governance but has become less of a means to the ends of effectiveness and efficiency and more of an end in and of itself (Bovens, 2007: 449). Bovens observes that 'accountability is indirectly of importance because, ultimately, it can help to ensure that the legitimacy of governance remains intact or is increased. This effect is partly the consequence of the other effects (democratic control, a power equilibrium and responsiveness enhance the legitimacy of the administration)' (Bovens, 2007: 464).

Ideally, accountability increases two aspects and operates on two planes. It increases both the 'answerability' and 'enforcement' of the state—the obligation of politicians and public officials to inform and explain and the state's ability to both reward and punish. Accountability is both horizontal (between equal parties of the state) as well as vertical (between unequal parties to the state). Equal parties of the state are the three arms of the state through separation of powers as well as checks and balances. Unequal parties to the state are citizens and the state through the democratic process—direct or representative as well as, increasingly, participatory (Schedler, 1999).

Accountability can therefore be assessed by determining the extent to which reform has contributed to answerability and enforcement on both the horizontal and vertical planes. In addition, if 'accountability is important to provide a democratic means to monitor and control government conduct, for preventing the development of concentrations of power, and to enhance the learning capacity and effectiveness of public administration' (Bovens, 2007: 462), then accountability can also be assessed against each of these three aims and effects. Accountability's democratic aim and effect is that of popular control through delegation from citizens to their elected representatives (Bovens, 2007: 463). Its constitutional aim and effect is that of preventing corruption and the abuse of power, through 'the extent to which an

accountability arrangement curtails the abuse of executive power and privilege' (Bovens, 2007: 466). And its learning aim and effect is that of increasing effectiveness and efficiency through 'the extent to which an accountability arrangement stimulates public executives and bodies to focus consistently on achieving desirable social outcomes' (Bovens, 2007: 466).

Thus, accountability is fundamentally about constraints on and control of power—through the structuring of the state as well as through the democratic process. Where state structures are designed so as to enhance accountability and strong citizen links with the state are maintained through the democratic process, more accountability can be expected—and vice versa.

Liberal Peace as the Basis for Realising that Promise? The KNDR, Structural and Institutional Reform

State-building has become an omnipresent corollary of peace-building (Paris and Sisk, 2007). Establishing liberal peace[2] thus now entails not just ceasefire monitoring and formal negotiations but also disarmament, demobilization and reintegration (DDR), security sector reform (SSR), democratization and liberalism (MacGinty, 2008). Democratization is standardized, including constitution-making, the conversion of conflicting parties to political parties as well as electoral and judicial reform, alongside the growth of civil society, the private sector and the middle class. Under state-building as peace-building, however, accountability's ideal aims and effects—as spelt out above—become instrumental and subordinate to maintaining liberal peace through curtailing conflict and precluding violence. Inclusion, the electoral process and rule of law become means to sustain liberal peace rather than to secure accountability (Tadjbakhsh, 2011).

External support for state-building as peace-building increasingly tends to combine both military and civilian aspects, with defence, diplomacy and development (3D) coordinating interventions directed towards the whole of government (Tadjbakhsh, 2011). The liberal institutionalist assumption here is two-fold: first, that institutions can determine, modify and order individual motives and preferences; and, second, that stability is derived from political institutionalization (Migdal, 1997). Political institutions ideally are both inclusive and pluralistic, distributing power broadly yet subjecting it to constraints (Acemoglu and Robinson, 2012: 80-81). Again, however, under state-building as peace-building, achieving ideal political institutions is less important than securing liberal peace.

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2   *In the context of reform after 2007/2008 post-election violence, liberal peace as used here envisions end of inter-group conflict with democratic institutions resulting from political reform.*

The agreements negotiated by the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) under the KNDR in 2008 exemplify state-building as peace-building. In terms of peace-building, the KNDR's agenda items and resulting agreements covered the trigger of the supposed presidential electoral outcome, the proximate cause of political mobilization on ethnic grounds as well as, in the long-term, the structural causes and underlying grievances of past gross and systemic human rights violations, inequality and systemic discrimination on ethnic grounds and (male) youth un(der)employment. In terms of state-building, the KNDR's agenda items and resulting agreements covered structural reform through conclusion of the constitutional reform process and institutional reforms—the latter in relation to power-sharing and the electoral management body as well as the entire justice system, from the security services through to the judiciary.

The liberal peace held and liberal institutionalism's assumptions seemed to be holding too. Apart from providing the constitutional framework for all other institutional reforms, the new Constitution restored separation of powers and checks and balances, enhanced equality provisions and requirements, provided for devolution and opened up new avenues for the exercise of participatory democracy.

That said, it did not, however, end the first-past-the-post, winner-take-all electoral system and replace it with mixed-member, proportional representation (MMPR), the former having caused much of the electoral related violence and warped the principles of democracy and the latter largely touted as a solution to plurality-majoritarian electoral outcomes, a dangerous system in fragmented societies. This had been a key demand from the inception of the struggle for constitutional reform so as to improve inclusivity and pluralism on ethnic as well as gender grounds as well as to lessen the intensity of electoral contests for the presidency. But the Constitution was a negotiated document and parliamentarians ultimately opted to reject MMPR.

In addition, as predicted above, accountability's ideal aims and effects became instrumental and subordinate to maintaining liberal peace. The Independent Review Commission (IREC), created under the KNDR, to investigate the 2007 General Elections and the supposed presidential outcome, opted in its final report to reject evidence brought before it by Kenyans for Peace with Truth and Justice (KPTJ), a coalition of citizens as well as the governance, human rights and legal sector of civil society. IREC's Chair, during its hearings, went so far as to accuse KPTJ of being responsible for the violence for compiling and releasing this evidence (two of its Commissioners, however, included a dissenting opinion in support of KPTJ's evidence in IREC's final report). IREC's report concluded that, as it could (would?) not determine the true outcome of the 2007 presidential election, it would opt for the broad

brush of institutional reform rather than upholding accountability in terms of its answerability and enforcement aspects, accountability on the vertical plane or accountability's democratic, constitutional and learning aims and effects.

The then Electoral Commission of Kenya (ECK) was therefore disbanded and an interim electoral management body was created, to be succeeded, in time for the General Elections of 2013, by the IEBC. Openings for the positions of Commissioner were publicly advertized. Those short-listed were initially approved by both sides of the grand coalition government and then approved by parliament. Constituency boundaries were re-delimited to address previous gerrymandering with new county boundaries being delimited as well. Voter registration was both electronic through biometrics to remove double entries or non-existent voters as well as manual. An electronic transmission system was established to forward provisional results directly to the national tallying centre.

Meanwhile, the judiciary had seen the appointment of a new Chief Justice and setting up of the Supreme Court, also through a public vetting process. A judicial committee was established to handle any electoral disputes—including, at the presidential level, under tight constitutional timelines, with one week to file and two weeks to reach a decision.

All seemed set to ensure the General Elections of 2013 would avoid the problems experienced in 2007. On 4 March 2013, voters went to the polls. The lines were long but relatively peaceful—with the exception of reports of violence from some constituencies in Nairobi and at the Coast, the latter of which caused delays in the opening of some polling stations in some constituencies.

But then the Electronic Voter Identification (EVID) systems failed across the country—causing resort to manual identification of voters. The electronic transmission system also failed—causing resort to the manual returns, the verification process which was questioned by both CORD and Jubilee, with domestic and international observers being denied the chance to participate the verification. At the end of the week, despite an effort by AfriCOG and the KAF to obtain a court order to stop the counting and tallying process and re-do it by assessing the constituency level Forms 36 against the polling station level Forms 34, the IEBC declared Kenyatta the winner, having purportedly obtained the 50 percent plus one threshold. CORD and KPTJ, through AfriCOG and the KAF, immediately began to work on electoral petitions to challenge, respectively, the outcome and the process of the supposed presidential result.

The Promise Betrayed: the IEBC and Evidence from the Civil Society Electoral Petition

The civil society petition, in summary, accepted that, as in 2007, there had been no (substantive) problems with polling. However, all technologies for voter identification and, critically, electronic transmission had failed. Given the IEBC's failure to otherwise safeguard the integrity of the vote, also as in 2007, it argued (substantive) problems had occurred with counting and tallying, as well as verification of the same. Based on Article 81 of the Constitution relative to a 'free and fair' election, civil society argued that the breaches below affected both the legality and the validity of the so-called presidential results.

The Voters' Registers

Civil society noted that four voters' registers were used: the provisional one announced 18 December 2012; the electronic one assumed gazetted 24 February 2013; one listing voters without biometrics electronically posted on 2 March 2013; and the one given to political parties just prior to polling.

As the numbers of total registered voters were inconsistent across all four, it argued that it was impossible to know the number of registered voters or to assess voter turnout. In addition, the clean-up of the provisional voters' register after publication and verification should have reduced the total number of registered voters in the electronic one. As there could be no additions after the close of voter registration, it argued it was unclear where the one listing voters without biometrics could have come from.

More disturbingly, while the overall difference between total registered voters in the provision and electronic voters' registers was within reason, when matching changes against Kenyatta and Raila Odinga's provincial strongholds, disturbing patterns emerged which systematically favoured Kenyatta and Jubilee over Odinga and CORD. Kenyatta's provincial strongholds (Central and the Rift Valley) saw an addition of 68,836 registered voters (with another 4,222 additions to Eastern and 6,604 additions to North Eastern). Odinga's provincial strongholds (the Coast and Nairobi) saw a reduction of 13,790 registered voters (with another 50,102 deletions from Nairobi and 2,938 from Western).

The number of total registered voters in all four voters' registers were also inconsistent with the number of total registered voters given out with the result on 9 March , 2013. In 45 of the 47 counties, additions were made of between 101 and 8,516 registered voters (with the largest additions being in the Rift Valley). The number of total registered voters given out with

the result on 9 March 2013 also differed in the same constituencies for different positions voted for. For example, in Makueni constituency, different figures were given at all levels. And, in Othaya constituency, the figures moved from 46,843 to 47,293.

The failure of the EVID and electronic transmission systems

The civil society petition noted that the tender for the EVID system had been awarded to an unqualified bidder contrary to Article 86 of the Constitution and the Public Procurement and Disposal Act. Laptops and their back-up batteries were sent to the field uncharged. One third of all phones for the electronic transmissions system were undelivered. And phones that got to the field were either uncharged or without the application to access the electronic transmission system.

More importantly, however, measures put in place to then verify the manual transmission system (of constituency tallies on the Forms 36) were insufficient given the lack of provisional results (of polling station tallies on Forms 34) to check the Forms 36 against and the inability of political party agents and national/international observers to observe the IEBC's own verification of Forms 36 (following their removal from the national tallying centre floor to the balcony). What this meant was that the totals on Forms 36 were sometimes higher than the total votes cast. This also meant that a steady, statistically improbable gap had somehow been maintained between Kenyatta and Odinga even as results were released from different parts of the country.

Declarations and Orders Sought

The civil society petition therefore asked that the voter register be declared invalid, that all Forms 34 and 36 be preserved and produced, that all phones, servers and data be preserved and produced, and that all tallies be verified and re-done from the polling station level up. It also asked that an independent forensic audit be conducted into all technological failures as well as the entire process.

The Judgement of the Supreme Court: Implications on the Promise of Institutionalism

The Supreme Court chose to disregard the unconstitutionalities, illegalities and irregularities pointed out in the civil society petition.

With respect to the multiple voters' registers—and the implications thereof for determining the total voters registered as well as whether or not voter turnout was credible—it held that the voters' register does not need to be single, but can include additional registers catering for special categories of voters. The discriminatory and systematic patterns of additions and deletions of registered voters in Kenyatta's as opposed to Odinga's strongholds were ignored, with the Supreme Court finding instead that civil society did not, apparently discharge their legal burden of proof to demonstrate that the voter registration process was unlawful or compromised voters' rights. While it noted 'there were many irregularities in the data and information-capture during the registration process,' it held that 'these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st Respondent [the IEBC], for the purpose of causing prejudice to any particular candidate' (Republic of Kenya in the Supreme Court of Kenya at Nairobi, 2013). It did, however, urge the IEBC to back-up its voters' registers.

The Supreme Court continued to find the failures of the EVID and electronic transmission systems insufficient to affect the validity or non-validity of the supposed presidential results, while at the same time urging investigation and prosecution in respect of procurement and deployment of the same. It also found that the IEBC's relocation of political party agents at the national tallying centre was lawful as concerned the IEBC's exercise of its discretion to place order, peace and security above transparency. The Supreme Court's response posited that electronic transmission was not the primary method for the transmission of results—which had never been in question by civil society. In effect, the Supreme Court failed to uphold the aim or purpose of electronic transmission and the presence of political party agents' as well as observers—that of individually and collectively safeguarding the integrity of the vote. The denial of access by political party agents as well as domestic and international observers to the verification process has been fundamental—without such access how could any of them challenge or confirm the Forms 36?

The Supreme Court's own scrutiny of Forms 34 and 36 found that Forms 36 were missing for 75 constituencies. Ten of the 18,000 polling stations purportedly examined had their Forms 34 missing. And five of the 22 polling stations singled out for particular examination showed discrepancies. The civil society, which had observed the scrutiny, showed that the number of registered voters was missing from some Forms 36, some constituencies had two Forms 36 and some polling stations had more votes than registered voters—regardless of which voters' register was used. At least four further questions then arose. Why would the scrutiny report claim that the Forms 34 and 36 from only 18,000 polling stations had been examined when, in

fact, those from all 33,400 polling stations had been examined? How could missing Forms 36 for about a third of all constituencies give supposedly valid results? Why were results based on more voters than registered voters not cancelled as per the Constitution and relevant electoral law? What had the purpose of the scrutiny been if not to add up all the effects of the above on the supposed presidential result?

Yet, there was no return to this scrutiny—its illegalities and irregularities or its numbers—in the Supreme Court's drawing of conclusions. To the contrary, the Supreme Court noted that it had 'already held', however, that such a process of re-tallying of votes, re-computing and re-assignment of value, falls beyond the election-contest mandate of this Court, and is excluded by the 'rule of remoteness' (Republic of Kenya in the Supreme Court of Kenya at Nairobi, 2013: 97). In essence, the Supreme Court failed to play its oversight role—which, given the incomplete and late release of the Forms 34 and 36 to the petitioners was a role that feasibly only the Supreme Court could have played.

Neither was there any engagement with the statistically improbable, steady gap maintained between Kenyatta and Odinga throughout the duration of the release of the results. The Supreme Court held that, in respect of the possible inflation and deflation of presidential results for both candidates that would have been required to maintain this statistically improbable, steady gap, the evidence did not meet the evidentiary threshold.

Thus, the Supreme Court concluded that the petitioners failed to demonstrate that profound irregularities had occurred which impeded voters' participation or subverted the electorate's intent, "Hardly any matter of significance, at this stage, came before the Court such as would alter the thrust of the overall evidence and the submissions on law; and we must hold that no challenge to the tallying process has been made such as to lead to an order of annulment" (Republic of Kenya in the Supreme Court of Kenya at Nairobi, 2013: 89).

And the world Acquiesces: External Actors and Observers Verdict

Many external actors and observers had refrained from commentary or the release of their full reports pending the Supreme Court decision. Yet, following the decision, they almost unanimously chose to follow the path laid down by the Supreme Court and ultimately excuse the unconstitutionalities, illegalities and irregularities experienced—even where noted by their own observation teams. At least five excuses or justifications were given when signing-off on the elections: the poor implementation and understandable logistical difficulties excuse; the Elections Observation Group (ELOG) excuse or the (patronisingly) unrealistic expectations/ understanding excuse; the understandable trade-offs excuse; the contortions with no excuse;

and the missing the point excuse. Only one external observation group was, in the end, left standing.

The poor implementation and understandable logistical difficulties excuse

With respect to counting, the African Union's (AU) report noted that poor lighting in the polling stations had made verification of valid and invalid ballots difficult. It also noted the challenges to the electronic transmission of results, including the late provision of telephones to presiding officers, network failures and suspicions of system hacking. None of these challenges were questioned further (African Union, (2013).

The ELOG excuse or (patronisingly) the unrealistic expectations/ understanding excuse

ELOG, the umbrella domestic observation group noted that the IEBC's results for Kenyatta were within the projected parallel vote tabulation (PVT) ranges: Kenyatta from 47-52.4 percent; and Odinga from 40.9-45.9 percent. What it failed to note, until pushed, was that its actual result for Kenyatta was 49 percent. It also failed to comment, again until pushed, on the alternative reading allowed by its large margin of error of 2.7 percent.

This, however, did not stop the International Foundation for Election Systems (IFES), which had provided financial and technical support to the IEBC, from claiming that the IEBC's count was corroborated by ELOG's PVT and most of the international observation missions, such as the Carter Centre (when, in fact, no international observation missions had purported to corroborate the count). In its 16 April 2013 testimony to the American House Committee on Foreign Affairs' Sub-Committee on Africa, Global Health, Global Human Rights, and International Organisations, IFES claimed that the 2013 General Elections had been marred not by a 'failure of technology' but 'a failure of project management'—that is, an attempt to implement too much technology in too short of a time. That said, IFES claimed that 'enough safeguards were included to ensure it was a credible vote (not critically dependent upon technology) and the process was peaceful'. The real problem was, in IFES's (patronizing) understanding, that candidates and the media 'failed to understand the vote counting and reporting process' (Sweeney, 2013).

The Understandable Trade-offs Excuse

Slightly more critically, the National Democratic Institute (NDI), which had provided financial and technical support to ELOG, when testifying before the same Sub-Committee, noted not just the failures in the functioning of electronic poll books on election day as well as in the system for the electronic transmission of results from polling locations, but also that party agents and international observers had been excluded from part of the results tabulation at the national level and that the IEBC had yet to release all results at the polling station level.

However, it also noted that 'ELOG, in confirming the IEBC results, also called on the IEBC to make public information material to the results announced, urged those who felt aggrieved to seek redress through the courts and called upon the courts to act expeditiously and to apply fairness in ensuring equal protection of the law'. Thus, in NDI's view, 'ELOG correctly combined its confirmation of the credibility of the presidential results with a call for further urgent actions to ensure electoral integrity, and that approach applies equally following the Supreme Court's unanimous ruling (Jennings, 2013).'

NDI sounded the caution that 'in close elections, where nearly half the population is disappointed in the outcome, and particularly where flaws are apparent, transparency and accountability are vital'. Yet, it apparently overcame that caution when concluding that 'it is the Institute's view...that Kenya's presidential election results were credible, though the process included important flaws', going so far as to posit that 'the elections, and the challenge to the results, strengthened the democratic institutions of Kenya' (Jennings, 2013).

The Oscillating Voters' Register

The Carter Centre's full report listed a long litany of problems with the voters' registers as well as the counting and tallying process—in line with those problems outlined in the civil society petition.

As concerns the voters' registers, the Carter Centre noted discrepancies (a total variation of about 100,000 voters) between the provisional list of voters registered published on 18 December 2012 and the voter statistics per county published on 24 February 2013. It further noted that registered voters published with the presidential results released by the IEBC on 9 March 2013 differed from the voter statistics per county published by the IEBC on 24 February 2013. In addition, registered voters recorded on Forms 36 by returning officers in constituency tallies differed from those listed in the national voter register. And turnout figures were different for each elective position in given polling stations, with the recorded number of ballots cast

differing by several hundred to several thousand for the different elections in the same polling station.

As concerns the verification of the counting and tallying process, it noted the initial release of inaccurate figures transmitted by electronic means, with returning officers not receiving them in almost 60 percent of cases. It further noted the lack of transparency in the national tally, with party agents and observers unable to observe adequately, the publication of Forms 34 and 36 that were not accessible, the IEBC's continued unwillingness to publish results by polling station, the fact that the judicial scrutiny was not open to international observation and that the report of that scrutiny did not mention of figures obtained or report on discrepancies between numbers in Forms 34 and 36, reducing the added value of the exercise.

Yet, despite that long litany of problems, the executive summary of the report concluded that 'in spite of serious shortcomings in the IEBC's management of technology and tabulation of final election results, the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters'." This directly contradicted, however, the finding in the full body of the report that that procedure did not present sufficient guarantees to safeguard the integrity of the vote! Whether this contradiction was deliberate or not remains unknown (The Carter Centre International Election Observation Mission to Kenya, 2013).

Widespread Minor Discrepancies

Similarly, the European Union (EU)'s Election Observation Mission (EOM) confirmed and reiterated the problems with the voters' registers raised by the civil society petition. It noted the appearance, two days before polling, of a list of 36,236 registrations for which biometric data was not available and not included earlier or in the election results. It noted too that four different lists were used: the register in the poll books; the lists printed for individual polling stations; the list of people whose biometric data had not been captured; and finally, the entries listed in the Green Book (manual records). It found that the EVID was not used in half of the polling stations observers and that the inconsistent procedures to verify registration on polling day implying that no reliable records of registered citizens or voter turnout exist.

As concerns safeguarding the integrity of the vote through the counting and tallying, it further noted that electronic transmission of results was only successfully carried out in a small number of the polling stations attended by its team, that published presidential results were only disaggregated to constituency level while disaggregation down to polling station level is

the only way to trace and verify agent and observation figures and that the winners of the other elections had been gazetted but no summary results had been published to date. Finally, it noted that ELOG's margin of error meant its findings would also have been consistent with a second-round outcome.

However, despite also noting 'widespread minor discrepancies in tallies and between numbers of votes cast for presidential and other electoral races' (European Union Election Observation Mission (EU EOM), 2013), the EU EOM concludes that, as 'the differences were almost all less than one per cent, [there was] no overall pattern favouring one candidate or another' (European Union Election Observation Mission (EU EOM), (2013). This, of course, ignores the critical finding laid out in the civil society petition with respect to additions and deletions of registered voters between the provisional and electronic versions of the voters' registers. In and of themselves, and at the micro level, the additions and deletions seemed minor—it is only when they were mapped against Kenyatta's and Odinga's strongholds at a more macro level that discriminatory and systematic patterns became clear that favoured Jubilee over CORD. That critical finding was ignored—just as it was by the Supreme Court.

Thus is it unsurprising that the report concluded that 'the court was conscious of the importance of its task in the context of political and constitutional stability in Kenya, and of the need to exercise judicial restraint in propounding on the exercise of the popular will' (European Union Election Observation Mission (EU EOM), 2013). Finally, it noted that 'the Supreme Court's decision was accepted, although it met with criticism from Raila Odinga, his supporters and some civil society organisations' (European Union Election Observation Mission (EU EOM), 2013). Needless to say, nothing was said about the nature and substance of this continued criticism—the inference being that it related solely to political partisanship (European Union Election Observation Mission (EU EOM), 2013).

AGLI's Different Observation

In the end, only the African Great Lakes Initiative (AGLI)'s report went beyond noting the failure of the EVID in 41 percent of the polling stations it observed (with 26.8 percent of polling stations resorting to manual registers some or all of the time) and the failure of 29.3 percent to submit results electronically. It noted irregularities including the failure to provide secrecy for voters, the inappropriate influencing of voters, the denial of access to accredited observers, the limited or non-use of electronic systems and the failure to complete manual procedures.

In addition, however, it noted the issuance of multiple or unstamped ballot papers as well as the issuance of multiple ballots for the presidential vote in four of the polling stations it

observed. In one polling station, although there were 23 percent more presidential votes than those in the other five levels, that presidential result was added to the total.

The AGLI noted that its report was based on a limited sample in Western province. However, it concluded that although the Supreme Court had failed to delve into evidence of fraud, 'fraud on a wide scale could have easily happened and most likely did. At a minimum we recommend that a thorough audit of the election process be conducted' (Ossmann, 2013).

What Explains the World's Acquiescence? Holding the Liberal Peace

Externally-assisted state-building as peace-building inevitably raises questions—including those of ownership and legitimacy. Those questions are too often answered by making trade-offs—including those between short-term imperatives and long-term objectives (Paris and Sisk, 2007).

Liberal peace may stress democratization but to de-politicize democratization from the outside-in is problematic. In addition, the form of democratization matters—majoritarian, winner-take-all electoral systems are exclusionary, formal institutions may matter less than informal ones and cosmopolitan notions of justice may also matter less than communitarian ones. As motives are always mixed, it is critical to democratize too, the global institutions driving liberal peace to de-politicize democratization from the outside-in, as well as to engage with informal institutions and communitarian notions of justice—without essentializing or romanticizing the former and while adhering to cosmopolitan notions of justice (Tadjbakhsh, 2011).

If the above is not done, it is easy for liberal peace to be dismissed as hegemonic neo-imperialism, imposing non-reflexive, standardised, uniform formats through the cooption of actors who could otherwise propose alternatives: 'it becomes peace from IKEA: a flat-pack peace made from standardised components', reflecting the capacities and interests of external interveners rather than internal needs (MacGinty, 2008). Thus, if liberal peace dominates to the exclusion of all else or works through cooptation, instead of supporting bottom-up, inside-out democratization, domestic actors can (and will) instrumentalize it and its institutions to resist and subvert it (MacGinty, 2008).

The consequence is that neither structural nor institutional reforms achieve their desired end of greater accountability: "in reality, such reforms were foisted upon these countries in contexts where politics went on as usual. Hence, even when reforms were adopted, their

intent was subverted, or politicians used other ways to blunt their impact" (Acemoglu and Robinson, 2012: 447).

Questions of ownership and legitimacy were foregrounded in Jubilee's campaign strategy. To counter both integrity and practical concerns posed by the upcoming ICC trials of its presidential and vice-presidential candidates, the Jubilee campaign posited that Kenyan sovereignty was under neo-imperialistic threat and that legitimacy rested solely in Kenyans' electoral choices—democratization from the inside-out. It thus deftly placed all external actors—including the AU's Panel of Eminent African Personalities—on the defensive. Whether or not its assertions were true did not matter. What mattered was that, by going on the offensive, the Jubilee campaign forced reactions from all external actors—including their doing all possible to avoid the slightest appearance of impinging on Kenyan sovereignty and being neo-imperialistic. This was especially so given the back-drop of the violence that followed the 2007 General Elections. For while achieving greater accountability in Kenya may be a long-term objective of external actors, Kenya's stability was deemed the greater short-term imperative.

The conclusion of the constitutional reform process had seen the retention of the first-past-the-post, winner-take-all electoral system and failed to usher in MMPR as a means of enhancing inclusion and pluralism on ethnic and gender grounds and lessening the intensity of the contest for the presidency. Unsurprisingly, therefore, political alliances continued to be calculated and formed on an ethnic basis—with the assumption that ethnic blocs have homogenous political preferences. This calculation and formation carried, though, new meaning in the General Elections of 2013—the Jubilee campaign was calculated and formed on the basis of the numbers ostensibly brought to the table by the Gikuyu and the Kalenjin. The script was flipped—far from arousing concern as to the internationally indicted status of Jubilee's flagbearers in respect of the violence of 2007/8, opinion polls began to indicate steadily rising support for the Jubilee campaign. For it managed to present itself not as an alliance of the accused and indicted under cosmopolitan notions of justice, but as an alliance that had brokered peace between the Gikuyu and the Kalenjin through communitarian notions of justice.

In short, as predicted above, the Jubilee campaign instrumentalized liberal peace and its institutions and managed to subvert the intent of structural and institutional reforms and blunt their impact.

The reactions of external actors indicated little preparation for a politically strategic and principled response. Despite having themselves been alert to the need to focus on securing the

integrity of the vote through the counting and tallying process (NDI. 2012), in the conclusions (if not the detail) of their final reports, external observers seemed to focus on old generation electoral fraud through the polling process and not on new generation electoral fraud. Old generation electoral fraud including, for example, the focus on a clean voters' register as well as bribery, coercion and intimidation of voters and ballot stuffing in strongholds. And new generation electoral fraud including, for example, the failure to focus on discriminatory and systematic patterns of additions and deletions to the voters' register and the impossibility of accurately verifying returns on the Forms 36 against the Forms 34.

With one exception, therefore, all external actors and observers signed-off on Kenya's General Elections of 2013, pronouncing them free and fair. Granted, given the position of domestic actors such as ELOG, the IEBC itself and the Supreme Court, being politically strategic may have appeared to entail not countering domestic actors and thus trumping both their mandates and principle.

But the question is begged as to what constitutes free and fair—given that their reports, in effect, saw but chose not to see or feel of the new generation fraud? If there were no decisive figures for registered voters, how could voter turnouts be determined? If the differing figures for registered voters in the same polling stations and constituencies gave rise to differing figures for voter turnouts—including differing figures for voter turnouts in excess of 100 percent—how could it be determined which polling station and constituency results should constitutionally and legally be rejected? If constituency results could neither be verified against electronically transmitted provisional results nor by Forms 34 from the polling station level, how could they be verified? Were these minor blips or major breaches of the integrity of the vote? What, ultimately, did 'free and fair' mean?

These questions have not gone away. To date, IEBC has failed to release results from the polling stream level. It has also failed to release results from levels other than the presidential level, with one commissioner having now publicly confessed to 'sleepless nights' trying to reconcile an excess of over one million votes at the presidential level. The IEBC Chair has also now publicly stated that the excess is 'only' several hundred thousand. Either way, that there would have been an impact on Kenyatta's supposed 50 percent plus one is evident. In addition, there has been no public explanation to date for the conflict of interest posed by the IEBC's having shared its server for the receipt of electronically transmitted provisional results with the Jubilee campaign. Again, are these minor blips or major breaches? What does 'free and fair' mean?

Evidently, in proclaiming the General Elections of 2013 as 'free and fair', external actors and observers chose to view these unconstitutionalities, illegalities and irregularities as minor blips. However, in terms of the promise of greater accountability inherent to structural and institutional reform, they are major breaches.

Conclusion

In effect, external observers failed to focus where was most needed—particularly given the experiences of 2007. They also made trade-offs, privileging short-term negative peace and, ultimately, interests over ethics. Perhaps this is unsurprising, given their investment (and therefore implication) in liberal peace, seen as 'critical for stability of the second largest non-oil producing economy in Africa and hub for security and economic advancement in East Africa'.[3] And too given their investment (and therefore implication) in the success and failure of the liberal institutionalism as concerns structural and institutional reforms under the KNDR—for the IEBC as well as the judiciary.

But the implication is that formal institutional reform was privileged over substantive accountability. If accountability is assessed by determining the extent to which reform has contributed to answerability and enforcement on both the horizontal and vertical planes, it is clear that answerability has not been achieved in terms of both the IEBC and the judiciary providing factual answers as to what happened with the presidential vote. Nor was enforcement enhanced in terms of the judiciary ensuring that responsibility was taken by the IEBC for what went wrong with the presidential vote. On the horizontal plane, the judiciary failed to hold the IEBC, as an independent regulatory authority (IRA) responsible for elections management to account. And on the vertical plane, given all the questions about the presidential vote that still pertain, the 2013 General Elections cannot be said, at the presidential level, to have fostered faith in the IEBC or the judiciary—let alone foster faith in the legitimacy of the presidency, the vice-presidency and citizens' democratic control and power over the same.

As for accountability's democratic, constitutional and learning aims, whether popular control through delegation from citizens to their elected representatives was achieved is an open question, as is the question of curtailing abuse of state power and privilege. And, evidently, given these still pending questions, it cannot be said that effectiveness and efficiency was enhanced with respect to achieving desirable outcomes for either the IEBC or the Supreme

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3   *This view (and versions thereof) underpinned pre-election briefs and reports by the Congressional Research Service, the Council for Foreign Relations and NDI.*

Court. The notion that the General Elections of 2013 strengthened Kenya's institutions is not, in this sense, just an absurdity but a falsehood.

The consequence is that the presidency and vice-presidency are now held by two of the ICC suspects. The consequence too is that belief in the IEBC and the judiciary has been shattered, together with belief in the potential of structural and institutional reform to enhance accountability. The liberal institutionalist project is over. While the liberal peace may have held this time round—through containment of the trigger of the supposed presidential electoral outcome—whether it will in the future is doubtful. The proximate cause of political mobilization on ethnic grounds was evident for all to see. And the structural causes and underlying grievances of gross and systemic human rights violations of the past, inequality and systemic discrimination on ethnic grounds and (male) youth un(der)employment remain—with grievance now enhanced by the failures of the IEBC and the Supreme Court.

Thus, the trade-offs made by external actors have only served to postpone a reckoning with the contradictions, dilemmas and tensions posed by liberal peace's state-building as peacebuilding. Structural and institutional reform that did not advance accountability marks a perhaps decisive failure of liberal institutionalism in Kenya—with consequences for the liberal peace held thus far.

Chapter 3

Local versus International Standards of Elections Assessment: Kenya's 2013 General Elections - *Seema Shah*

Introduction

On 4 March 2013, Kenyans across the country went to the polls to cast their ballots in a landmark election. The election was marked by a series of administrative irregularities and inconsistencies, but there is widespread disagreement regarding what impact these problems had, if any, on the overall credibility of the election. Many local and international election observers described the election as largely credible, but a section of Kenyan civil society sharply disagreed. The Africa Centre for Open Governance (AfriCOG) and the Kenyan Asian Forum (KAF) petitioned the Supreme Court, alleging that the irregularities impacted the overall credibility of the election (AfriCOG and Kenyan Asian Forum. 2013).

In this chapter, I lay out the petitioners' claims related to voter registration in order to move the discussion of electoral integrity in Kenya forward. In what ways did the arguments regarding electoral credibility differ? Why were some irregularities perceived to be more important by some actors? What do these differing opinions reveal about the definition of a credible election in Kenya?

Electoral Integrity: Local Context versus 'International Consensus'

There is virtual consensus among politicians, practitioners, and academics that 'free and fair' elections are critical to emergent and established democracies, but there is relatively little information regarding what 'free and fair' means in terms of measurable standards (Schedler, 2002: 38-39). Part of the problem was – and continues to be – the lack of specific indicators. Many international election monitoring organizations[4] have developed assessment

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4   *Notable examples include guidelines published by the Organization for Security and Cooperation in Europe, the African Union, the European Union, and the Organization of American States as well as by the Carter Center, the UN, and the National Democratic Institute.*

guidelines, but these are often difficult to operationalize into measurable standards (Norris, 2013a: 565). Indeed, analysis of election assessment has suffered from a serious lack of systematic methodology (Elklit and Reynolds, 2005: 147; Elklit and Svennson, 1997: 33; Mozaffar, 2002: 86; Norris, 2013: 564).

Over the past 15 years, however, academics have taken up the challenge to produce such standards (Elklit and Svensson, 1997: 42; Schedler, 2002: 40-41; Elklit and Reynolds; 2002; 2005; Norris et al., 2013: 132-134; Vickery and Shein, 2012: 3-11; Alvarez et al., 2008: 745-66).

In 2013, Norris articulated her own definition of electoral integrity, which brought together the diverse work on this topic. Norris (2013b: 564) suggested,

> Electoral integrity refers to international conventions and global norms, applying universally to all countries worldwide throughout the electoral cycle, including during the pre-electoral period, the campaign, on polling day, and its aftermath. Conversely, the notion of 'electoral malpractice' is used to refer to first and second order violations of these global norms. This conceptualization emphasizes four distinct features: (i) Global norms grounded in multilateral agreements, international conventions, treaties, and international laws…; (ii) A distinction between first and second-order malpractices, according to the severity of their potential consequences; (iii) Shared standards applying universally to all countries and types of regimes…; and (iv) The notion of an electoral cycle, where a range of electoral malpractices can occur at any stage in a sequential process… (Norris, 2013b).

Norris is not alone in her emphasis on global standards. The Varieties of Democracy Project (V-Dem) also measures aspects of electoral integrity, and its analysis also attempts to ground definitions of democracy in widely accepted conceptions of the term. What is missing, however, is local, non-expert perceptions. What do ordinary voters think of their elections? In her work, Norris acknowledges that there are instances in which international assessments based on global norms differ significantly from public assessments (Norris, 2013b: 584). It is important to understand such differences, both in order to refine international norms and to learn how to address specific local problems.

Perhaps more importantly, local opinion is important because it is voters who ultimately legitimize elected governments. It is therefore critical to understand what voters prioritize in their own assessments of elections. Such local indicators of electoral integrity will differ from one election to the other depending on context. If an election is not credible in the eyes of the

locals, international norms, no matter how widely endorsed they may be, do not make much of a difference. Indeed,

> the concept of 'fairness' is a qualitative judgment that voters themselves are in an ideal position to make…It is voters who experience the election campaign, directly through contact with election candidates and parties, and indirectly through the mass media. Unlike outside observers, they will also cast a ballot and therefore have a degree of 'ownership' over the election outcome. (McAllister and White, 2011: 665)

Sarah Birch agrees, noting that citizens are especially well placed to evaluate electoral processes, given the wide-spread participation and the attentiveness that elections tend to spark (Birch, 2010: 306-307). Ignoring public opinion is dangerous, as low levels of domestic public faith in elections have been shown to be linked to depressed levels of public faith in other political institutions as well as to civil unrest (Birch, 2010: 1602).

In recent years, ordinary citizens have taken election assessment into their own hands, aided in many cases by the growth of social media. In Kenya, the Ushahidi platform relies on crowdsourcing to publicly report on election-related violence and other incidents of concern. In the aftermath of the 2014 election in Turkey, a group of citizens known as 140journos used social media to collect and analyze polling station level results from around the country.[5] They then compared these results to officially announced results, looking for discrepancies.

> Since the election, 140journos has been attempting an unprecedented task: verifying each and every polling station's voting results via crowd-sourcing. Using members' personal networks and social media tools, the group has been requesting original photos of ballot reports for every one of Turkey's 194,000 polling stations. Ballot reports are the results from individual polling stations that list the number of votes for each candidate or party. To get original photos of these summaries, 140journos reached out to as many poll workers as they could from within their networks, which is why most of the ballot reports received are from Istanbul or Ankara. The group also issued public calls via Twitter, Facebook, and its website for people to send in photos of ballot reports they were able to acquire. 140journos has been comparing the original photos of ballot results they receive to the reports made public by Turkey's Supreme Electoral Council (SEC) — and…the numbers don't match (Gebeily, 2014).

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5   *The details on how 140journos social media election monitoring worked can be found at http://www.globalpost. com/dispatch/news/regions/europe/turkey/140408/meet-140journos-twitter-group-trying-prove-election-fraud-turkey.*

Citizen-led monitoring groups such as 140journos reveal a significant gap between academic definition of electoral integrity and local conceptions and priorities. Indeed, even if citizens were to use a definition such as Norris's to evaluate a particular election, it would be difficult to use that definition to understand the significance of specific violations or problems. In fact, Norris's definition categorizes errors based on whether or not they spark violence. In many elections, though, there can be myriad important problems that do not spark violence but still impact perceptions of fairness and therefore perceptions of credibility.

Challenging the Credibility of the 2013 Kenyan Election

The gap between local and international election assessments became abundantly clear in the aftermath of the 2013 Kenyan election. Many local and international election observation missions and international electoral assistance providers reported largely favorable evaluations of the administration of the election. In fact, all of the main international observation missions noted several errors in the electoral process but did not believe these errors severely impacted the overall credibility of the election. One of the most prominent local coalitions, the Elections Observation Group (ELOG), which deployed over 7,000 observers and conducted nation-wide parallel vote tabulation (PVT), concluded that the IEBC's results were 'consistent' with the PVT projections (ELOG, 2013: 90). In its election-day press statement, ELOG stated, 'ELOG is confident that the Election Day process has been generally credible' (ELOG, 2013: 91).

Another segment of the Kenyan civil society, represented by the Africa Centre for Open Governance (AfriCOG) and the Kenyan Asian Forum, however, challenged the credibility of the election in the Supreme Court. The civil society petition alleged that the Independent Electoral and Boundaries Commission (IEBC) failed to administer elections that met constitutional standards of transparency, verifiability and impartiality (AfriCOG and KAF, 2013: 5).

One of the central issues of the petition was a list of inconsistencies in the voters' register. The petition outlined a series of unexplained changes to the voters' register and asserted that there was no final, verifiable number of registered voters in Kenya. The petitioners argued that these problems, together with a host of other irregularities 'challenge the entire electoral process and lead to a conclusion that the process was not accurate, credible, transparent, free, fair or accountable' (AfriCOG and KAF, 2013: 14).

Notably, the international election observer groups also cited problems with the voters' register. The EU went so far as to say,

> The use of the voter register on Election Day did not enable consistently reliable records of registered citizens, nor of how many had voted. Following the failure of pollbooks (laptops with a full voter register and a fingerprint-reading device), alongside difficulty in identifying voters in the correct polling stations, a total of four different lists were used: the register in pollbooks; the lists printed for individual polling stations; the list of people whose biometric data had not been captured, and finally, the entries listed in the 'green books' – the manual records of entries made during voter registration (EU, 2013: 15).

At the same time, however, the EU still described the election as 'peaceful, transparent and credible' and that the 'IEBC and its staff succeeded in overcoming the technical and operational difficulties that arose on Election Day to ensure that the integrity of the vote was protected' (EU, 2013: 1). Similarly, the Carter Center noted that the machines meant to identify registered voters failed at a rate of 41 percent and that certain voters' names appeared on paper lists but not in the biometric system (Carter Center, 2013: 46). Overall, however, such irregularities were considered so minor that the Carter Center said, 'The watchwords of Kenya's 2013 elections were transparency, security, and credibility' (Carter Center, 2013: 6).

Voter Registration and the Lead-up to Election Day

The Independent Review Commission (IREC or the Kriegler Commission), established by the Government of Kenya to investigate all aspects of the bungled 2007 electoral process, identified voter registration as one of the most critical areas in need of reform. Specifically, IREC explained that the register used in the 2007 election was bloated, including more than one million deceased persons, and that women, youth and minority communities were significantly under-represented. Moreover, IREC pointed out that the register included only approximately 70 percent of the voting age population (IREC, 2008: 8). Unsurprisingly, the Commission described voter registration in Kenya as 'open to serious criticism' (IREC, 2008).

To its credit, the newly created IEBC took action to address these problems. Specifically, it announced plans to create an entirely new digital register. Biometric technology would capture voters' fingerprints, photographs and other personal details. On election-day, electronic voter identification (EVID) kits would rely on fingerprint matches to confirm the identities of those voters who had registered. Also, and perhaps most critically, the IEBC explained that this technology would identify voters who had cast their ballots on the central database of registered voters such that once a voter had cast her vote, she would not be able to vote again.

Indeed, in a public statement at the end of October 2012, the IEBC stated that the BVR kits would 'ensure that all those who enrol themselves for the elections are entitled to vote, and to vote only once' (Hassan, 2012). During voter registration, each voter's information would be automatically transmitted to the IEBC's central biometric database. 'This means a voter register is being created directly with every registration unlike in the traditional Optical Mark Reader (OMR) method which requires scanning of millions of registration forms' (Hassan, 2012).

Moreover, the IEBC explained that the BVR kits were equipped with a system for audits, which 'can be reviewed independently to establish individual accountability and assist in reconciliation of database records. BVR greatly minimises multiple voter registrations, even though it may not eliminate errors completely' (Hassan, 2012). Technology, the IEBC promised, would address and manage the so-called 'pain points' of elections.

Unfortunately, many of the potential benefits of the technology were squandered before the kits even arrived in the country. As a result of multiple delays, the last of the BVR kits only arrived in Nairobi on 3 November 2012, allowing the IEBC a mere 16 days to unpack, test and distribute the kits. The last of the EVID kits arrived on 28 February 2013 leaving just 4 days for unpacking, testing and distribution.

Due to the delays, the voter registration period was shortened from 60 to 30 days, and registration officially ended on 18 December 2012. The delays also impacted the period for public verification of the register. The original timeline provided for 30 days for members of the public to check that they were on the register and that their information was correct. In the end, however, this period was shortened to two weeks. The IEBC did endeavour to make the verification process as user-friendly as possible. In addition to staffing centers where individuals could check their details in person, the commission also established an SMS service so that individuals could check their details via their mobile phones.

The Voters' Register on Election Day

The problems with the registration process became abundantly clear on election-day, as polling stations across the country experienced technological failures. Various sources reported technological failure rates of between 40 and 50 percent (See AfriCOG's post-election opinion poll and reports from the Carter Center and the European Union). An investigation by The East African indicated the technology failed in at least 80 percent of polling stations (The East African, 2013).

When the EVIDs broke down, IEBC staff turned to paper copies of the voters' register, which included voters' photographs but did not include fingerprints. According to AfriCOG, the problems began there because this paper list was just one of multiple lists being used across the country. For instance, the IEBC was also using the 'green book', another hard copy of the list of registered voters. According to the IEBC, this list was compiled manually during the voter registration process. When voters arrived to register, IEBC staff entered their details by hand into notebooks. At the end of the process, this green book was a compilation of thousands of individual notebooks, each containing individual registration centers' records. As noted by AfriCOG, this green book bore striking similarities to the much-maligned black book of previous elections. The Kriegler Commission had specifically recommended that use of the black book be discontinued, because it was a source of potential malpractice (IREC, 2008: 105).

The use of multiple lists resulted in a number of problems, including registered voters who were unable to vote because their details did not appear on any list, unregistered individuals permitted to vote and turnout exceeding 100 percent (AfriCOG, 2014: 11-14).

AfrCOG claimed that the EVID system, along with the electronic transmission of results, was considered essential to improve the legitimacy of the election. By using biometric information to positively identify registered voters and then deleting that name from the list of eligible voters, the EVID system was designed to prevent the ills that had plagued previous Kenyan elections, including multiple voter registration, multiple voting, or stuffing of ballots and other irregularities.

Unexplained Changes to the Voters' Register

The petitioners were also concerned about seemingly strategic changes to the register. There were significant differences between the provisional register, released in December 2012 and the final, gazetted, principal register, released in February 2013. Overall, the principal register contained 12,500 more voters than the provisional list. AfriCOG questioned how, given that the legal end of registration was in December, the principal register could have been larger than the provisional register.

Region	Changes Between December 2012 and February 2013
Coast	+901
Nyanza	-15,026
Central	+1,848
Rift Valley	+67,000

North Eastern	+6,604
Western	-2,938
Eastern	+4,222
Nairobi	-50,102

Source: AfriCOG, 2014: 8.

Second, it appears that the changes followed a pattern. As can be seen in the table above, more than 68,000 voters were added to areas considered to be Jubilee party strongholds after the legal end of registration, while more than 15,000 voters were taken away from areas considered to be CORD strongholds.

Third, AfriCOG cited concern about the use of multiple registers. As detailed in the table below, the total number of registered voters in Kenya has been in flux. Moreover, the IEBC has not released the number of voters in the green book.

Changes in the Number of Registered Voters in Kenya

Date	Number of Registered Voters	Change from Previous Total
December 18, 2012	14,340,036	N/A
February 24, 2013	14,352,545	+12,509
March 2, 2013	36,236 voters without biometrics	N/A
March 3, 2013	14,336,842	-15,703
March 9, 2013	14,352,533	+15,691
July 18, 2013	14,388,781	+36,248

Source: AfriCOG, 2014: 9

Fourth, AfriCOG research uncovered several examples of turnout in excess of 100 percent. For example, in Turkana Central, three polling stations show a turnout of over 100 percent using the number of registered voters per polling station as published by the IEBC on 24 February 2013. However, when using the number of registered voters as recorded by polling station officials, the turnout drops below 100 percent (see below).

Turkana Central Polling Station	Votes Cast	Registered Voters (as published by IEBC)	Voter Turnout	Registered Voters (on Form 34)	Voter Turnout
PS 49	134	66	203.0%	165	81.2%
PS 82	1019	1010	100.9%	1515	67.3%
PS 91	269	161	167.1%	300	89.7%

Source: AfriCOG, 2014: 12-14

In Githunguri and in Tharaka, the Form 34 figures indicate voter turnout exceeding 100 percent.

Githunguri Polling Station	Votes Cast	Registered Voters (on Form 34)	Voter Turnout	Questionable Votes
PS 19 Stream 3	632	628	100.6%	4

Tharaka Polling Station	Votes Cast	Registered Voters (on Form 34) ORIGINAL	Voter Turnout	Registered Voters on Form 34 CHANGED	Voter Turnout	Questionable Votes
PS 72 Stream 1	149	126?	118.2%	166	89.8%	~23

Source: AfriCOG, 2014: 12-14

In Tharaka, the presiding officer noted the problem on the form. The note read, 'The number of voters was higher than the registered voters. This was authorised by the returning officer (RO) as he argued they were registered at constituency level' (AfriCOG, 2014: 14). AfriCOG cited cases like this one to illustrate its belief that there was a significant degree of opacity in the administration of the election.

Perceptions of Wrongdoing in 2013: Reflections and Conclusions

The AfriCOG petition argued that, among other things, problems with the verifiability of the voters' register compromised the overall credibility of the election. While many other observers and analysts also noted problems with the register, none alleged that these problems impacted the integrity of the electoral process. What accounts for this different interpretation?

Evidence suggests that international election observation missions are often restricted by political considerations. These missions' reports sometimes must temper their criticisms such that they do not negatively impact inter-country relations (Kelley, 2010: 164). But what accounts for the rest of Kenyan civil society and the public at large, which either endorsed the electoral process or remained silent?

One possibility is that the concept of electoral integrity is still in the nascent stages of development. How seriously should flaws in the voters' register be taken? Should the answer to this question be dependent upon local context, or is there a universal standard to be applied? If there is a universal standard, how can it be specific enough to take into account the detailed minutiae that were the subject of the Kenyan presidential election petition?

Another possibility is that people's perceptions and/or willingness to publicly voice opposition to what appears to be the majority view are shaped by local historical and political context.

It is worth noting that many international observers were largely focused on 'peace', and the relative lack of violence in 2013 lay behind their praise for the administration of the election. In fact, the Carter Center specifically said,

> The elections were largely peaceful, and for that, all Kenyans deserve to be congratulated, especially the candidates — presidential and other — who failed to win seats but accepted the results. (Carter Center, 2013: 6).

Similarly, the EU stated,

> The 2013 Kenyan General Elections took place following major reforms and massive society-wide efforts for the elections to be peaceful, transparent and credible. This was reflected on Election Day itself by a huge turn out and remarkable patience of Kenyan voters, who must be congratulated for their civic pride and responsibility. While several serious violent incidents occurred in some parts of the country, overall the atmosphere was calm and the democratic spirit of Kenyans prevailed. (EU, 2013: 1).

The Commonwealth also explained its focus on peace:

> The election campaign was largely peaceful. Given the background to these polls, the high level of competition between political contestants and the fact that politics in Kenya retains a strong ethnic dimension, the peaceful campaign was both highly welcomed and commended. This environment was facilitated in no small measure by the large peace rally in Nairobi attended by leading candidates, the positive and constructive tone of the presidential debates, the numerous calls for peace from senior figures and a more responsible coverage by domestic media. (Commonwealth, 2013: 33).

Perhaps local and international observers and analysts believed that maintaining peace trumped other considerations. Should such local contextual concerns be integrated into conceptions of electoral integrity? Unfortunately, at the end of the process, the Kenyan public was left with two differing sets of evaluations: the international monitors' reports, which pointed out but eventually dismissed a series of errors in electoral administration and civil society reports which attempted to show Kenyans why the series of irregularities were cause for concern.

Unfortunately, without local consensus about what indicators are most important in determining electoral credibility, it is difficult for local monitors and/or observers to make a strong case.

Going forward, civil society might begin to draft such indicators and standards. The process of drafting local indicators must be inclusive. In the future, local stakeholders can then use these publicly accepted standards, along with other legal benchmarks, to determine the credibility of their own elections.

Chapter 4
Inside the "Democracy Police" Station: An Assessment of Election Observers in Kenya's 2013 General Election - *Fred Otieno, Nicholas Ondoro*

Introduction

Today, election monitoring[6] as an international norm has nearly become *sine qua non.* In fact, as at 2006 this 'shared standard and behavior appropriate for actors' (Hyde, 2011) in democracy promotion through electoral practice had pervaded more than 80 percent of elections around the world (Hyde, 2011). On the face of it, the massive norm diffusion of election observation should translate into improved quality and integrity of elections around the world especially with numerous Electoral Observer Missions (EOMs) monitoring any single election today. This expectation is not particularly remote considering that when the practice intensified after the end of the Cold War, observer missions were viewed as 'Democracy Police' (Gisela, 1993). Yet, systematic studies on the work of election observation show a mixed bag of implications on democratization through elections.

Judith Kelley (2012) has summarized this mixed bag of outcomes threefold: the *good*, the *bad* and the *ugly.* On the good side, election monitoring has the potential of improving the quality of elections. This claim is supported by empirical evidence suggesting among other implications, observation's deterrent effect on electoral fraud (Hyde, 2007). On the bad side, Kelley observes that most of the time, monitoring of elections does not improve the quality of elections as claimed. On the ugly side, and which is even more alarming, EOMs at times portray biases which legitimize governments born out of questionable elections.

The three possibilities postulated by Kelley can only beg more questions useful when assessing various observer missions—as this chapter aims in the case of Kenya's 2013 General elections. For example, are the *good*, the *bad* and the *ugly* implications of election

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6   *Throughout this chapter, we use Monitoring and Observation interchangeably unless where distinction is specified.*

observation mutually exclusive or can such implications characterize the same EOM Final Report? If for instance the answer concurs with the former part of this question, how useful then are EOMs Final Reports in situations where fragmented societies holding elections get embroiled in a bifurcated and potentially destructive post-election debate on the integrity of the elections in question? These debates do not only set the tone for any post-election electoral reform but may also affect in either direction, a country's electoral management body's subsequent performance. In the context of the 'good' side, what was the overall effect of the various EOMs monitoring Kenya's 2013 Elections?

This chapter assesses five EOMs involved in Kenya's 2013 elections against two of the three benchmarks in the above paragraph—the good and the ugly. It argues that it is important to examine the good for one main reason, notwithstanding the overall conclusion EOMs draw, their reports usually provide detailed analysis on quality of the election in question which is very useful fodder for electoral reform in between elections. Analyzing the ugly is helpful here as the circumstances of Kenya's 2013 election and its outcome generated a partisan and bitter national debate on the credibility of especially presidential election outcome. In theory, EOM reports in such situations should offer guidance; but as this chapter will show, on the specific question on credibility of the 2013 General Elections, the EOMs reports were also characterized by sharp contradictions thus could not definitively help much in the credibility of the electoral outcome debate. The chapter is unable to assess the bad possibility of EOMs (as Kelley defines above) since an endeavor to prove whether election observation actually improved or failed to improve an election in question requires both a rigorous methodological process and specific details from various EOMs (such as actual polling stations where observers were stationed), thus is beyond the scope of this chapter.

Observing Kenya's 2013 General Election: A Background

Kenya's 2013 General Elections attracted a number of EOMs at the invitation of either the government of Kenya, the country's electoral management body or both. These EOMs were domestic NGOs, International NGOs (INGOs) and Inter Governmental Organizations (IGOs). Overall, the EOMs involved in Kenya's 2013 General Elections endorsed the election. However, an in-depth analysis of these reports reveals contradictions not unique to this election but which have characterized election observation since inception.

The previous cycle of elections in Kenya ended up in unprecedented violence in which more than1,000 people were killed and 700,000 internally displaced (Human Rights Watch (2011). Although there are deep rooted historical explanations of the violence, the immediate one is

the perceived manipulation of the outcome of the 2007 election. Put differently, the election was allegedly marred with maladministration rendering it irredeemably flawed. Perhaps afraid of history repeating itself, the country set itself on an institutional reform path whose objective among other things was to guarantee the integrity of the 2013 general election, thereby avoiding the attendant violence. To clearly define elections which would pass the test of integrity, Article 86(a) of Kenya's new constitution set the threshold for conducting elections as one applying a system which is 'simple, accurate, verifiable, secure, accountable and transparent.'[7]

In the end, and much to the relief of Kenyans and international actors keen on Kenya, violence, as a response to perceived election maladministration did not occur in 2013. However, the integrity of the outcome of the 2013 general elections, just like that of the previous one is still a subject of intense debate. This is surprising, and a huge mockery of the enormous institutionalist driven state-building efforts in the post 2007 political history of Kenya. In fact, a sizeable section of credible local and international commentators still pass the same judgment on the 2013 general elections as that of the Kriegler Commission on the 2007 general election: 'It is impossible to tell who won the Presidential election'.[8] The 'triumph of peace' in the election, a dominant post-election narrative, thus has been incessantly confronted with questions of whether in the process of its realization, justice was gobbled up. The very existence of this claim, its truth notwithstanding, is adequate grounds to worry proponents of the association between regular competitive elections and democratic consolidation.[9] Why should EOMs come into the debate about the integrity of any country's election? This chapter argues that because election observers work (or at least ought to work) under the principle of political impartiality[10], one can rely on their assessments when confronted with the question on veracity an election.

Election Observation: Toward a Definition

An understanding of the concept of election observation and the evolution of the norm over time is no doubt an important starting point for any endeavor to assess EOMs' work in a given election. Although scholarship on the election observation phenomenon has tended to dwell on

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7   *See the Constitution of Kenya passed and promulgated in 2010*

8   *Judge Johann Kriegler chaired the Kenyan Independent Review Commission (IREC), an inquiry into the bungled 2007 General Election which led to a post-election violence.*

9   *See for instance Huntington's (1991) argument which centralizes subsequent electoral turnovers and peaceful handover of power in defining democratic consolidation.*

10   *The United Nations Declaration of Principles for International Election Observation, 2005 under the Code of Conduct for International Election Observers outlines this.*

the emergence of the norm, the causal claims linking election monitoring and democratization, and critical assessment of performance of election observers; literature is scanty on a concise definition of the term.[11] According to International IDEA (1997) election observation is 'the purposeful gathering of information regarding an electoral process, and making of informed judgments on the conduct of such a process on the basis of information collected by persons who are not inherently authorized to intervene in the process' (International IDEA, 1997: 10).

About a decade later, the Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers (2005) endorsed by a number of intergovernmental organizations and international non-governmental organizations, and which is arguably the most recent consensus on the practice of election observation offers a comprehensive definition of international election observation:

> …is the systematic, comprehensive and accurate gathering of information concerning laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral process based on the highest standards for accuracy of information and impartiality of analysis (UN, 2005: 2).

This definition raises a number of normative parameters justifying the need for an assessment of EOMs within the context of elections and democratic consolidation. First, elections are observed by 'persons not inherently authorized to intervene in the process" and "impartial and professional analysis', suggests expectations of objectivity and by extension integrity of EOMs final reports. Second, 'the purposeful gathering of information' and 'systematic, comprehensive and accurate gathering of information' role implies that EOMs can provide a rich repository of data about any observed election; such data may be useful in drawing further inferences about a polity's democratic credentials in general and the quality of that polity's specific election. Third, and as Tuccinardi et al. (2012) argue, the deliberate inclusion in the 2005 definition of '…laws, processes and institutions' point to a departure from election-day events and the obsession with election outcome but rather a broader democratic consolidation endeavor. This endeavor has enabled major political and technical leaps in the practice of election observation since 2000 (Tuccinardi et al., 2012). Finally, because EOMs final assessments are 'informed judgments', end users analyzing such reports ideally ought to treat them as authoritative information about elections.

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11   See for example literature on election observation by Gisela (1993); Carothers (1997); Kelley (2009); Hyde (2007); Eicher (2009) all which deal with various aspects of election observation.

Limiting his analysis to international observation, Bjornlund (2004) adds two new concepts to the above definitions. First, Bjornlund insists that the assessment must be based on "universal standards for democratic elections"—here perhaps implying the significance of standardization of the norm. Second, that international election observation should be done by responsible foreign or international organizations—here creating the impression that not all international observers are responsible.

The practice of election observation thus has evolved over time. Such evolution was characterized by a misunderstanding or narrow conceptualization of election observation both by practitioners and beneficiaries (citizens of countries conducting elections). Tuccinardi *et al.* (2012) observe that in early 1990s election observers were erroneously expected to deter fraud and validate electoral processes but have since morphed into comprehensive democratic support entities working as partners of countries conducting elections. In this chapter, we acknowledge the undue expectations on observers but contend that be that as it may, observer reports can be useful in establishing veracity of an election. To date, the misunderstand surrounding what observers can and cannot do has not been completely settled, begging an inevitable existential question key in appreciating the role of EOMS: Where does the leverage of election observer missions derive from? To answer this question, one needs to trace the norm of election observation and how it has assertively claimed its space within democratization efforts around the world.

Tracing the International Election Observation Norm

The earliest effort at international election observation is where the Cuban president Fulgencio Batista in 1958 attempted, in vain, to invite international observers for the country's elections (Hyde, 2011). 'As of 2006, more than 80% of elections in the world were internationally monitored' (Hyde, 2011: 2). Writing in 1997, Thomas Carothers observed a number of developments in election observation as a growing global norm: A burgeoning trend in the practice of election observation, a concomitant search for standards guiding this new phenomenon in democratic consolidation and ominously, criticism almost equaling the pace at which the practice was growing. The spread of election observation around that time was consistent with the post-Cold War democratization crusade around the world. In fact, 'election observation was the best established, most visible and often best funded type of democracy related assistance' (Carothers, 1997: 18). Rich (2001) observes that, instrumentally, the UN General assembly resolution 46/137 of 1991 which established an electoral assistance unit (later the Electoral Assistance Division) played a part in the proliferation of international election observation.

Then, criticism directed at election observation was fuzzy, perhaps a sign of both internal flaws among practitioners and a general misunderstanding of the role of election observers. Today, the norm is accepted almost globally; there are significant strides in the front of standardization of the practice and criticism directed at EOMs is nuanced and more useful to the development of election monitoring. What explains the emergence and the arguably impressive diffusion of election observation norm? Judith Kelley and Susan Hyde have offered plausible but conceptually divergent theories on international norm emergence and diffusion which may be useful here.

Kelley (2008) borrows from Finnermore and Sikkink (1998)'s life cycle theory—which likens evolution of norms with a normal life cycle to explain the rise of election observation. Kelley's theory sees an 'an interaction of multiple factors in an intricate interplay of causal mechanisms' (Kelley, 2008: 107) throughout the four stages of norm life cycle: norm emergence, tipping point, norm cascade and norm internationalization. The theory contends that election observation norm emerged with an evolving set of norms related to democracy, elections and human rights; reaching a tipping point at the end of Cold War when western country got all the space to advocate for democracy and use conditionality more strategically in favor of democratic norms. As a result, the cost of not inviting election observers increased for nondemocratic states—which were compelled into inviting observers regardless of whether the political elite in such states intended to hold free elections or not. This in turn created both the supply and the demand side for observers—leading to a norm cascade. The belief that nonestablished democracies must have their elections monitored effectively internationalized the norm, Kelley argues.

Hyde's theory on the other hand is hinged on states' desire for international benefits like foreign aid, increased foreign investments, trade, membership into international organizations and legitimacy and prestige (Hyde, 2011: 3). The desire incentivizes states to send internationally credible signals that they have certain desirable characteristics in this case that they are democratic. One of the ways in which states send such internationally credible signals is by inviting international observers to monitor their elections. States that do so, under this theory, experience increased share of the international benefits. The behavior soon becomes widespread as other states imitate it (Hyde, 2011). Of interest to this chapter is Hyde's theory's implicit turn of focus on election observers—their 'stamp of approval' as to whether states conducting elections in deed possess the characteristics they claim to possess or otherwise.

Central in Hyde's theory is the role of sovereign states—whether democratic or otherwise in the initiation and diffusion of the election observation norm, a clear difference from Kelley's theory which sees agents—norm entrepreneurs at the initiation and spread of international norms.

That election observers only come in upon invitation by states conducting elections—and also desiring to portray a democratic image makes the states a critical variable in explaining emergence and diffusion of election monitoring norm. This means that states preparing for an election cycle or a referendum have the option not to invite EOM, but as rational actors do invite in pursuit of the international benefits associated with having elections observed. Other than on initiation, both theories tend to have similar explanations on diffusion—the increasing cost of not inviting observers as many states accept election observation.

Observed elections are therefore generally perceived as potentially democratic whereas nonobserved ones are seen as nondemocratic (Hyde, 2011). Yet, there are cases of observers endorsing elections with glaring or subtle flaws. Considering that the leverage of (international) election monitors is largely in their credibility (Kelley, 2009), the very possibility of EOMs endorsing flawed elections is baffling. Thus, motivated by other factors but not necessarily the confidence in their intention to hold competitive elections, most states holding elections have succumbed to the pressure to invite election observers. Invariably, the observers' assessments differ from one case to the other, sometimes in an inexplicable fashion. These two paradoxical claims suggest a realistic probability that both democratic and undemocratic elections—by design or otherwise, can pass the election observers test. This possibility is, Hyde argues, one of the central reasons why election observation became an international norm. If pseudo-democrats did not believe that they had a chance of fooling observers, they would not invite them, at least not during the period of norm formation.

Domestic Election Observers

As the international norm of election monitoring spreads, there has also been a concomitant growth of domestic election observers. Before 1990, election observation was largely the domain of international organizations (Nevitte and Canton, 1999). Though earlier on technically inferior and with relatively lower leverage, domestic observers' role has also increasingly become engrained in electoral processes. Domestic observers are usually modeled around consortiums of local civil society groups and NGOs, a composition with conflicting implications to it. On the one hand, their familiarity with idiosyncrasies of a country conducting elections is critical during election monitoring process. On the other hand however, these domestic observers often lack the requisite expertise in election observation. Nevitte and Canton contend that it is these domestic groups which make the final determination as to whether elections are free and fair, owing to their nuanced understanding of the state holding elections. That the civil society organizations emerge from an atmosphere of discontent with status quo, has also tended to raise questions about their impartiality (Nevitte and Canton,

1999). Though a debatable label, international observers have always insisted on working with nonpartisan domestic observer groups.[12]

In Kenya, local civil society organizations have always coalesced into larger groupings as domestic observers during all the five General Elections since the advent of pluralist elections (OSIEA, 2014). In all those occasions, the domestic observers have endorsed the elections despite various claims of gross electoral malpractice characterizing most of those elections—prompting an ongoing discussion around whether there is a need to reexamine the place of domestic observers in future elections in Kenya. In the 2013 General Election, the Carter Center and European Union observer missions markedly lauded ELOG, a domestic observer group for boosting the confidence in the electoral process in Kenya. Conversely, there is a section of the civil society with reservations on the conduct of ELOG particularly accusing the domestic observer for not boldly taking on IEBC on irregularities.

Yet, in polities where democracy is yet to be consolidated, the growth of domestic election observers must be encouraged for three reasons as Nevitte and Canton observe. First, domestic observer groups create synergies with international observers in a symbiotic arrangement where the former taps into technical expertise necessary in monitoring elections while the latter takes advantage of domestic observers in-depth understanding of the terrain in which elections are being conducted. Second, domestic observers can create opportunities for cross-fertilization across a region which is important in improving the quality of elections in a region without much dependency on international actors. Third and perhaps most importantly, domestic ownership of various consolidation processes is usually desirable. Nevitte and Canton observe that international observers always leave shortly after elections; it is the domestic observers' engagement in cumulative activities across elections which can really improve quality of elections. A gap in domestic observer groups' effectiveness in after elections is that they tend to be hastily formed around elections time and disbanded soon after elections thus not providing the needed continuous engagement in the inter-election period.

In a nutshell, the practice of election observation as strategy in the promotion of democracy has advanced and is today widely accepted. As suggested above, such advancement has come with praise and a fair share of criticism, both rightfully so. So just how has the election observers' balance sheet looked like over time?

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12   *See for instance Handbook for European Union Election Observation.*

The Election Observation: A Glance at the Balance Sheet

Throughout the evolution of election observation norm, studies tend to portray two shades that have characterized such a growth. This is not necessarily a unique weakness of election observation, but a widespread phenomenon in many democracy promotion efforts. In light of this reality, before delving into an assessment of the election observers' performance on Kenya's 2013 General Elections, it is imperative to highlight the achievements and criticisms of the norm thus far.

On the positive side, studies revolve around two areas in which election observation can or has contributed towards better electoral practices. First and foremost, elections observers can detect and even deter electoral fraud (Carothers, 1997; Eicher, 2009; Hyde, 2007). In reference to Africa's third wave, this role is perhaps the most important. As an illustration for instance, when substantive political liberalization in Africa began in the 1990s, most opposition parties and their supporters wary of incumbents' tendency to manipulate election outcomes heavily relied on international election observers to deter fraud (Gisela, 1993). Abbink (2000) also envisioned this important role of election observation in stimulating political liberalization and democratization in Africa. However, at the earlier stages in the development of election observation norm, the detection capabilities of EOMs were largely limited to overt malpractices such as ballot stuffing, while the deterrence effect was less clear (Carothers, 1997). Today, on the front of detecting electoral fraud, standardization of election observation has largely moved towards electoral cycle approach. Such tightening of election observation methodology with application of multiple strategies has advanced detection and deterrence capturing even subtler forms of electoral malpractice (Nevitte and Canton, 1999). Consequently, there is a significant amount of emphasis put not just on election-day events but also on other pre-election processes pertinent to the integrity of an election. As a result, today EOM arrive considerably early in countries holding elections and observe various pre-election processes where subtle electoral malpractices are likely be engineered. On deterrence effect, recent empirical evidence from natural experiments on the effect election-day presence of observers at polling stations reveals some promising positive correlation (Hyde, 2007). Hyde's natural experiment conducted in Armenia found a noticeable reduction of votes of the candidates suspected of sponsoring fraud in observed stations compared to the vote-share in unobserved ones. Because reduction of vote-share for candidates likely to sponsor fraud especially in their strongholds can be a proxy for deterring electoral fraud, cautious conclusions can be drawn on the causal effect of election observation.

Second, if properly structured, election observation can help hold together shaky electoral processes in transition countries (Carothers, 1997). The presence of especially international

observers can encourage public confidence in the electoral process (Eicher, 2009). For an electoral process to succeed, such public confidence is usually required from both factions of the political elite competing in elections and the support base of these factions. Arguably, the entire process culminating into the 2013 General Elections in Kenya needed legitimization considering the egregious circumstances in which the previous one ended. Kenyans needed an absolute assurance in two mutually reinforcing areas. First, that the 2013 election would pass the test of integrity. Second, that the election would be peaceful. Multi-actor institutional efforts under the auspices of KNDR's Agenda Four reforms largely take the credit for preparing the country towards 2013. However, inviting observers to monitor the 2013 General Election should be viewed as attempts by the electoral management body and government to add a vital layer of legitimization of the election process. In fact, there are cases elsewhere in which assurance of the presence of credible international observers guaranteed a successful electoral process. This role of election observers can be illustrated by the case of 1996 presidential elections in the Dominican Republic in which the opposition dropped threats of boycotting and disrupting elections with the assurance of presence of international observers (Carothers, 1997).

On the other side of the balance sheet, criticism of election monitoring has tended to converge on two broad areas. First, EOMs follow different standards and procedures while carrying out election observation (Carothers, 1997). The absence of or failure by EOMs to use same standards and procedures inevitably leads to varied final observer reports. At the birth of the norm and for a long time thereafter, the common standards and procedures produced election assessment which tagged those elections either as 'free and fair' or otherwise. Even as recent as at the turn of the century, the inadequacies of the narrow 'free and fair' yardstick were still manifest in election observation (Abbink, 2000). Such an approach, according to Eicher (2009) ignores the complexity of electoral processes, and is therefore likely to mislead. Both Gisela (1993) and Kelley (2009) argue that the discrepancies in standards and procedures reflect complex allegiances in which EOMs find themselves in with countries conducting elections, donors and the international milieu in which elections are being conducted. For example, in Kenya's 1992 General Elections, EOMs interpretations and conclusions exhibited discrepancies which not only suggested that the observers were under some external pressure but also arguably moved them into the arena of diplomacy (Gisela, 1993). As a result of having to juggle these various interests, EOMs get compromised (Kelley, 2009). The perceptions and realities of compromise have far reaching implications on both the efforts to improve quality of elections in the world and the norm of election monitoring. As Kelley observers, compromising EOMs can jeopardize the future of election monitoring,

enable government manipulation of elections, legitimize undemocratic regimes and stifle viable opposition movements.

Second, election observers have been accused of being overly attentive to election-day events at the expense of other critical electoral processes key in the overall success of an election (Gisela, 1993; Carothers, 1997; Kelley, 2010). This accusation, particularly prevalent when the norm of election observation was at its nascent stages, has since spurred significant advancements in methodology of election monitoring whereby today EOMs embrace electoral cycle approach. Whereas this consciousness on impacts of processes preceding the election-day is commendable, one sustained accusation on EOMs election-day emphasis is still alarming—that observers' assessments of the overall quality of an election is still highly likely to be influenced by election-day irregularities or lack thereof (Kelley, 2010). This means for instance that those elections which record insignificant election-day irregularities but are characterized by profound pre-election malpractices capable of tilting the outcome are likely to be endorsed by EOMs.

The choice of a lens with which to assess the performance of election observers in a given election must thus take into consideration a complex interdependence. States seek to prove that they possess certain internationally desirable characteristics, election observers only come in upon invitation by states holding elections, various EOMs have donor and regional interests and that the practice of election observation in terms of standards and methodology is a fairly nascent endeavor.

Conceptual Framework

A critical mass of states[13] has succumbed to the pressure to open up their elections for scrutiny by both domestic and international election observers. Conversely, as Hyde (2011) argues, this gesture does not necessarily imply that incumbents in those states have no intention of manipulating the very elections for which they are inviting observers. In fact, it is this very possibility that observers can endorse flawed elections which encourages (pseudo-democratic)[14] incumbents to go ahead and invite EOMs (Hyde, 2011). Thus it does not necessarily follow that once countries holding elections invite election observers, competitive elections will take place or if they are not competitive, observers will denounce them. So

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13   *Hyde (2011) refers to Finnermore and Sikkink's (1998) use of the concept of critical mass in their 'norm entrepreneurs theory' explaining how international norms emerge.*

14   *Hyde uses the term in reference to incumbents who are not necessarily committed to competitive elections but due to international pressure, have to allow elections and invite election monitors.*

deep is the muddle in election observation that the determinants of EOMs' assessments has attracted scholarly attention.

In this chapter, we follow three of Judith Kelley's statistically tested explanations—and therefore theories on considerations which election observers make while assessing elections (Kelley, 2009). The choice of these three theories (the third one partially applied) is because they are specifically suitable in the circumstances in which the election in Kenya was conducted. First, election observers are less likely to endorse an election with greater irregularities in general and are particularly unlikely to endorse elections which are characterized by very obvious forms of cheating. Here, election irregularities are categorized threefold: structural e.g. restrictions on vying for office, voting and funding of campaigns; pre-election capacity problems such as problems with the voters roll, conduct of the electoral management body and administrative insufficiencies; and election-day cheating such as vote counting and tallying, voter fraud and intimidation. This explanation is particularly applicable to the 2013 Kenyan election for two reasons. First, given the massive logistical demands of conducting elections for six offices in one day, the electoral management body could have been susceptible to irregularities throughout the electoral cycle. Second, election-day and post-election events such as spectacular failure of technology in electronic voter identification, and transmission of results have attracted wide criticism, some suggesting that such irregularities warranted outright denouncement of the election. It is therefore interesting to look at how EOMs concluded on these irregularities especially pursuant to safeguarding of electoral norms as outlined in numerous election monitoring standards documents.

Second, Inter-Governmental Organizations (IGOs) are more likely than International Non-Governmental Organizations (INGOs) to endorse elections; this tendency however decreases in the case of IGOs with more democratic members. Kelley contends that IGOs usually have more donor and member state constrains and tends to be more cautious while writing election observation reports. Conversely, INGOs are usually more flexible as they do not speak directly for any government or donor. IGOs in a regional or international linkage with many democratic member states also tend to be stricter on democratic norms than those in less democratic linkages which tend to be relatively lenient. Since all EOMs involved in Kenya's 2013 elections endorsed the process, this chapter is interested in positions taken by the EOMs on specific aspects of the electoral process and if such positions suggest a considerable degree of independence or juggling of peripheral interests of the EOMs.

Third, election observers are more likely to endorse elections showing improvement relative to the prior election. This theory is especially supported by a worldview of elections as a part of broader democratization efforts. Kelley posits that this reality often puts EOMs in

an awkward dilemma when elections do not necessarily meet expected standards but are deemed as a step in the right direction within the entire democratization rubric. In such cases, sometimes observers' assessments tend to be cautions lest they disrupt the ongoing democratization momentum in countries conducting elections. This lens is particularly suits in the Kenyan case considering that the 2007 election was bungled, an occurrence which had far reaching implications on the countries existing political institutions. The 2013 elections cannot be viewed in isolation as a normal event and instead should be seen as a culmination of multi-actor efforts of resilience from a democratic reversal. This resilience is credited both to domestic actors and the international community. It is therefore not far-fetched to think that election monitors were fully cognizant of the historical circumstances in which Kenya went to the 2013 elections.

Methodology

This chapter applies a qualitative approach in assessing five EOMs involved in Kenya's 2013 elections. These EOMs are The African Union Election Observer Mission (AU-EOM), The Carter Center Election Observer Mission (CCEOM), The Commonwealth Observer Group (COG), Election Observer Group (ELOG) and The European Union Election Observer Mission (EUEOM). The choice of the four EOMs for this chapter is justified by a number of reasons linked to the theoretical framework discussed above. AU-EOM is an IGO in whose linkage network Kenya falls, it is a regional organization with members having averagely poor democratic rating scores than regional IGOs in other continents.[15] The Carter Center-EOM is a quintessential INGO, has vast experience in monitoring elections and which, according to Kelley's theory should enjoy flexibility and autonomy while monitoring elections. The Commonwealth, to which Kenya is a member, is an international IGO which draws members from both developed and developing countries. The mixed membership of the Commonwealth comes with arguably deeper historical ties and diverse democratic credentials. The EUEOM like the AU-EOM is an Inter-Governmental Organization but from a region with nearly all democratic member states.[16] However, it is important to note that many more local, regional and international organizations sent EOMs, these include Citizen Coalition for Electoral Democracy Uganda (CCEDU), African Great Lakes Initiative (AGLI), East Africa Law Society (EALS) and several faith based organizations like Catholics Justice and Peace Commission (CJPC).

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15   See for example POLITY IV scores—2012 for Sub-Saharan Africa. http://www.systemicpeace.org/polity/ssafrica2.htm

16   See for instance POLITY IV scores—2012 for European countries http://www.systemicpeace.org/polity/europe2.htm

Here, qualitative approach specifically means an in-depth analysis of the language used by these EOMs' reports in describing various aspects of the election. Words used in EOMs' reports are never haphazard but are carefully chosen words conscious of the weight of the observers' reports. The implications of the choice of words can be on the observers' credibility, electoral management bodies, contestants, voters and the legitimacy—both domestic and international of countries holding elections. Even more importantly, EOMs choice of words are useful in making the judgment call of whether elections are endorsed, ambiguous or denounced—an exercise that can be fairly subjective.

Following on other approaches used in similar work before, the qualitative analysis in this chapter focuses on two areas usually covered in a typical election observation mission: EOMs preliminary statements, usually issued immediately during the post-election period and the final EOMs report which usually comes out several months after an election.[17] Because EOMs final reports are often bulky, this chapter focuses on executive summaries and concluding sections but occasionally follows the body of the reports when deemed necessary. Because the post-election debate on the veracity of the 2013 elections has been bifurcated, it is also useful to bring in some of the credible claims for or against the election. These claims would include grounds for and evidence in various election petitions and election audit reports.

The African Union Elections Observer Mission was invited by the Kenyan government and the country's electoral management body IEBC. The Mission, whose membership was drawn from regional bodies, other countries electoral management bodies and civil society organizations consisted of a total of five Long Term Observers (LTOs) and 69 Short Term Observers (STOs) from 29 African countries. The LTOs stayed in the country for about 65 days, 12 days of which were during the post-election period. The STOs on the other hand stayed in the country for about 12 days, five of which were in the post-election period.[18] The Carter Center Election Observer Mission came in at the invitation of IEBC; its LTOs arrived in mid-January and stayed through late April until once the ensuing presidential electoral dispute was determined. The mission's 38 STOs arrived closer to the election-day, making a mission of 52 observers from 27 countries. Perhaps an important point to note is the fact that the CCEOM was the only INGO invited.[19] The Commonwealth Observer Group was invited by the IEBC, arriving in the country one week before the election-day. However, upon receiving the invitation, COG sent an assessment mission in January. Accepting to observe the election can thus be viewed as an implicit endorsement that the pre-election environment in Kenya

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17   *See for instance analysis of EOM work done by Gisela (1993) and Kelley (2010).*

18   *The Africa Union-EOM.*

19   *The Carter Center Election Observer Mission.*

was conducive for genuine competitive elections.[20] The European Union Election Observer Mission heeded to an invitation by Kenya's electoral management body—IEBC. The mission stayed in the country for about 65 days, 30 days of which were during the post-election period. The Electoral Monitoring Group—ELOG, a consortium of local civil society organizations was accredited by the IEBC. It assembled a team of 580 constituency supervisors and over 7,000 election observers including 976 specially trained to run a Parallel Vote Tabulation role during the 2013 election (ELOG, 2013). In what can be interpreted a proof of credibility, some of the international observers in their reports hailed the successful cooperation between them and the domestic observer.[21]

The 2013 General Election: Observers Verdict

All the five observer groups that this chapter has reviewed endorsed Kenya's 2013 election. The AU-EOM found the election 'credible', a view shared by ELOG albeit with a slightly lower level of certainty, terming it as 'generally credible'. The CCEOM likewise held that the election provided *enough guarantees*[22] for the will of Kenyans in the election; this is similar to EUEOM which hails IEBC for *protecting the integrity* of the vote. The Commonwealth Group's final report perhaps most unambiguously captures this verdict:

> Despite these concerns, and the various shortcomings identified, our overall conclusion is that the process for the 2013 General Election in Kenya was credible and met many of the benchmarks for democratic elections to which Kenya is committed (COG, 2013: 35).

The EOMs preliminary reports are largely congruent with the final reports released later on but on a number of occasions show sharp contradictions. Across the five EOMs, there are no remarkable contradictions in the final observer reports except the choice of language which reveals varying degrees of certainty or caution. On this for instance, the COG's assessment appears to be the most careful. It is closely followed by the AUEOM which also appears to exercise significant amounts of caution, 'noting with concern' in areas that did not meet electoral standards. In similar contexts, the CCEOM is arguably intrepid, using such terms as

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20   *As a principle, some organizations usually send needs assessment missions to countries that have invited them to monitor their elections. Accepting to monitor thus implies satisfaction with the environment in which elections are to be conducted.*

21   *CC-EOM describes ELOG'S cooperation and excellent work, EU-EOM on the other hand underscores the importance of ELOG in contributing to the credibility of the electoral process.*

22   *Throughout this section, we italicize words and phrases with weighty judgmental implications on the election chosen by the EOMs.*

regret and disappointment, while ELOG's assessment appears to carefully balance its choice of words. The EUEOM is arguably the boldest on instances where a process failed. For example, compared to other observers who tended to explain technological shortcomings by other factors, the EU plainly asserts that the use of technology was not a success and went contrary to best practices. For illustration, we put the observers' choice of words on an arbitrary scale of certainty where 0 means least certain and 10 means most certain, the graph below represents the observers' verdict as described.
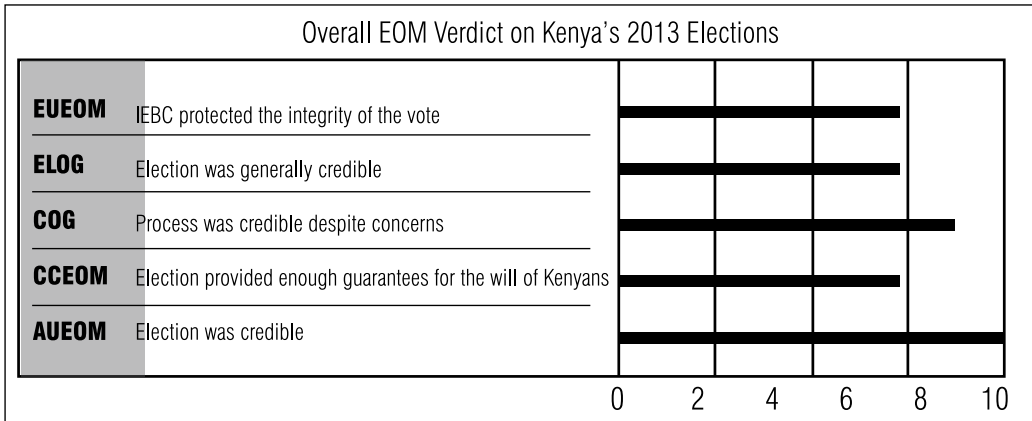
Source: Authors, 2014

Using Judith Kelley's three hypothetical propositions described under the theoretical framework of this chapter, this section has identified four broad areas in all the reports whose analysis could be illustrative. These are legal/institutional frameworks, peace and media, voter registration and voting, counting and tallying.

Legal/Institutional Framework

Kenya's General Election of 2013 took place under a new legal and institutional environment occasioned by comprehensive reforms christened as Agenda Four reforms—notably the electoral management body, judiciary, and security. The election observers generally agree that the election was a major test for Kenya's reformed institutions; this view is not exclusive just to observers but a widely shared one. Throughout the EOM's reports, there is a general praise for the nascent institutions and a tendency to downplay the significance of any institutional failures on the overall outcome. The AUEOM for instance *notes with satisfaction* the changes in Kenya's electoral landscape brought about by the new constitution, *commends efforts* of Kenyan authorities for conducting an independent and impartial process, and *notes with*

satisfaction the efforts to prepare the judiciary for adjudication of election related disputes. The CCEOM describes Kenya's institutional framework as 'a sound comprehensive legal framework' which *fulfilled* the country's international obligations against which the mission was observing the election. Throughout its report, the CCEOM uses three parameters: fulfilled, largely fulfilled and partially fulfilled in a descending order of approval. Similarly, both the interim and final COG reports approve the institutional framework. COG's interim report equally hails the progress comparing the 2007 and 2013 institutional and legal reforms while the final report points out the confidence in Kenyan institutions going into the election. Other than acknowledging the test for Kenyan's new institutions, the EUEOM specifically notes the electoral management body's success in 'overcoming technical and operational challenges thereby protecting the integrity of the vote'. The domestic observer—ELOG's assessment of the institutional environment arrives at a mixed bag in which on one hand, the institutions put effort but on the other hand, were curtailed by high expectations, institutional weaknesses and fragmented political support.

The 'progress lens' is clearly noticeable in the observers' assessment of the legal and institutional framework within which Kenya's 2013 elections were conducted. Yet, there have also emerged criticism that considering the expectations from them, the performance of the institutions was underwhelming. On the electoral management body, such criticism hold that the failure of electronic components of the administration of the 2013 election may have not only been errors of omission but also that those errors effectively equated it to that of 2007—a manually conducted election. Long et al. (2013) for instance describe the performance of the electoral management body as that characterized by 'a series of administrative missteps' (Long et al., 2013: 141). In what appears consistent with the errors of omission accusation, the Commonwealth observers note a 'reported' pressure from the executive to IEBC in which the former favored Biometric Voter Registration (BVR) while the latter was for a simpler system. The constricted timelines within which IEBC was expected to conduct the election is a theme that runs through all the EOMs reports. With the pressure to apply fairly sophisticated technology without sufficient time to test it, it may not be farfetched to read mischief from other actors. Nevertheless, the overall picture is that of electoral institutions malleable to other forces, an image that dents the optimism embedded in the progress lens.

The electoral dispute mechanisms put in place have also come under criticism. First, amid the praise, a number of EOMs pointed the confusion in political party dispute resolution. Second, the handling of the presidential petitions at the Supreme Court, which CCEOM describes as one conducted in 'a very professional and rigorous manner' (CCEOM, 2013:

11) has also elicited criticism on such aspects as the jurisprudence[23] relied upon and the unrealistic litigation timelines provided for in the constitution; both raising concerns about the institutional promise on (presidential) election dispute mechanism in Kenya.

The Peace Narrative and the Media

Given the tragic end of the 2007 election, both Kenyans and the international community were unanimous on the need for a peaceful election cycle in 2013. In fact, Kenyans generally seemed ready to sacrifice a fair election result just so that peace would prevail (Long et al., 2013). The observer missions were equally generally conscious of this fact; their reports demonstrate the ubiquity of the peace narrative both in the body of their reports and as a primary yardstick by which they assessed the performance of the media. The opening sentence in the forward of CCEOM's final report under lining the centrality of peace in the elections states:

Peace prevailed throughout Kenya's 2013 election cycle, protected by a national determination to avoid the personal tragedies and public humiliation of the violence following the release of disputed elections in 2007 (CCEOM, 2013: 3).

Apart from appreciating the role of the media in other aspects of the election such as voter education and upholding of transparency, in nearly all the reports, EOMs gave credit to the media for its contribution to a peaceful election process. All the reports commend the pre-election arrangement with the electoral management body and media regulators in which the media houses signed a code of conduct on responsible coverage of the election. The AUEOM reports that the media was either positive or neutral in its coverage of the electoral process, an observation echoed by the EUEOM's assessment asserting that the media specifically 'filtered potentially disagreeable messages not conforming to their calls for patience and peace.' Similarly, the CCEOM credits the media for its role in voter education. The COG preliminary and final reports note responsible behavior by the media and the contestants. The final report specifically commends the media for insisting on obtaining results exclusively from the official

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23   See for instance Wachira Mainas's article in The East African dated 20 April, 2013 (also available in AfriCOG/ KPTJ Election Series, 2014) in which he refers to the precedent from Nigeria relied upon by the Supreme Court as 'backward looking'. The article cites similar views by a leading Nigerian constitutional lawyer. http://africog.org/reports/ AfriCOG-KPTJ_%23Elections2013_Compendium.pdf. Jurists from the five East African countries in a workshop also faulted the jurisprudence. http://www.standardmedia.co.ke/?articleID=2000092900&story_title=jurists-fault-supreme-court-ruling-on-presidential-petition&pageNo=1

source. The domestic observer ELOG however highlighted the media's role in 'enhancing transparency and accountability' in the election.

The observers' consciousness about the peace narrative which also tended to inform their overall expectations from the media points to their inclination that the 2013 election was supposed to be the hallmark of the country's peacebuilding efforts started in 2008. Put differently, the election was expected to show progress by avoiding violence characterizing the 2007 cycle. Whereas on the one hand, campaign for a peaceful election was largely supported, on the other, in it are contradictions with possible negative implications to the overall quality of the election. A major criticism has been whether the peace narrative soared at the expense of justice, a critical component of an electoral process and a fundamental precursor to peace. For instance, it remains unclear whether by filtering information or being neutral; the media obscured electoral malpractices inaccessible by citizens. Viewed in ELOG's remark of a notable reluctance by the state to grant media freedom, one can argue that the media may have made the easiest choice and because the observers were keen on a peaceful election, they did not expand their scrutiny of the media beyond the focus on peace. Matter-of-factly, CCEOM final report appears to fault the media for focusing on spreading peace message at the expense of news and softening incidences of irregularity for fear of reactions from the public.

Voter Registration

While defining electoral irregularities, Kelley (2010) categorizes the irregularities related to voter registration under pre-election administrative problems. In Kelley's theory, pre-election administrative problems such as anomalies in voter registration tend not to attract denouncement of elections. The AUEOM *noted with concern* last minute amendments on timelines for finalization of the principal register. Further, the mission observed *significant constraints* this development had on the electoral management body's planning and implementation of the election. Conversely, the AUEOM's preliminary report extols the BVR and verification processes as *open and user friendly* and which *prevented fraud*, while its final report adds that the process was inclusive. In its interim report, CCEOM concedes that the absence of consistency in the voter register was contrary to international standards and raised *serious credibility* questions but points out that the differences did not portray partisan manipulation. While lamenting the *serious delays,* CCEOM's final report gives a medium level approval of largely fulfilled to the pre-election developments under which voter registration

falls. In what might draw an opposite interpretation of CCEOMs opinion on voter registration aspect of the 2013 election, the mission recommends need for an expanded commitment to accurate and credible register. Consistently, COG's final report notes the delay in the voter registration process; however, and more interestingly, it observes some technical challenges with the BVR kit but concludes that the voter list was overall reliable on the election-day. The EUEOM also agrees that technology did not succeed, but even more importantly, it points out that the voter registration process disenfranchised marginalized groups and another 3 million eligible voters. Finally, ELOG notes that the procurement process of the BVR kit was unsatisfactory, yet was arguably the most important aspect of the voter registration process. Consequently, the acquisition process eroded confidence in the voter roll and IEBC thus the general pre-election preparation could not guarantee 'free, fair, transparent and incontestable election' (ELOG, 2013: 51).

The EOM's observations on the voter registration process generate a compelling reason to doubt if a resulting election could have been credible as the observers signed off. Surprisingly, all the observers except ELOG downplay the effect of the irregularities surrounding the voters roll on the credibility of the election. First, the 'significant constraints' to the electoral management body is fairly indicative. Second, given the suspected interest by different factions of the political elite in composition of the voters roll, ruling out partisan manipulation in such inconsistencies in the register may be indefensible. Between 18 December 2013 –when registration of voters officially ended and 9 March 2014—when the final presidential results were posted on the electoral management body's website, the figures in the voters roll changed four times.[24] According to an intuitively[25] designed study on the last released version of the voter register against the provisional register issued on 18 December 2013, the variation in the voters roll finds three conclusions which dispute the absence of partisan manipulation argument.[26] One, that the variations in the registers were not random, two, in one of the front runner's perceived strongholds, there were only deletions from the register and three, eventually one of the front runners strongholds lost just over 14,000 while the other's stronghold gained 67,000 votes. Related to the above findings, the absence of information on patterns if any in the 3 million disenfranchised voters as observed by EUEOM may be a cause of legitimate concern. The oscillating voter register was a core basis on which the

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24   See 'Voter Registration for the 2013 General Elections in Kenya' AfriCOG/KPTJ Election Series, March, 2014.
25   The authors of the study picked out perceived strongholds—Coast, Nyanza and Rift Valley, Central regions of the two presidential front runners Raila Odinga and Uhuru Kenyatta respectively.
26   See Mainas and Kegoro's (2013) also available in AfriCOG/KPTJ Election Series, 2014) http://africog.org/reports/AfriCOG-KPTJ_%23Elections2013_Compendium.pdf

complainants in the two presidential petitions asked the Supreme Court to nullify the outcome of the election.

Voting, Counting and Tallying

The election-day and post-election administrative duties were not exempt from challenges. In Kelley's theory, elections marred by election-day irregularities are more likely to be denounced by observer missions. The first opportunity on election-day to apply technology—use of Electronic Voter Identification Device (EVID) failed in about half the polling stations.[27] However, the failure of EVID and electronic result transmission has been downplayed in part by the argument that application of technology was not an explicit constitutional duty of the electoral management body, a position also expressed in ELOG's final report while commenting on the registration process. However, Article 86(a) of Kenya's new constitution provides that IEBC uses 'a simple, accurate, verifiable, secure, accountable and transparent system'. A watertight application of technology in the voting and tallying process would have added a critical layer on specifically the accuracy, verifiability and security aspects of the election given the ease of de-legitimizing manually conducted elections as was the case in 2007. In so doing, it would have curbed in 2013, what inquiries into the previous election cycle termed as 'a worrisome feature of the 2007 elections…the incidence of abnormally and suspiciously high voter turn-out figures…from many constituencies in certain areas' (Dialogue Africa Foundation, 2009: 21). In fact, although it downplays the overall effect, EUEOM noted widespread minor discrepancies in tallies and number votes cast between presidential and other races, a feature of the discredited 2007 elections. CCEOM's interim report also terms as 'worrying discrepancy' while comparing form 36 on votes cast differing across ballots. The effect notwithstanding, this observation offers some ground to entertain claims that the 'worrisome feature' of the 2007 elections could have happened in 2013 as well—and more importantly questioning the progress in the country's electoral quality, especially after broad institutional reforms. To illustrate the description, we put the observers' choice of words on an arbitrary degree of approval of the tallying process where 0 means least approval and 8 means most approval, the graph below represents the observers' verdict as described.

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27   *Most audits have placed the degree of failure at 40-50 percent.*

EOM's Verdict on National Tallying process		
EUEOM	Widespread minor discripancies in tallies	
ELOG	Integrity not compromised	
COG	Tabulation at national level marred by inconsistencies	
CCEOM	Worrisome discrepancy across ballots	
AUEOM	Tabulation and transmission in good time	
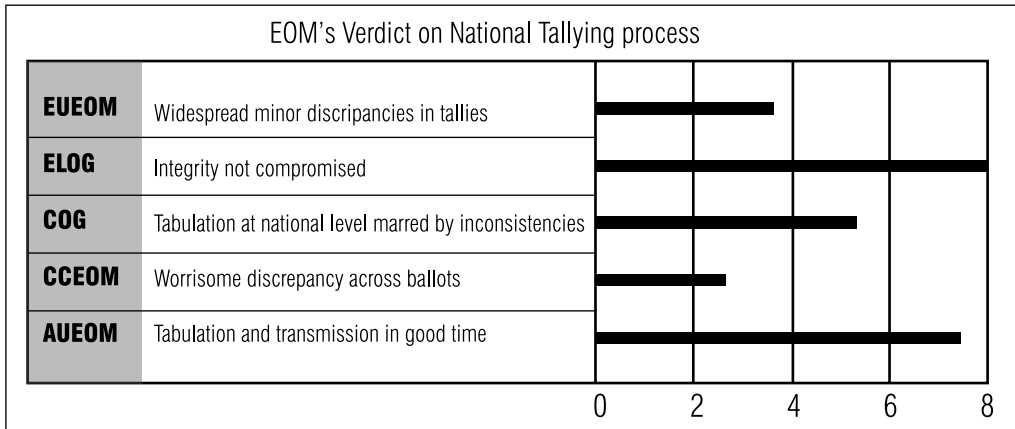
Source: Authors, 2014

The CCEOM final report holds that both voting and counting met the current best practices despite failure of EVID in approximately 50 percent of polling stations. On the tabulation process, it grades Kenya as having partially fulfilled its international obligations and concludes that the will of the people as expressed in the ballot box was accurately recorded and communicated. Similarly, ELOG observes an overall credible election-day processes whereby the integrity of closing of polling streams and counting of votes was not compromised. The AUEOM's final report echoes these observations, citing that the tabulation and transmission of results took place in good time—within the seven days as stipulated in the constitution. However, the mission also notes the failure of technology leading to eventual suspicion, a view echoed by CCEOM which reports the threat posed by unreliability of data displayed through tabulation and without IEBC publishing details of the results for public verification.

Paradoxically, nearly all the observers decry the denial of observers and agents access to the National Tallying Center. CCEOM notes that access to the National Tallying Center was inadequate and limited with observers detached from meaningful access to the receipt and processing forms. The EUEOM reports that the processing of official results lacked necessary transparency. COG also notes some tension between IEBC officials and agents at National Tallying Center on access to the process. The Commonwealth observer reports perhaps best captures the process of tallying presidential results, while noting transparency of the process; it observes 'the problems identified resulted in some confusion and tension among some stakeholders, and represented an untidy end to a critical part of the process' (COG, 2013: 34).

As EUEOM pointed, the problems characterizing voting, counting and transmission process warranted suspicion. Taken in isolation, each of these problems do not appear to pose

significant threat to an electoral process, however, if a thread of sequence is seamed across the problems, a systematic and worrisome pattern emerges. Failure of electronic identification of voters leaves no guarantee that only physically present enlisted voters cast their ballots. In the immediate unavailability of form 34—which records details of results at polling stations, failure of electronic transmission of results and absence of meaningful access (as CCEOM put it) to the verification and tallying process, worrying discrepancies in form 36—which gathers results at constituency level, then it becomes practically difficult to authenticate the 'recording and communication' of the will of voters. Other audits into form 34 for instance found such irregularities as numbers on the forms do not add up, number of votes cast exceeds total number of registered voters, number of registered voters in the form exceeds that given by the electoral management body, some of the forms missing, number on the form changed without an authorizing signature, illegible numbers and non-identical copies of some forms.[28] These observed irregularities, particularly from vote counting and tallying processes, may not be obvious enough to warrant outright denouncement, nonetheless, they are certainly not trivial enough to describe the electoral process as credible. In fact, using Election Administration System Index (EASI)—a new methodology of assessing the quality of the same election, Bland (2014) finds Kenya's administrative preparation in the pre-election period as weakest, with a generally fair management of the election-day activities but with problematic tallying process. In such circumstances according to Kelley, observers would be inclined to endorse the election. For illustration, we put the observers' choice of words on an arbitrary degree of approval of access to tallying process where 0 means least approval and 8 means most approval, the graph below represents the observers' verdict as described.

EOM's Verdict on Access to National Tallying process

EUEOM	Process lacked necessary transparency	
ELOG	Agents denied access, justified due to their conduct	
COG	Untidy end to a critical part of the electoral process	
CCEOM	Inadequate and limited, not meaningful	
AUEOM	Visited national tallying center	
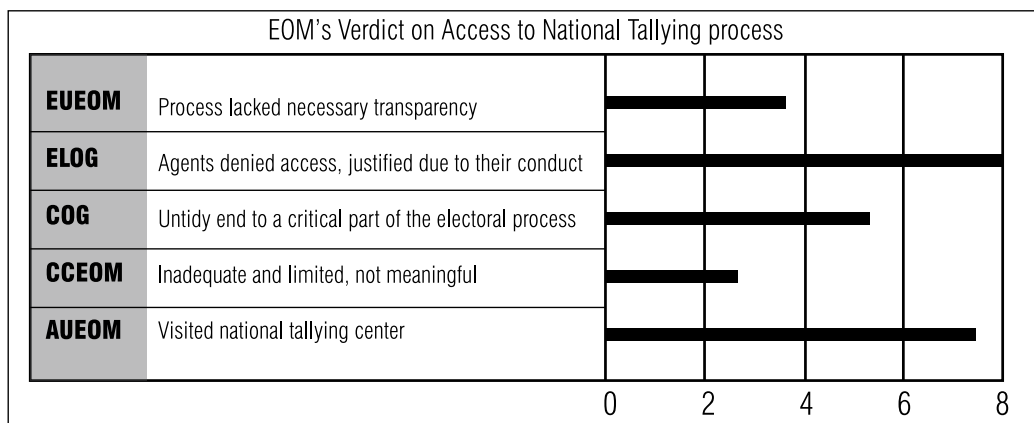
Source: Author, 2014

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28   See 'Election Day 2013 and its Aftermath' AfriCOG/KPTJ Election Series p.6 http://www.africog.org/reports/election_day_2013_and_its_aftermath

Conclusion

This chapter has examined election monitoring—today, a globally accepted practice, in the context of Kenya's General Elections of 2013. It began by posing the contradictions that have characterized the work of observers—initially viewed as the democracy police and how such contradictions manifested themselves while observing Kenya's 2013 General Elections. It has also highlighted the definition of election observation, emphasizing the (undue) expectations inherent in such a definition. In addition, the chapter has revisited some of the theories on the origins, spread and global acceptance of election observation underscoring the fact that such a global acceptance does not necessarily imply a burgeoning commitment to competitive elections across inviting states. Further, it has applied existing theories on determinants of observer mission's behavior revealing interesting dynamics at play in endorsing or denouncing elections while assessing five EOMs involved in Kenya's 2013 elections. Against the foregoing discussion, the chapter makes the following conclusion.

First, election observers involved in Kenya's 2013 General Election were largely guided by the importance of praising partial progress (Kelley, 2010) relative to the reversal witnessed in the 2007 General Elections. The unwritten 'consensus' to go easy on this election was not exclusive to observers but was shared both locally—as the conduct of the media discussed above suggests and by the international community—as international observer reports suggest. Second, from the observer reports on the registration of voters, voting and tallying processes, and other aspects of the election, one gets a clear sense of the actual quality of the election—which is a useful primary role of election monitoring but based on the same information gathered by the observers may not necessarily arrive at the same verdict as that of the observers. A case in point, how does one reconcile the noted lack of meaningful access to the national verification and tallying process with the conclusion that the will of the voters was accurately recorded and communicated? That observers can gather useful information regarding the quality of an election but make contestable conclusions is interesting: first, it voices Kelley's argument that there are other tangential determinants of behavior of election observers; second, the continued relevance of Gisela's assertion made over two decades ago that the continuing criticism directed at election observers should not question the existence of election observers, rather the criticism needed to push for standardization of the practice then and a commitment to those standards now.

Third, apart from the areas on which the observer reports' conclusions may generate debate, their data on the quality of the election will be useful as the country shifts focus to the next cycle of elections. The glaring pre-election, election day and post-election administrative challenges and other shortcomings for example on behavior of political parties at nominations, failure to

fast-track gender quota provisions, civic and voter education gaps and election finance must inform preparation for the next elections. Election observers leap from perceived and real obsession with election-day, which was mentioned earlier in this chapter, to an election cycle approach which recognizes importance of various components of an electoral process to the overall success is clearly useful. We thus recommend that international and domestic observers engage other actors in the electoral process in between 2013 and 2017 in implementing these shortcomings identified by the observers. The next important leap in the practice of Election Observation which would enrich democratic consolidation in countries conducting elections thus should be getting the various stakeholders to implement recommendations contained in observers' final reports.

2 Shaping Electoral Outcomes: Visible and Invisible Institutions at Play

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Chapter 5

Judicial Activism versus Restraint: Assessing Constitutionalism and Judicial Reform in Kenya's 2013 Elections - *James Gondi and Iqbal Basant*

Introduction

Kenya's 2013 General Elections were seminal for several reasons, they were the first to be held under the New Constitution, the first under the newly formed Independent Electoral and Boundaries Commission (IEBC), the first under a raft of electoral reforms and the first since the outbreak of the worst violence in the country's history the 2007-2008 Post Election Violence (PEV). Thus whatever the result, the manner in which the elections were conducted and their aftermath would set precedents for the future of Kenya.

Following the declaration of Uhuru Kenyatta as the winner of the Presidential election, the opposition filed a suit seeking to have the result nullified while a section of the civil society filed a suit that questioned the process of the election seeking to have a re-run. These petitions went to the nascent Supreme Court under the provisions of the new Constitution through which it acted as a safety valve to prevent the outbreak of violence as was the case in 2007. The Court found in favour of Uhuru Kenyatta and his running mate William Ruto in a judgement that was arguably restrained.

Yet allegations of electoral maladministration, specifically surrounding the application of technology, registration, transmission of results and tallying gaps emerged. Due to the magnitude of the presidential petition and its place among many firsts as explained earlier, the impact that the precedents set by the ruling will certainly shape the future of elections and electoral dispute resolution in Kenya.

As is discussed later on in the chapter, this chapter contends that the Supreme Court decision did not provide clear direction or indications on the application of principles in the new laws, in applying restraint the decision failed to develop jurisprudence and election management

practices. This problem has been further compounded by the fact that the Court of Appeal has shown a progressive streak of judicial activism when deciding election petitions in some cases overruling a restrained High Court which has ruled in line with the Presidential petition and finally a Supreme Court that does the same. This confluence between activism and restraint makes it difficult to determine which principles and jurisprudence will be taken on board by the relevant bodies. However, the sum total on judicial and electoral reform will be negative because restraint is negative for reform.

This debate over the elections and the use of judicial activism and restraint needs to be placed within the context of Kenyan history particularly the 2007 Post Election violence that brought about reform. For the realization of the progressive values and abstract ideals contained within the Constitution, judicial activism is necessary as such values need to be inculcated in everyday practice and life across the board not merely in electoral reform. The cultural shift required within Post Conflict Kenya for reforms to truly take hold and avoid a repeat of the PEV can best be achieved through a progressive activist judiciary that sets precedents to place these values into law.

The chapter begins by examining the theoretical background and origins of the terms judicial activism, judicial restraint and the interlinked concept of judicial independence. These are important to understand first the concept of activism, secondly its 'opposite' –restraint and the necessity of judicial independence in order for a court to be activist in the manner proposed herein. This section will also examine the historical role that activism and restraint have played in the United States considered the 'home' of the term and show how progressive activist rulings can advance Human Rights and Democratic values. The chapter will then move to Kenya briefly touching upon the debate therein and finally use the petitions surrounding the elections as a case study to show the necessity of activism and how rulings made can influence electoral reform and practice moving forward.

The chapter then lays out the necessity for progressive institutions, building on the history of electoral malpractice that has characterized Kenya in addition to generally weak institutions including the judiciary that have been used as an extension of the executive in order to maintain the status quo. The desire to create independent institutions resulted in the promulgation of the 2010 Constitution, a progressive forward-looking document that seeks to promote Human Rights and Democratic Values. The eruption of violence after the 2007 elections served as a catalyst for reform as exemplified in Agenda Four of the Peace Settlement that brought about a cessation of violence. More specifically, it has been widely argued that it was the failure of electoral management and the failure of the court to be seen as a legitimate arbiter that directly led to the Post-Election Violence. Hence the electoral reforms that were put in place as

a result exemplified by the Independent Review Commission (IREC) Report (Kriegler Report) are of vital importance and the chapter will argue that these must be placed at the centre of election petitions.

The chapter then looks at the petitions that emerged following the Supreme Court ruling on the Presidential Election. With regard to these petitions as well as the Presidential judgement questions will be asked about the precedents that they set and jurisprudence created. The chapter will argue that the precedents set by the Supreme Court ruling in the Presidential Election petition were largely neither activist in nature nor progressive in the manner envisaged in the new Constitution. As a result, the lower courts and indeed the Supreme Court itself have had to uphold these precedents in other election petitions, although the Court of Appeal has been activist where the Supreme Court and High Court have not.

This demonstrates the importance of using judicial activism to advance the progressive nature of the constitution by demonstrating the negative effects restrained or conservative rulings can have. In concluding, the article will review a few non-election related cases which have led to claims of judicial 'interference'. This analysis will reveal that these outcomes are necessary and in line with precedents for judicial activism that have been set elsewhere around the world.

Judicial Activism

In recent debates, the Kenyan judiciary has been accused of being too activist, indeed 'excessively activist' by the National Conservative Forum (Buhere, 2012). These accusations may be guided by political interests, ideology as well as concerns over judicial overreach.[29] Such fears of judicial overreach have cast the judiciary as interfering with the workings of other branches. The term "judicial activism", which may be considered a type of judicial review, has historically had a negative connotation particularly in the United States, and perhaps this explains these fears (Irons, 1988). Thus, in the course of the discussions, Kenyan critics of judicial activism have accused the Kenyan judiciary of mimicking the liberal activism that was influential in the American system since the early 1950s. According to these critics, judicial activism gives the judiciary too much power and 'gives grounds to a judge, who subscribes to this approach to settle cases on grounds extrinsic to the Constitution' (Irons, 1988).

It may be argued that this is an over-stretch of the situation in Kenya. It is to be noted that the Kenyan judiciary also sometimes retreats when facing executive, political and popular

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29   *Mugambi Kiai 'Threat to Chief Justice Mutunga not in order', accessed online on 1 July 2015 http://allafrica.com/ stories/201208180621.html*

pressure. As is the situation with other comparable courts, the other sources of restraint may be pragmatic in nature. For example, the South African Constitutional Court, which is deemed activist, has exercised restraint in some cases. For instance, in a case relating to same sex unions, the Court decided to practice restraint as the legislature was reviewing laws on the same (Theunis, 2009). In India, the Supreme Court was used as a tool of the Executive from 1974-1977 (Iyer, 2007). However, in the period after 1978, the Court became highly activist in defence of social welfare rights (Iyer, 2007).

This chapter claims that in some cases, the function of judicial activism is to protect the Constitution and to ensure its implementation. In Kenya the transformative nature of the new Constitution makes this an important function (Juma, 2010). The chapter posits therefore that judicial activism does not constitute an overbearing or overreaching judiciary in the Kenyan context. Instead, it is essential that we have an activist judiciary in Kenya. In supporting this thesis, a brief history of judicial activism will be provided to demonstrate that the Kenyan judiciary is well within its rights to carry out its operations thus and that it is crucial that it does so. The main premise is that this will be an aid to the political and constitutional transition underway in Kenya. In the context of a new constitutional dispensation, the implementation of the new constitution is perhaps more important than its passage as it represents the tangible realization of the promise of constitutional change since the dawn of multiparty politics in 1992.

The 2013 Kenya elections are used as a case study for the possibilities of judicial activism. These elections took place under a new constitutional dispensation, the first since the Post-Election Violence (PEV) and the reform agenda that accompanied it. Following disputed results, the Supreme Court in its verdict, upheld the outcome of the elections. Due to the political implications of this case, it was without doubt the most important case the court had tried and thus garnered massive public attention therefore making it an ideal test for judicial activism. Indeed within the proceedings of this case the court was told that it was 'good for a young court like this which is crawling…I think it is good for it to show judicial restraint' [30]

There is a further premise for judicial activism. A crucial dimension of constitutional transformation is the integration of the supreme legal document in national discourse particularly in its nascent stages. Judicial activism can help the courts contribute to this enterprise, as the precedents set with regards to the constitution will remain the judiciary's legacy for many years to come. Therein lies the imperative of judicial activism.

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[30]   *Inform Action Kenya 2015 'Kenya: A Guidebook to Impunity' April 14 2015 Available at https://www.youtube.com/ watch?v=Ir0AX1HuJ4k*

Law does not exist in a vacuum and hence its application must be determined by the social context in which it operates. For this reason, the interpretation of the law by the judiciary is fundamental to its actual implementation and necessary for it to have an impact upon society. With this insight at hand, the political context in Kenya, the expected reformist nature of the executive and the legislature, calls for an activist judiciary. The claim here is that it may well turn out that the transformational moment the nation finds itself will be the handmaiden of an activist judiciary working towards the well-being of the nation.

Finally, it may be recalled that following the vetting process, the judiciary enjoyed a far higher degree of confidence from the Kenyan people. According to opinion polls, the faith that citizens had in the judiciary was at an all-time high and steadily rose particularly between the promulgation of the new Constitution and the 2013 election.[31] In the most recent of these polls conducted in September 2012, (1) 84 percent of Kenyans trust Kenyan courts (2) 77 percent of respondents prefer using courts to resolve their disputes (3) 70 percent of Kenyans approve of the Chief Justice and (4) 66 percent rightly recognise the Judiciary as having the responsibility to interpret the law.[32] Given this turnaround, it is perhaps the branch of government therefore most likely to lead a 'reform' of the government system. Following the election petition however confidence in the judiciary has fallen with one analyst stating,

> The Supreme Court is the highest court in the land and cannot be seen to make obvious mistakes…After that ruling (On Presidential Election petition) public confidence in the Supreme Court went down [33]

This has been followed by other incidents that have marred public confidence that can be traced back to this loss of legitimacy including internal disputes, corruption allegations and confrontations with the legislature. It has been argued that these setbacks have been in part catalysed by the fallout from the Supreme Court decision that has impacted the perception of the court.[34] This does not necessarily mean that the judiciary is not the institution most likely to steer reforms but that public perception depends largely on the conduct of the judiciary at a particular time. From this it can be reasoned that an activist stance which promotes democracy and constitutionalism may also serve to augment faith in the judiciary.

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31   The Kenya National Dialogue and Reconciliation(KNDR) Monitoring Project Agenda Item 4 Reforms Long Standing Issues and Solutions Progress Review Report March 2012

32   ICJ Kenya (2012) 'Judiciary perception survey presentation Sep 2012' ICJ http://www.infotrakresearch.com/downloads/Judiciary_perception_survey.pdf

33   Wanja Gathu (2014) 'Public Confidence in Kenya's Judiciary Plummets', IWPR Available at www.iwpr.net/global-voices/public-confidence-kenyas-judicary-plummets

34   Wanja Gathu (2014) 'Public Confidence in Kenya's Judiciary Plummets', IWPR Available at www.iwpr.net/global-voices/public-confidence-kenyas-judicary-plummets

Judicial Independence, Judicial Activism and Judicial Restraint Defined

The Concept of Judicial Independence Determined

Judicial activism and judicial independence are closely linked to each other. However, a judiciary does not need to be independent in order to be activist. There are cases where the judiciary has been activist but in service of political interests such as when it is used to advance political interests. An independent judiciary, similarly, need not be activist. The distinction between judicial independence and judicial activism is that the former is freedom from influence, whilst judicial activism is the use of the powers conferred upon the judiciary to contribute towards the development of the law. Judicial independence is not however necessary for activism.

Judicial independence is a fundamental principle under the rule of law and all legitimate governments claim to subscribe to it (Ferejohn et al., 2004). A fundamental pillar of a burgeoning democracy is an independent judiciary. It is for this reason that the independence of the judiciary is explicitly stated in constitutions as a precondition and outcome of democracy (Mzikamanda, 2007). It also follows that the strengthening of institutions particularly the judiciary can act as a check on executive power. Diescho observes that:

> A cardinal feature of a democratic system is the doctrine that the judicial branch is independent, and that judges, as officers of the courts, are protected from political influence or other pressures that might affect their judgements (Diescho, 2008:18).

As suggested above, institutional independence and decisional independence are mutually reinforcing in a democracy. Yet judicial independence is not always guaranteed in states undergoing democratic transition or even established democracies, for it may be compromised by political and economic forces. In Kenya, according to Mutua, judicial subservience has been such that '[s]uccessive chief justices have served as the personal envoys of President Moi in making sure that executive wishes were executed.' (Mutua, 2001). In India, the largest democracy in the world, while activist judges have used their positions to further human rights and extend legal rights to those who lacked access to them, some have also been at some point subservient to the executive branch.[35] The Indian judiciary has undergone three distinct

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35   *Bhagwati P.N 'Judicial Activism in India' Speech given at University of Wisconsin, published in the Gargoyle newsletter www.law.wisc.edu/alumni/gargoyle/archive/.../gargoyle_17_1_3.pdf*

phases, a period of judicial activism backed by legal thinking, subservience to the executive and a more socially minded if less legally based phase from 1978 to present (Iyer, 2007).

What does judicial independence mean? According to Ferejohn, a judiciary is independent to the extent

> …that a court is able to make decisions free of influence from other actors, and to pursue its goals without having to worry about the consequences from other institutions" they further state that the "greater the level of input these other actors have on the courts personnel, case selection, decision rules, jurisdiction and enforcement of laws the less independent it is (Ferejohn et al., 2007).

It is clear from the above that for the better part of its history, the Kenyan judiciary has long been viewed as politically controlled rather than independent. According to Ahmednassir Abdullahi an advocate who formerly sat in the Judicial Service Commission,

> The political class and especially the executive arm of government had during the lost decades (last four decades) maintained a frightening grip over the judiciary. The judiciary was also grossly understaffed as a deliberate governmental policy on the part of the executive to emasculate the judiciary as a counterforce or check on executive transgressions against the Kenyan people (Abdullahi, 2011).

In common accounts, this judicial decline may have been a key reason why the resolution of key questions such as the disputed presidential election outcome in 2007 elections was not given serious consideration.[36] While legal recourse to the courts following disputed election results could have been undertaken as opposed to a political solution, the people did not trust the courts as they viewed as being subject to political influence. This explains why judicial reform became a key issue to be undertaken under the Kenya National Dialogue and Reconciliation (KNDR), inter alia 'financial independence, and transparency in the appointment of judicial officers.'[37] In addition to the entrenchment of judicial independence standards in the new Constitution, a further reform measure resulted in judicial vetting, which saw several long standing judges declared unfit to hold office.

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36   *Phillip Waki Commission of Inquiry into the Post-Election Violence (CIPEV) final report Oct 2008, http://www. kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf, p 461.*

37   *The Kenya National Dialogue And Reconciliation (KNDR) Monitoring Project1 Agenda Item 4 Reforms Long-Standing Issues And Solutions Progress Review Report March 2012*

Judicial Activism

The term Judicial Activism was popularized by Arthur Schlesinger in 1947 which raised considerable debate in the public domain.[38] Some scholars have criticized it as being when the judiciary strikes down legislation (Jones, 2002).It can also be used when the judiciary ignores precedent

> For modern scholars who define and analyze activism, the term has come to mean (i) any serious judicial error, (ii) any undesirable result, (iii) any decision to nullify a statute, or (iv) a smorgasbord of these and other factors. (Green, 2009: 1201).

Judicial Activism is a philosophy of legal interpretation which denotes the way a court should actively access its' power as a check to the activities of governmental bodies, when it is thought that those bodies have exceeded their authority. It suggests that courts ought not only to interpret the letter of the law but breathe life into it by contextualizing such interpretation in line with the intention of the legislature and in view of the role of the judiciary in advancing democratic principles.

According to Delvin,

> By activist law-making, I mean the business of keeping pace with change in the consensus. Dynamic or creative lawmaking is the use of the law to generate change in the consensus. A law that tried to impose an alien idea upon a free society would come to grief (Corder, 2007: 1).

The nature of the Constitution highlights two important factors, with regard to judicial activism. Firstly, the new Constitution invests more power in the judiciary, which supports the position that judicial activism is needed particularly during the transition process. Secondly, the historical and social context within which the constitution was written infer the need for a strong and independent judiciary to curb the power of the executive and the legislature. Some have argued that a legislature that is not performing its functions is grounds for judicial activism (Katju, 2012). Judicial activism is considered necessary when the legislature is weak or fails altogether to ensure that the law is kept in line with social conventions.

> It has been said that since the legislatures have failed to keep the law in a serviceable state the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for the consideration of the contemporary values of community (Gibbs, 2004: 6).

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38   *John Q Barret 'Arthur M. Schlesinger, Jr.— in Action, in Archives, in History' 2007.*

Judicial activism may be viewed with the idea that the law is organic and constantly growing and the role of the judiciary is to aid its development. According to Chief Justice Bhagwati of India, the 'judge infuses life into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.' [39] He further goes on to say that the Supreme Court has become through its activism a 'symbol of hope for the people of India.'[40]

This premise relates to the structure of constitutional law. Abstract in nature, the Constitution contains broad principles whose real meaning are only provided through interpretation. Thus, the Bill of Rights explicitly calls for the development of relevant law.

What is Judicial Restraint?

Judicial restraint may be taken as the antithesis of judicial activism. Each represents a fundamentally different approach to the practice of the judicial arm of government and in a wider context the debate between normative and positivist arguments respectively.[41] Viewing judicial restraint in this wider setting is important to understand the dogmatic positions taken by both sides of the debate on the political spectrum, generally the conservative and liberal elements. From this optic, judicial restraint is the idea that the court has a passive role to play. It represents a type of judicial interpretation that emphasizes the limited nature of the court's power to interpret the law according to statute and precedent. According to Posner (2012), such an approach emphasizes the reluctance of judges to overturn the legislature or executive and from and ideological standpoint posits that judges do not make law rather they apply it.

According to King, judicial restraint arises when judges must decide on questions of

> statutory interpretation, judicial review of administrative discretion, review of tribunal findings, adjudication of human rights claims and in the interpretation of international law to mention a few. In all of these contexts, judges have identified certain questions as being inappropriate for judicial resolution, or have refused on competency grounds

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39   *Bhagwati P.N Judicial Activism in India Speech given at University of Wisconsin, published in the Gargoyle www. law.wisc.edu/alumni/gargoyle/archive/.../gargoyle_17_1_3.pdf*

40   *Bhagwati P.N Judicial Activism in India Speech given at University of Wisconsin, published in the Gargoyle www. law.wisc.edu/alumni/gargoyle/archive/.../gargoyle_17_1_3.pdf*

41   *Positivist and normativity in the sense that one implies following the letter of the law, that is how things are and normativity in the sense of looking at the way things should be. Positivists in favour of restraint advocate for the letter of the law to be followed. Normativists favour activism as they believe that the law needs to be interpreted.*

to substitute their judgment for that of another person on a particular matter. (King, 2008: 409)

In the Kenyan case, the Constitution was arrived at by means of a long consultative process resulting in a very liberal constitution. A liberal constitution by its nature leaves greater room for interpretation particularly in its formative years. It is also defined by a set of civil and political rights which are outlined in the document (Boregband, 2010). During this period, legal interpretation gains added significance, requiring an exiling of judicial restraint.

The nature of our constitution making process lay in the context of transition from authoritarian rule to a more open democracy with vibrant institutions. Indeed, the features if the Constitution of Kenya 2010 are comparatively progressive. Turner (2008) has argued that the presence of the Bill of Rights in the American Constitution (also present in Kenya's new constitution) demonstrates a liberal constitution.

About liberal constitutions, Hayek argues,

> This (sic) liberal constitution he explains must recognise society as a 'living organism'… Changes in liberal society…must occur within the confines of established rules of just conduct rather than being democratically determined. (Turner, 2008: 51)

Proponents of purposive interpretation of law would urge the courts to interpret these provisions from a liberal standpoint. Thus it can be argued that an activist judiciary is better suited to realize the gains in the new constitution, as opposed to a judiciary that would exercise restraint.

In the Presidential Election Petition No 5 of 2013, the Supreme Court rejected the first Respondent's argument that the court ought to proceed with restraint with regard to interpretation of the constitution. It ruled unanimously in favour of a purposive, liberal interpretation despite its judgement arguably being to the contrary. The Court said that:

> There may be an unlimited number of ways in which such an approach is to guide the Court. But the fundamental one, in our opinion, is fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution.[42]

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42 *2013 Supreme Court of Kenya at Nairobi, Petition No 5 of 2013 –Raila Odinga vs IEBC and 3 Others as consolidated with Petitions 3 and 4 of 2013 at paragraph 230.*

Judicial Activism and Restraint across Time and Space

The history of the ideas of judicial activism and judicial restraint in the United States are instructive. The landmark ruling in the United States in the case of *Marbury v. Madison*[43] set the precedent which allowed the Supreme Court to invalidate acts of Congress that it deemed contrary to the US Constitution. This allowed for a judicial review of federal legislation (Evan, 2011). Initially this act was greeted with great consternation as it was seen as an unelected court usurping the powers of an elected legislature and helped define the future basis for separations between different branches of government in the United States.

Judicial review and indeed activism raises questions about the democratic nature of decisions taken by the courts. An important question is as follows. Does the fact that the judiciary is formed on the basis of selection and hence undemocratic in constitution mean it takes away powers from the people's elected lawmakers whose decisions can be considered more democratic as a result? In answer to this question, in what Bickel referred to as the 'counter-majoritarian difficulty', the judiciary is not an elected body and does not represent the will of the majority of the people (Bickel, 1986). This presents a restriction on the voice of the majority prevailing in a democratic setting. However, when considering the undemocratic nature of the judiciary, one must look at the practical implications of introducing direct democracy to such proceedings rather than considering judicial activism as then American President Ronald Reagan put it, a process through which judges are 'short circuiting the electoral process' (Curry, 1985) One cannot practically apply direct democracy to some of the issues under the purview of the court without great difficulty.

Moreover, it is the courts that are tasked with interpreting these laws and as argued by Reid they can 'extend the law by development and application of fundamental principles' (Gibbs, 2004). This after all is the function of having legal specialists in the judiciary who are not always present in the legislature and are unlikely to be involved in such cases. Further members of the legislature in Kenya are not required to be legal practitioners and as such are not elected on the basis of these skills, judges however are appointed on the merits of their legal skills.

In striving for its independence, the judiciary places itself in a position not to be influenced by political considerations in its decisions unlike both the legislature and the executive. This protects it from majoritarian tyranny and allows it to make 'fairly constructed constitutional principles that stipulate rights and duties, and that these might be better protected, particularly for minorities, by legal experts than by political actors supported by shifting majorities'

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43   *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).*

(Ferejohn et al., 2007). Indeed, democracies put in place several measures to safeguard the independence of the judiciary so that they are not subjected to political influence. These include security of tenure and other obstacles in the way of changing the composition of the courts particularly at the highest levels.

This raises an interesting point. It has been argued that the judiciary as a whole, despite its aspirations to be beyond political interests, is by virtue of its position in government involved in politics. Further, the individuals that compose the judiciary are subject to their idiosyncrasies and value judgments when interpreting the law. However, democratic theory presupposes judicial independence, with judicial interpretation as the final authority on the law. In certain systems for example, the constitutional court is 'deliberately structured to be more autonomous' (Ferejohn et al., 2007). However, in nascent democracies such as Kenya where the doctrine of separation of powers is in practice not strong, the effects of the individual idiosyncrasies are even more profound.

It was in the United States that the term judicial activism first acquired its negative connotations. Broadly speaking, republican conservatives favour judicial restraint and liberal democrats favour judicial activism (Irons, 1988). However, there can be a restrained liberal court, and an activist conservative court. The case of Cooper v. Aaron[44] in the Supreme Court is instructive in this respect. Following the resistance to the implementation of desegregation in schools as decided by the Supreme Court in Brown v. the Board of Education,[45] the district court ruled that the programme needed not be implemented immediately but progressively. The Supreme Court held that it was the ultimate authority and 'political branches must always acquiesce to the Court's decisions about the ultimate meaning of the Constitution'.[46] This demonstrates that a liberal court can be restrained.

The major cases of judicial activism cited by critics in the United States have included Brown that granted African American students the right to learn in a desegregated environment.[47] In the case, the state policy of separation of black children from whites thereby denying them a chance at a better quality education. In rejecting the principle of 'separate but equal', the Court found that the Constitution's equal treatment clause had been violated.

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44   Cooper v. Aaron, 358 U.S. 1 (1958)

45   Brown v. Board of Education, 347 U.S. 483 (1954).

46   Brown v. Board of Education, 347 U.S. 483 (1954).

47   Brown v. Board of Education, 347 U.S. 483 (1954)

The Brown and Aaron cases are progressive rulings that changed social relations in an evolving society. Liberal in nature, they were opposed by conservative republicans. Almost three decades later, President Reagan spoke about replacing the judges in the Supreme Court with judges who 'harbour the deepest regard for the constitution and its traditions – one of which is judicial restraint' (Curry, 1985).

In the United States, judicial activism has historically been a term used by individuals who do not like the decisions of a court.[48] Whilst the majority of the objections arise from conservative Republicans in recent times, there have been cases in which both the Democrats and Republicans object when the ruling does not favour their respective political interests. Further despite the furore over judicial activism in the United States, the Supreme Court struck down only 0.6 percent of laws Congress passed between 1954 and 2003, these are merely the cases of judicial review, contained within these are the cases branded activist.[49]

The Kenyan critics of judicial activism have accused the judiciary of imitating the practice of judicial activism from the United States. The use of this term as opposed to perhaps judicial independence suggests the use was meant to impute the various negative connotations that accompany it. Further, the claims have not been ideologically driven, given that such ideological cleavages do not play a significant role in public debate over political discourse in Kenya. Put another way, the negative connotations that surround judicial activism stem from an ideological basis, which is not salient in Kenya. Thus, some political analysts have speculated that this is more of an attack by the conservative status quo adherents who see the current judiciary as the brightest hope for the reform of Kenya and hence destruction of the systems of patronage (Mutua, 2012).

Here one can draw from the example set by the post-apartheid courts in South African. Even more than Kenya, South Africa needed social transformation to overcome the remnants of a legalized and institutionalized system of inequality (Klare and Davis, 2010). As in Kenya, the majority of South Africans suffered and continues to suffer from great income inequality and feelings of marginalization. In order to redress this past, the Constitutional Court of South Africa and other top courts have been activist in some instances, 'thus reflecting a changing

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48   .Judge Ted Olson 'Ted Olson on Debate Over Judicial Activism and Same-Sex Marriage' 08 Aug 2010 Fox News http://www.foxnews.com/on-air/fox-news-sunday/transcript/ted-olson-debate-over-judicial-activism-and-same-sex-marriage#p//v/924499914001

49   Burke Kevin (2011) 'Judicial Politicization Reform and Activism: Further thoughts on Gingrich's' views Minnpost http://www.minnpost.com/community-voices/2011/10/judicial-politicization-reform-and-activism-further-thoughts-gingrichs-view

political consensus which is likely to reflect the social consensus, such as it is' (Corder, 2007). In this manner the courts have advanced the reform process, so is the Kenyan judiciary attempting to do. In the words of former United Nations Secretary General Kofi Annan, '[t]he independence and integrity of the Judiciary has given hope to the people of Kenya.'[50] This is because an activist judiciary is more likely to implement the new constitution and be reformist in nature.

The 2013 General Elections

This section looks at the context in which the Presidential Election of 2013 took place, the subsequent presidential election petition and selected cases from the 188 petitions that were subsequently filed. It looks at the jurisprudence on election disputes that was in place prior to the promulgation of the New Constitution in 2010 and the reform of the judiciary that began with the tenure of the Chief Justice, Willy Mutunga under the judiciary transformation framework. This will bring to light the specific measures taken to reverse these, such as the 2010 Constitution and the Elections Act, in order to demonstrate that the Supreme Court judgement in the Presidential petition went against this spirit. The argument then turns itself to the question of what this means for future electoral dispute resolutions in the progressive constitutional framework.

Constitutional, Judicial and Electoral Reform

Elections in Kenya have since the start of the multi-party era in 1992 been far from free and fair, they have been ethnic contests and have been reduced to a winner takes all contest between these ethnic groups. Cycles of violence have accompanied elections in Kenya, between 1991 and 1997 more than 600,000 people were displaced as a result of conflict around elections.[51] The early 1990s were marked by the push for a change in the Constitutional dispensation and general reform accompanied by General Elections marred by instances of vote rigging and other electoral anomalies (Bratton, 1998). The judiciary proved largely ineffective and,

> Shortcomings in electoral justice revolved around delays by the courts in concluding suits challenging the outcome of elections, the expense of such suits and an increasingly technical approach by the courts in dealing with such disputes, often negating substantive justice (Bratton, 1998: 56).

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50   Judie Kaberia 'Annan Commends Kenya's Judicial Reforms', Capital FM News Oct 9 2012 http://www.capitalfm.co.ke/news/2012/10/annan-commends-kenyas-judicial-reforms/

51   Truth Justice and Reconciliation(TJRC) Report Volume 2A: 27.

Thus the 2007 elections were simply the continuation and the worst manifestation of a long standing tradition of poorly conducted elections that were neither free nor fair and resulted in displacement and violence along ethnic lines. According to Branch 'The purpose of the violence was to create a much wider sense of chaos linked to the holding of elections' (Branch, 2012: 226). Taken as such measures to address the inadequacies of the electoral process in 2007 should be seen as an attempt to fight a long standing culture of impunity in order to achieve democratic rights. From an even broader viewpoint then the links between corruption, ethnic favouritism, nepotism, land and many other long term issues that have assailed Kenya are affected by electoral practice and positive electoral practices therefore will have a positive cascading effect upon other reform areas. Indeed, analysts have argued that the judiciary is central to this as the organ that can check executive power and bring an end to impunity but also that

> The desire by the Kenyan Public for a new Constitution has been spurred by decades of dissatisfaction with the judiciary's performance and susceptibility to impunity[52].

The clamour for Constitutional Change in Kenya was coupled to that for greater democratic space and reforms which characterized the 1990's and the push to remove the dictator Moi. In response to growing international and domestic pressures, 'many civil society groups that emerged in the 1990s (sic) from using mass demonstrations and legal challenges to force the government to implement many important reforms. The number of political detentions fell, small presses began publishing critical views of the government, and members of Parliament began to speak and vote more freely.'[53]

In 1997 before the General Elections the Inter-Parties Parliamentary Group (IPPG) was formed to debate and bring together views on reform and provisions were put in place through the Constitution of Kenya Review Act to undertake a Constitutional Review following the 1997 General Elections. When Moi reneged on this promise the Ufungamano initiative (outside government) was formed that was eventually incorporated into the Constitution of Kenya Reform Committee (CKRC) that collected views from around the country that was the foundation for the Bomas draft of the Constitution (Whitaker and Giersch, 2009). Thus we see that the fight for Constitutional Reform has been tied up with the struggle to gain democratic freedoms in Kenya and it can be argued that the attempts at inclusivity within this process led to a feeling of 'ownership' among the people. This argument is supported by the fact that

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52   Irene Ndung'u 'Cautious Optimism over judicial reforms in Kenya', ISS Feb, 12 2012 http://www.issafrica.org/iss-today/cautious-optimism-over-judicial-reforms-in-kenya

53   Human Rights Watch 2002 'Kenya's Un-Finished Democracy – A Human Rights Agenda for the New Government' Vol 14 No 10 (A) Available at http://www.hrw.org/reports/2002/kenya2/index.htm#TopOfPage

following various amendments made to the Bomas draft to become the Waki draft without participation by Parliamentarians and the Attorney General was one of the reasons it failed to pass in a 2005 Referendum. While there were certainly other factors at play this amendment of the Bomas draft generated 'anger about the way in which Kibaki and his allies hijacked the Bomas draft and unilaterally wrote a new Constitution that served their own interests' (Whitaker and Giersch, 2009:8).

The 2007 General Elections pitted two close rivals from ethnically opposed factions against each other resulting in a campaign period rife with hate speech and ethnic tensions which were carried over from the divisive 2005 referendum. Hence in a country where political power has been centralized in the hands of the presidency with weak checks and balances, rampant corruption and abuse of power, made 'the race for the presidency a high stakes, zero sum game.'[54] Following disputed election results violence broke out resulting in 3,561 injuries, 117,216 instances of property destruction and 1,133 deaths as a result of Post-Election Violence.[55] The elections themselves were widely reported to have:

> Many anomalies: unusually high voter turn-out, lack of access to voting centers, names missing from registers, questionable voting hours, party agents and police officers killed. Most important, the government body tasked with overseeing the election, the Electoral Commission of Kenya (ECK) showed clear signs of manipulating the vote counting with bias towards the government. As a result, the ECK chairman says he does not know who actually won the presidential election. Five ECK commissioners distanced themselves from the announced result (Klopp and Kamungi, 2008: 11).

The failure of the elections due to widespread discrepancies in the processes related to the conduct of the election was therefore the immediate trigger that led to the PEV. For this reason alone, it was crucial that the next General Elections held in 2013 upheld an exemplary standard of electoral processes. In 2007, as was the case in 2013 it was possible to go to court to challenge the results of the election. However, in 2007 the judiciary was widely not considered up to this task, it is a testament to judicial reforms that the Kenyan people were willing to place their faith in the courts following disputed results in the 2013 General Elections. For this reason, it was important that the judiciary repaid this faith in the spirit of the progressive 2010 Constitution.

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54   *Lonscar Nora 'Nervousness Surrounds Kenyan Elections' Fund for Peace Commentary February 12 2013 Available at http://library.fundforpeace.org/2013-02-kenyaelections*
55   *International Center for Transitional Justice 2008 'The Kenyan Commission of Inquiry into the Post Election Violence'*

The 2007-2008 Post Election Violence catalyzed institutional and legal reforms across a wide range of issues designed to address the long-term grievances that led to the outbreak of conflict. One of these measures was the formation of the Independent Electoral and Boundaries Commission (IEBC) to replace the ECK, (in line with the recommendations of the Kreigler Commission or Independent Review Commission IREC)[56] the reform of the judiciary, the passage of a new Constitution in 2010 and the Elections Act.

The Kriegler Commission was the body mandated to inquire into the conduct of the elections through the peace settlement that followed the PEV. More specifically they were tasked with inter alia to 'recommend electoral and other reforms to improve future electoral process'[57] and these recommendations would be based on their analysis of what went wrong with the 2007 poll. These would form the basis for electoral reform including the Elections Act and the work of the IEBC. While the report was criticized for the procedure it adopted including a failure to look at more than 19 constituencies, indicate fraud at the polling station[58] that failed to further the quest for impunity and ended up being labelled by civil society as 'a half-baked job that attempts to cover up offences committed by people who deserve no such protection' (Branch, 2012: 278). It did provide strong bureaucratic or procedural recommendations.

The Report specifically called for (1) an 'empowered special electoral dispute resolution court (2) To entrench a statutory limit to ensure that election petitions are finalised in good time (3) Election regulations should be amended to allow observation of the tallying process at all levels (4) Assure party agents' access to polling stations and tallying centres (5) Integrate the various descriptions of the entire counting and tallying procedure into one document only (6) Develop and integrated and secure tallying and data transmission system (7) Store certain relevant election materials (such as the election results)in electronic format'. [59]

A New Constitution

While the need for a new Constitution was almost universally agreed upon there was much debate over what was to be contained therein and to this end a Committee of Experts (CoE) was formed by Parliament to provide a draft. The Committee noted in its final report that, 'Because of well documented factual and historical reasons Kenyans would have been sceptical of any new constitutional dispensation which did not include some realignment of

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56   *International Commission of Inquiry formed in 2008 to examine the conduct of the 2007 Kenyan General Elections*

57   *IREC 2008 Report of the Independent Review Commission (IREC) P3*

58   *KPTJ 'Unfinished Business Kriegler Report Election Investigation' Issue 04/08 October 13 2008.*

59   *IREC 2008 'Report of the Independent Review Commission (IREC)'.*

the Judiciary'[60] and a near unanimous agreement that the organ needed serious reformation. Thus any form of constitutional reform would be seen to include and strengthen judicial reform. This Constitution was subjected to a referendum where it was approved and came into force in 2010.

This clamour for Constitutional reform in addition to the specific sections on the judiciary led to a general sense of reform in the body, as part of a 'fresh breeze sweeping through the court corridors and the country' (Branch, 2012: 304). The judiciary enjoyed high confidence as explained earlier following a reform process that included the public vetting of judges and magistrates. The judiciary 'demonstrated a willingness to intervene in political matters and to challenge the other branches of government, most notably the executive'[61] This was in stark contrast to the track record of the judiciary which had been adjudged to rely on technicalities to protect the ruling class from impunity and had generally been restrained in nature. To illustrate this point, the results of the 1997 General Elections were contested by the loser Mwai Kibaki in an election petition which was subsequently dismissed.

This occurred in December 1999 long after the December 1997 Election. The dismissal revolved around the manner in which the petition was served holding that personal service was required because 'election petitions are of such importance to the parties concerned and to the general public that unless Parliament specifically dispensed with the need for personal service then the courts must insist on such service'[62] Gazettement was not deemed sufficient service and the precedent created by this case was cited in 2003 Abu Chiba v Mohamed Bakari election petition, subsequently the 2010 Constitution under Article 87 (3) states on election petitions, 'Service of a petition may be direct or by advertisement in a newspaper with national circulation.'[63]

These demonstrate that election petitions have too often been decided on technicalities without due regard for the importance of the matter. They also show the need for judicial activism particularly in election petitions because of the backwards looking precedents they set and the perception they created that the judiciary was simply an extension of the Executive. To this end the Constitution contained a provision that 'the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.[64]

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60   *Committee of Experts on Constitutional Review 'Final Report of Committee of Experts on Constitutional Review' 11th October 2010.*

61   *Committee of Experts on Constitutional Review 'Final Report of Committee of Experts on Constitutional Review' 11th October 2010.*

62   *Kibaki Vs Moi Court of Appeal1' 10 December 1999.*

63   *Constitution of Kenya 2010 Article 87 3.*

64   *Constitution of Kenya 2010 Article 22 3 (d).*

The 2010 Constitution dedicated large sections to electoral conduct and dispute resolution and the Supreme Court that was to hear the 2013 petition. The petitions for the Presidential elections involving Moi and Matiba in 1997 and Moi and Kibaki in 1997 lasted 12 and 24 months respectively. In law, the time line is now only 14 days for Presidential petitions and 6 months for Gubernatorial and Parliamentary petitions.[65] Central among these constitutional changes were principles for free and fair elections that are 'administered in an impartial, neutral, efficient, accurate and accountable manner.[66] Article 140 provided for the resolution of electoral disputes in a strict time frame at the Supreme Court in line with the recommendations of the Kreigler Commission and the lessons learned from the 2007 elections.

The Elections Act also came into place to centralize and consolidate Electoral law as recommended by IREC and the IEBC was created under the Constitution. The Elections Act provided for the use of electronics including in the Principal Register of voters which will be open to public scrutiny and publish any changes made before an election.[67] The IEBC undertook an electronic voter registration exercise through a Biometric Voter Registration (BVR) kit and electronic tallying systems at a cost of approximately 40 billion shillings. Commentators have said that this meant that 'the IEBC as well as Kenyans counted heavily on the new technology towards creating the conditions for the delivery of a clean election.'[68] These provisions were to become important in the forthcoming Presidential petition.

Analysis of Selected Election Petitions

The March 2013 Elections took place amid fears of violence following the events in the aftermath of the General Elections in 2007 and were seen as a test for the IEBC and the reforms instituted since that time, nonetheless public confidence in the electoral body was over 90 percent[69]. Voting itself passed peacefully but there were problems being reported with the electronic register of voters and the IEBC resorted to manual means to verify voters. This however was the start of several anomalies that would plague the process including 'names missing from the voters register; non registered people being allowed to vote; registered voters being turned away; bribery of voters; coercion of voters to select particular candidates;

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65   *Kegoro George 'Mary Wambui Petition Victory raises bias queries in Supreme Court Bench' May 9 2014 Daily Nation Available at http://mobile.nation.co.ke/news/Mary-Wambui-Supreme-Court-Case-Othaya-MP/-/1950946/2309146/-/format/xhtml/-/3ebgdiz/-/index.html*

66   *Constitution of Kenya 2010 Article 81 (v).*

67   *Elections Act of Kenya 2012.*

68   *Dersso Solomon A 'Technical problems threatening to spoil Kenya's smooth election process' African Arguments 6 March 2013 Available at http://africanarguments.org/2013/03/06/technical-problems-threatening-to-spoil-kenyas-smooth-election-process-by-solomon-ayele-dersso/*

69   *Africog 2013 'Election Day 2013 and its Aftermath'.*

violence; and differences in the declared results as witnessed at the county/constituency level and those announced in Nairobi'.[70]

The electronic systems employed by the IEBC also began to fail and results could not be announced as promised in 48 hours by the IEBC Chair Issack Hassan. The Chair claimed that a computer bug inflated the number of rejected votes which had reached an alarmingly high number prompting the Uhuru camp to pronounce that it would not accept the inclusion of rejected votes in the tally while Odinga's party CORD claimed that the vote tallying process had been manipulated and needed to be halted.[71] Problems also appeared in tallying of votes with discrepancies between results announced, missing forms and votes cast in some cases exceeding registered voters. Following the declaration that Mr Kenyatta had reached the 50 percent plus one required to be elected President, CORD moved to court challenging the result and some members of civil society petitioned the court claiming that the process was flawed and needed to be redone. A third petition was filed to prevent the inclusion of rejected votes in the final tally, which could potentially deprive Kenyatta of the majority needed to avoid a run-off. The proceedings of this petition were broadcast live on Kenyan Television and thus presented a national showcase.

The Supreme Court found that Uhuru Kenyatta had been validly elected President but the implications of the precedents it set for future elections were not activist. These implications will be examined below. The Supreme Court merged the petitions and according to its judgement was asked to rule on the following questions:

1. Whether the 3rd and 4th Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013.[72]

2. Whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.

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70   Africog 2013 'Election Day 2013 and its Aftermath'. p 2.

71   The East African 'Electronic Systems Meltdown causes long delays, affects credibility of Poll' 9th March 2013 Available at http://www.theeastafrican.co.ke/news/systems-meltdown-causes-delays-affects-credibility-of-poll/-/2558/1715830/-/2yrmdb/-/index.html

72   This is the crux of the case.

3. Whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd Respondent.

4. What consequential declarations, orders and reliefs this Court should grant, based on the determination of the Petition. [73]

The judgement found that rejected votes should not be included in the final total. The old Constitution provided for the counting of 'valid votes' while the new Constitution substitutes this with 'votes cast which could imply rejected votes.[74] However, according to Wachira Maina this overlooks the possibility of a deliberate spoiled ballot as a protest vote, 'Saying that rejected ballots don't count as "cast votes" implies that the person who goes to the queue and casts a protest vote against the candidates on the ballot is treated exactly as the one who stayed home. Maina contended that, "That is not the theory of our Constitution."[75] Further this may also violate the Constitutional Principle in Article 138 4 (b) that the President shall be elected if they receive 'at least twenty-five per cent of the votes cast in each of more than half of the counties'[76] The contention about whether rejected votes counts as cast votes or not was particularly critical because in a close election, it would affect the 50%+1 minimum threshold a winner requires to avoid a run-off.

Even more damning were the decisions made on the use of electronics and the voters register. Despite numerous instances of the failure of electronics at registration and transmission the final judgement of the court on the matter read 'as with all technologies, so it is with electoral technology: it is rarely perfect.'[77] The court did call for investigations into the reason for this failure although it is unclear if actions have been taken. The court however allows for the use of manual systems as a substitute which is in stark contrast to the recommendations of the Kreigler Report and the reasons for public confidence in the IEBC which included its electronic transmission. Whereas Article 86 (a) of the constitution does not compel IEBC to use a particular voting method, it stipulates that that method must be 'simple, accurate, verifiable, secure, accountable and transparent'. The application of technology in the voting

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73   *Petition No 5 of 2013 Raila Odinga vs the IEBC*

74   *Petition No 5 of 2013 Raila Odinga vs the IEBC*

75   *Maina Wachira 'Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test'
Saturday April 20th 2013 Available at http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-
Court-failed-poll-petition-test/-/434750/1753646/-/item/0/-/2659o5/-/index.html*

76   *Constitution of Kenya 2010 Article 138 (4) (b)*

77   *Petition No 5 of 2013 Raila Odinga vs the IEBC 233*

process and vote transmission thus could have gone a long way to guarantee credibility.[78] Multiple discrepancies were revealed in the now manual transmission of results, documented in an extensive dossier prepared by the civil society petition which was dismissed for late submission. Considering the possible import of such a report an activist judiciary should have included this documentation but dismissed it on a technicality. The judgement also found effectively that the presence of multiple registers was equal to the 'principal register' as outlined in law effectively meaning that the register could in future be whatever the IEBC deemed fit, while failing to account for the discrepancies in numbers between registers and results, 'the Court's decision on this point has kicked open the door to future election fraudsters.'[79]

The outcome of the election petition was also to place the burden of proof upon the petitions, a precedent that was cited several times in forthcoming election petitions. The petitioners had to prove not simply that there were anomalies but that these served to enhance the votes of one candidate over another. In sum the 'court failed to speak to the large majority of evidence questioning the voter register and the forms used to tally the results, both of which were at the heart of the petitioner's case. As the bedrock of a free and fair election, the voter registry is a crucial part of any electoral process…provides a check on fraud'.[80]

Following the conclusion of the Presidential petition 186 other election petitions were launched pointing in part to the problems in tallying and transmission of results. These petitions revealed an activist Court of Appeal in contrast to its historical restraint and a restrained High Court and Supreme Court that had to defend the precedents set in Petition Number 5, IEBC v Raila Odinga. Thus in the case challenging the election of of Peter Munya, the High Court and Supreme Court acted with restraint. The Court of Appeal found that there were errors in counting of votes so voided the result. The Supreme Court however, following the precedent set by the Presidential petition opined that the court of appeal misapplied the law by looking at the wrong questions because 'nullification of an election should not be based on errors unless such errors have an effect on the final outcome of the election results'.[81]

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78   Kaberia Judie 'Raila Asks Supreme Court to order Fresh Presidential Election' Capital FM News March 16 2013 Available at http://www.capitalfm.co.ke/news/2013/03/raila-asks-supreme-court-to-order-fresh-presidential-election/

79   Maina Wachira 'Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test' Saturday April 20th 2013 Available at http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/item/0/-/2659o5/-/index.html

80   Shah Seema ' Supreme Court Accepted A Deeply Flawed Election', The Weekend Star 29 April 2013 Available at http://www.the-star.co.ke/article/supreme-court-accepted-deeply-flawed-election#sthash.iT5npz04.dpbs

81   Kaberia Judie 'Munya Reinstated as Meru Governor by Supreme Court', May 30 2014 Capital FM News Available at http://www.capitalfm.co.ke/news/2014/05/munya-reinstated-as-meru-governor-by-supreme-court/

The Supreme Court is directly mandated to deal with the Presidential petition and per Article 163 'Appeals shall lie from the Court of Appeal to the Supreme Court— (a) as of right in any case involving the interpretation or application of this Constitution; and (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved'.[82] Thus petitioners had to prove that cases brought to the level of the Supreme Court met this threshold, however the precedent set by involvement in these cases set by the Munya case could result in a large number of cases ending up in their docket.

The case of Mary Wambui in Othaya who had a petition lodged against her for example was resolved on a technicality that allowed her to retain her seat. There were issues concerning the late submission of the petition and whether it was filed in time. According to the Elections Act the timeline of 28 days to file begins counting from gazettement while the Constitution says this begins 'within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission'[83] effectively when the Returning Office declares a result. The petition was filed in time according to the Elections Act but not the Constitution and this issue was not raised in the High Court or the Court of Appeal. The Court of Appeal nullified her election, a decision which was set aside by the Supreme Court on this technicality as the case of Sabhal vs Joho (also arising from the 2013 elections) created a precedent that the Constitution overrode the Elections Act.[84] The Supreme Court allowed itself to address this issue because it was in the 'public interest' which raises questions over whether all elections can be seen as such thus making the Supreme Court an electoral court.[85] Similarly in the case of Migori County, the Supreme Court overturned a Court of Appeal decision nullifying the election of Okoth Obado and ordering a by-election.[86] When the Supreme Court set aside this ruling it criticized the Court of Appeal of 'overstepping its mandate in reviewing new evidence'.[87] In correct interpretation of such technicalities in filing petitions, any statutory rule or rule of procedure such as the Elections Act 2011 that contradicts the spirit of Article 87 and 105 (2) and (3) is null and void.

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82   *Constitution of Kenya 2010*

83   *Constitution of Kenya 2010 Article 87 (2)*

84   *Kegoro George 'Mary Wambui Petition Victory raises bias queries in Supreme Court Bench', May 9 2014 Daily Nation Available at http://mobile.nation.co.ke/news/Mary-Wambui-Supreme-Court-Case-Othaya-MP/-/1950946/2309146/-/format/xhtml/-/3ebgdiz/-/index.html*

85   *Kegoro George 'Mary Wambui Petition Victory raises bias queries in Supreme Court Bench', May 9 2014 Daily Nation Available at http://mobile.nation.co.ke/news/Mary-Wambui-Supreme-Court-Case-Othaya-MP/-/1950946/2309146/-/format/xhtml/-/3ebgdiz/-/index.html*

86   *Musa Kurian 'Migori Governor Okoth Obado fights to retain seat', April 4 2014 Daily Nation Available at http://www.standardmedia.co.ke/thecounties/article/2000108582/migori-governor-okoth-obado-fights-to-retain-seat*

87   *Muraya Joseph 'Obado is Migori Governor – Supreme Court', July 17 2014 Capital FM News Available at http://www.capitalfm.co.ke/news/2014/07/obado-is-migori-governor-supreme-court/*

Recent Developments in Kenya

Because Judicial Activism occurs outside the context of Election petitions as well, it is important to consider a few other examples in Kenya . The case regarding the appointment of the Ethics and Anti-Corruption Commission[88] has been cited by critics of judicial activism in Kenya. This case revolved around a challenge to the appointment to the position of the Chairperson of the Ethics and Anti-Corruption Commission of Mr. Mumo Matemu because there were questions about his integrity. In its ruling, the High Court stated that 'for failure to pay due attention to the information that was available which touched on his integrity or suitability,' [89] the appointment would be nullified.

It may be argued that looking at the social context, particularly the importance of curbing corruption, this activism was justified. It is debatable if the decision itself was activist as this may simply have been a case of having the power to review actions thought to be unconstitutional, however. Furthermore, the newly reformed judiciary is a recent development and it is likely too early to tell whether it is activist or not.

In an advisory opinion on the two thirds gender rule, the Supreme Court said that this would not be possible within the time frame suggested but only progressively.[90] The President of the Court offered a dissenting opinion thus:

'Parliament by its silence cannot deprive the women of this country the right to equal representation. I take judicial notice of Parliament having a short period before it is dissolved, but I do not see Parliament refusing to legislate in a matter like this that affects the majority of the voters in this country.'[91]

An activist judiciary in the mould described by critics would possibly have taken this direction. The question of which ruling is or would have been activist does not arise in the critique as it is not considered that the progressive implementation of the gender rule may have a higher likelihood of successes than a sudden imposition.

It is also important to note that the legislature not only failed to put into place the measures needed to achieve this rule but the Executive did not make any significant moves to correct this imbalance in the gender rule either. This augments the proposition that in Kenya the role

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88   *Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR*

89   *Ibid*

90   *In the matter of the principle of Gender representation in the National Assembly and the Senate (2012) eKLR*

91   *Ibid*

of the judiciary is far more important than in most states with a developed set of institutions. It is for this reason more than any other that Kenya must have an activist judiciary.

The Judiciary has even demonstrated a willingness to go against the State when it violates Constitutional principles. The Security Laws Act was passed by the legislature due to the majority enjoyed by the ruling coalition. Its provisions included restrictions on the media, expanding the definition of radicalization to possibly include activism and limiting rights of the detained[92] however, many of these principles were declared unconstitutional by the court because they infringed on the Bill of Rights. Thus it appears that even though it may have failed its most public chance to put forth progressive values there are still activist sentiments within the Judiciary.

Conclusion

To sum up, judicial activism has endured a negative connotation from its usage in the wider debates between Republicans and Democrats in the United States. It remains a problematic term to define as it is subjective. The degree to which one considers the activities of the judiciary as developing law, or interpreting it according to the letter of the law or precedent determines whether one considers it activist or not. A far less politically ignited term that may be used would be judicial independence, in terms of considering the freedom to make decisions a function of that independence.

Judicial activism, when brought to bear upon Kenyan politics, is certainly impregnated with negative connotations decrying a judiciary seen to have overstepped its mark. As has been shown, the context of the American practice different from ours. The American political system is far more 'developed' and enjoys a strong legislature, executive and other political institutions. Kenya does not. Yet as a nascent democracy, the independence of the judiciary is paramount, particularly when the other two arms of government do not enjoy public confidence.

The 2013 Election petition demonstrated the manner in which a restrained judiciary can stall electoral reform. It is likely that the next General Election will use the standards set therein as a benchmark for what is required. More broadly, the Constitution is a liberal constitution and as such it needs a strong activist judiciary to interpret it particularly in its infancy. The constitution was the outcome of a reform agenda that began in the early 1990's with the push for multi-

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92   *Human Rights Watch 'Kenya Security Bill Tramples Basic Rights', December 14 2014 Available at http://www.hrw. org/news/2014/12/13/kenya-security-bill-tramples-basic-rights*

party democracy. The constitution came to symbolize the hope of the Kenyan people for a better system of governance. However, with the new judiciary oscillating between activism and restraint depending on the relative weight of a case before it and the level of the court handling a given case, it is difficult to predict how the courts will behave in future elections. One can only speculate that given that elections and election petitions are essentially fierce struggles over control of state power, and therefore ultimately a weighty issue, electoral dispute resolution through the judiciary is unlikely to exhibit judicial activism.

As is the case in India, to paraphrase the words of Bhagwati, let the Kenyan judiciary become a symbol of hope for Kenyans.

Chapter 6

Nosy or Neutral? Evaluating the Security Sector in Kenya's 2013 General Elections -
Nicholas Ondoro, Fred Otieno

Introduction

The 2013 general elections in Kenya were a watershed moment in the country's electoral history. It delivered a 'peaceful' transition of power despite political tensions that threatened to plunge the country into another wave of post-election violence (Cheeseman et al., 2014). The elections were not only critical for Kenya's democratic transition, but also served to demonstrate the progress (or lack of it) Kenya had made in the aftermath of the post 2007/08 political crisis. The elections were also the first major test for institutional transformation under Agenda Four reform package of the Kofi Annan led Kenya National Dialogue and Reconciliation Process, hereafter referred to as KNDRP, including the Independent Electoral and Boundaries Commission (IEBC), reformed judiciary and reformed security sector, particularly the police service.

Most election observers, both domestic and international, returned a free and a fair elections verdict despite the challenges witnessed throughout the electoral process. Preliminary and final reports (AU Commission, 2013; Carter Center, 2013; ELOG, 2013; EU Commission, 2013) all gave the polls a general 'thumbs up'. The reports however remain largely ambiguous, making it difficult to draw conclusions on whether the elections represented the will of the voters or did not.[93] The elections were relatively peaceful. Some analysts argue that this relative peace may have contributed to lack of proper scrutiny of the electoral process. Ferree *et al*., (2014) note that Kenyans overlooked significant faults in the process leading to the general elections. Others have argued that 2013 was another 2007, reiterating the fact that the elections were flawed, and had the potential of causing another post-election violence (AfriCOG-KPTJ, 2013). The relative peace that existed during the 2013 general elections is

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93   *For more discussions on Election Observer Missions, see the chapter; 'Inside the "Democracy Police" Station: An Assessment of Election Observers in Kenya's 2013 General Election' in this Volume.*

therefore filled with negative content, and is akin to Johan Galtung's *negative peace* (Galtung, 1996). The debates around the conduct of the elections exemplify this position. Rather than engage in constructive debates to fix the flaws in the 2013 electoral process, the Jubilee Alliance remains recalcitrant, while Coalition for Reform and Democracy (CORD) seeks total disbandment of the Independent Electoral and Boundaries Commission (IEBC). The net effect is a polarized environment that sets the stage for possible electoral related violence in future elections.

Two incidents bring to the fore questions regarding the role of the security sector actors in the 2013 general elections. First, while addressing a political rally in Kisumu in January 2014, Raila Odinga, the 2013 presidential election loser, likened the events at the National Tallying Centre for the 2013 presidential election at the Bomas of Kenya to a military coup. He claimed that the country's military chiefs helped Uhuru Kenyatta to rig the 2013 presidential elections.[94] Secondly, the Kenya Television Network's (KTN) *Jicho Pevu/The Inside Story* (Ali and Namu, 2014) serialization of the conduct of the elections alleged that the IEBC and security sector actors engaged in electoral malpractices. These allegations provided the impetus for the opposition to push for the disbandment of the IEBC. Despite the allegations, Kenya's military does not have a history of open involvement in politics, though it has provided aid to civil authority in special circumstances, such asduring the 2008 post-election violence. On the other hand, the intelligence service and the police have been invariably accused of involvement in electoral malpractices, particularly during President Moi's reign[95]. Raila's remarks drew immediate reaction. The Independent Electoral and Boundaries Commission, National Security Advisory Committee and the Jubilee Alliance demanded immediate apology from Raila and urged the Director of Public Prosecution (DPP) to charge Raila for incitement (Momanyi, 2014; Ndonga, 2014). While Raila's CORD coalition stood with Raila over the remarks, Kajiado Central MP, Joseph Nkaisery, himself a retired military officer differed with his colleagues and cautioned Raila to stop playing politics with the military. Ethnic fault-lines dominated response to Raila's allegations and KTN serialization. Thus, Kenyans missed the opportunity to debate the allegations objectively.

The foregoing incidents are significant to this chapter for two reasons. First they are characteristic of the behaviour of the Kenyan political elite –always turning to their ethnic

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94   *In a rhetorical question, Raila alluded to tribalism in the forces and noted that former President Kibaki was aware of the scheme. He also added that the Jubilee coalition 'had to take it by force and use it as a shield to protect themselves in the case they have over there' (the International Criminal Court at The Hague), and that the 'Supreme Court judges were threatened' (Rushdie et al., 2014).*

95   *See Branch (2011); Hornsby (2012) for further discussions on the involvement of the police and the intelligence on electoral processes in Kenya.*

communities only when their individual interests are threatened. Kisumu is not only the base of Raila's support, but also dominated by the Luo, Raila's ethnic community. Kisumu was also the centre of confrontations between the security forces and the public in the 2007 general elections. In fact, over 80 percent of the deaths reported in Nyanza were from gunshot wounds in 2007/08 post-election violence (Kanyinga *et al*., 2010a), and the region still had one of the highest security forces deployments during the 2013 elections (Long *et al*., 2013). Secondly, the substance of the allegations also raises questions about the efficacy of the wider liberal democracy project in Africa. It is not unusual for presidential election losers to make claims of electoral malpractices by the security organs even when election observers return free and fair election verdicts. From Ethiopia to Uganda, Cote d'Ivoire to Rwanda, Ghana to Zimbabwe, perceived or real interference in the electoral process by the security actors is a pointer towards the fact that defining democracy in terms of elections remains an inadequate endeavour.

Whilst these developments should have offered a chance to effectively interrogate the role of the security sector in Kenya's 2013 elections, they generated ethnic undertones with the net effect of sweeping under the carpet what would be genuine discourse, not only on the integrity of the 2013 elections, but also on the future of competitive politics in Kenya. This chapter revisits this debate by interrogating the role of the security sector actors in Kenya's 2013 general elections. *What was the role of the security sector in the 2013 general election? Should the security sector reforms during Kenya's power-sharing period (2008-2013) take credit for the peaceful 2013 elections?* Clearly, these are not easy questions to answer. By the very closed nature of Kenya's security system, investigating the role of the security sector actors in the 2013 elections remains a difficult task. Accountability mechanisms in Kenya's security sector still remain weak despite the ongoing reforms of government agencies and the IEBC has demonstrated lack of transparency in how it conducted the 2013 general elections. However, electoral malfeasance is hard to prove especially in transitional societies characterized by weak institutions (Kanyinga et al., 2010b). Under these circumstances, this chapter does not claim a ground breaking treatise, but forms the basis upon which the role of the security sector actors in Kenya's future elections could be further analyzed.

The discussion rests on three conceptual pillars namely: democracy, power-sharing, and security sector reforms. The part that follows discusses these conceptual pillars. Points of contestations and convergence on these concepts amongst scholars are discussed with the view to locating Kenya's position in the debates, particularly in relation to the 2013 general elections. In doing this, Kenya's democratization process is analyzed within the democratic transition paradigm and the role of Kenya's security sector in this process is evaluated. The

power-sharing period (2008-2013) forms the context within which the security sector reform process is analyzed with the view to determining the extent to which the reforms contributed (and/or constrained) to the peaceful 2013 general elections. The third part examines conduct of the 2013 general elections particularly examining whether the security sector was 'nosy or neutral'. The final part draws key conclusions and provides study lessons for security sector reform and electoral processes in transitional societies, going forward.

Clarifying Concepts

Democracy

The concept of democracy remains a controversial one. It means different things to different people, ranging from minimalist concern with election procedures to sweeping prerequisites for socio-economic equality. Liberal conceptualisations consider democracy to be attainment of institutional guarantees that unfold within the transitional paradigm. This includes the opening, breakthrough and consolidation (Murunga and Nasong'o, 2007). At the *opening stage* of the transition paradigm, a fault line emerges between *hardliners* and *soft-liners* in an authoritarian regime. This is followed by *the breakthrough* characterized by the collapse of the regime and followed by the emergence of a democratic system and the coming into power of a new government through elections. The post elections period is followed by *consolidation* in which the democratic forms are transformed into democratic substance through reforms of state institutions, regularization of elections, strengthening civil society and the overall habituation of society into the new democratic norms.

The more a country gravitates towards institutional guarantees, the more democratic it tends to be. Most countries however exhibit attributes of democratic life including limited space for opposition parties, independent media and civil society and democratic constitutions, while at the same time suffering from democratic deficits including poor representation of citizen's interest's abuse of law by government and state security agencies and elections of uncertain legitimacy amongst others. This situation creates a political grayzone (Carothers, 2002; Diamond, 1996) in which countries are neither fully authoritarian nor fully liberal democracies. Given the substantial number of countries within the grayzone, different 'shades of democracy' or 'qualified democracy' terms have emerged that characterize these states. These include semi-democracy, formal democracy, electoral democracy, façade democracy, pseudo-democracy, weak democracy, partial democracy, illiberal democracy, and virtual democracy (Collier and Levitsky, 1997). These 'adjectivized' democracies describe countries stuck somewhere in the transitional paradigm, most of them in the consolidation phase.

Drawing from O'Donell (1994), O'Donnell and Schmitter (1986), Carothers (2002) argues that to describe countries in the grayzone as democracies is to apply the transition paradigm to the very countries whose political evolution call the paradigm to question. Taking the case of Kenya, would it suffice to say that Kenya is at the consolidation stage? The elections in 2002 probably marked a transition from Moi's authoritarianism. However the transition was later marked with reversals that resulted into to the 2007 post-election violence.[96] In the same vein, Agenda 4 Reforms (2008-2013) may be viewed as consolidation period after the 2007 tragedy.

The Kenyan case therefore demonstrates that there has never been a complete break with the past. From Jomo Kenyatta to Uhuru Kenyatta, the process of democratization has been superficial. The struggles to remove the colonial government did not yield meaningful democratic change. Jomo failed to deconstruct the colonial state. Under the colonial administration, security was constructed in terms of protection of white settlers and their property, the colonial administration, and mobilization of natives for labour and containment of the African populations. Jomo Kenyatta did not dismantle this architecture, but rather strengthened it. Jomo's agenda for the immediate post-independence Kenya was consolidation of power. He dismantled the federalist system (*majimbo*) that was negotiated in the run-up to independence thus giving way to patron-client system in which competition for state resources revolved around ethnic identity. The desire to control the colonial instruments of power culminated in the Constitutional Amendment Act No.16 of 1969 which empowered the senior Kenyatta to control the civil service. This amendment effectively put the civil service and the local governments directly accountable to the central government (Murunga and Nasong'o, 2007: 29). The security committees were in control of the central government through the provincial commissioners, district commissioner and district offers and up to the villages through the chiefs.

If Jomo Kenyatta thrived on the provincial administration, Moi followed in his footsteps. Like his predecessor, consolidating a power base was on top of Moi's agenda. The change the constitution debate in the late 70s[97] and the 1982 attempted coup by the Kenya Air Force (KAF) (Branch, 2011; Hornsby, 2012) which attempted to undermine Moi's leadership had a profound impact on control of the security sector. They provided a window of opportunity for Moi to entrench his rule in the security sector. He systematically altered the roster of

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96   See Kanyinga and Okello (2010) for elaborate debates on these reversals.

97   *The change the constitution debate was started by the Kikuyu elite before Kenyatta's death ostensibly to block Moi from succeeding Kenyatta. For these discussions see Hornsby (2012: 323-330).*

participants[98] who perpetuated patron-client networks under Kenyatta regime, replacing them with appointees sympathetic to his cause, for the purpose of achieving the most favourable security sector policy venue, while at the same time suppressing the agenda of those opposed to his rule. Thus, the changes in the security sector that emerged during the formative stages of Moi's rule was that of 'de-kikuyunisation' to 'kalenjinisation'- in this case, using the ethnic card to secure Moi's hold on to power.[99]

The 2002 general elections was a dramatic moment for the country. It ushered in new leadership that thrived on the much needed reforms. Though the transition was framed on reform agenda, it was a lost opportunity in Kenya's democratization process. Kibaki paid less attention to the need to balance regional and ethnic interests. In particular, the security sector became under the control of appointees from Mt. Kenya region. It was time again to use the ethnic card used by Moi to install Kibaki's men. As a result, 'by 2006, the permanent secretary for Internal Security, and the Criminal Investigations Department (CID), General Service Unit (GSU), Presidential Escort and National Security Intelligence Service(NSIS) heads –all Kalenjin in 2002 –were all Kikuyu, Embu or Meru' (Hornsby, 2012: 713). Whilst it was rational to have trusted people controlling the security, it was obvious that this trust was by ethnicity.

President Uhuru inherited a security sector whose leadership was perceived to be ethnicized by the Kibaki administration. Unlike his predecessors, Uhuru did not immediately change the leadership of the security sector. Three possible reasons explain Uhuru's delay to reconfigure the ethnic composition of the leadership of the security sector. First, Uhuru may have taken cue from his predecessor whose trust in the leadership of the security sector seemed to have been motivated by ethnicity. Secondly, the smooth transfer of power to Uhuru midwifed by the security sector actors in a contested election may have instilled a sense of confidence in the security chiefs. Thirdly, the reform undertaken during the power-sharing period granted independence to the security institutions, hence the challenge in replacing individuals within such institutions. However, in response to runaway insecurity in Kenya and pressure from both within and without the ruling Jubilee Alliance, Uhuru had to reconfigure the leadership of the security sector.

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98   *Altering rosters in this context means replacing political appointees in such institutions. For further clarification, see the debates on policy image and policy venue in Baumgartner and Jones (1991), originally derived from Schattschneider (1960) conflict expansion arguments that losers in a policy debate have the motive to change participants by replacing them with those sympathetic to their position.*

99   *De-Kikuyunisation and Kalenjinisation as used in this context refer to Moi's deliberate move to restructure the civil service and the state-owned enterprises, removing a significant number of the members of Kikuyu community who previously dominated these sectors during Kenyatta's regime and replacing them with members of his Kalenjin community respectively (Hornsby, 2012).*

First was the reshuffle in the military on 30 July 2014. Though this was consistent with the military guidelines on promotions and retirement, it was seen as a wider game plan to succeed Julius Karangi, the Chief of Defence Forces with the newly appointed Kenya Air Force Commandant reportedly being the *'man to watch'* (Ombati and Gisesa, 2014). President Uhuru Kenyatta however remained committed to the constitution and the principle of civilian oversight of the security sector. He promoted and appointed Samson Mwathethe to the position of the Chief of Defence Forces on the advice of the National Defence Council. This appointment was important as it was in keeping with the military tradition of the position of the Chief of Defence Forces rotating amongst the top generals in the three services namely; the Kenya Army, Kenya Air-Force and the Kenya Navy.

The second and perhaps the most significant was the resignation on 'personal grounds' of the Director General of the National Intelligence Service (NIS) Major-General Michael Gichangi on 14 August 2014.[100] This triggered a chain reaction that led to a power-shift within the National Security Advisory Committee (NSAC). Key figures in NSAC during the elections had either been replaced or remained in NSAC but with less influence. Francis Kimemia, the former Head of the Civil Service and NSAC Chair was transferred to the less glamorous post of Secretary to the Cabinet, Mutea Iringo was transferred from Principal Secretary Interior to Defence. The two were later to step aside to allow for investigations on corruption allegations against them. Whilst President Uhuru may have appeared hesitant to reshuffle the leadership of the security sector, the exit of Gichangi, the retirement of Karangi and the fight against corruption provided an opportunity to reconstitute NSAC team that facilitated the peaceful 2013 elections, but nevertheless perceived to be partisan.

The role of security sector in a democracy cannot be overemphasized. The provision of security – the sense among citizens and communities that the routines of their lives are reasonably protected by the actions of social control apparatuses of the state –is one of the basic demands laid against the state by its society (Caparini and Marenin, 2004). It is in this light that the Kenya Defence Forces; the National Intelligence Service; and the National Police Service - the three constitutionally recognized security organs- are charged with the responsibility of promoting and guaranteeing national security in accordance with Article 238(2) of the Kenyan Constitution.[101] The Kenya Defence Forces are empowered to defend

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100   Though the statement from the State House indicated that Gichangi resigned on 'personal grounds', there were speculations in the media that he may have been forced to resign by the Executive. Issues including his role in the ICC, poor working relationship with the Chief of Defence Forces and terror attacks in Kenya are cited as responsible for his exit. See (Mathenge and Mbaka, 2014).

101   Article 238(2) emphasizes the ideals of constitutionalism, liberalism, inclusivity and diversity in the operations of the security organs.

and protect territorial integrity and provide aid to civil authority in situations of emergencies and disaster. In the same vein, the National Intelligence Service is responsible for security intelligence and counter intelligence to enhance national security while the National Police Service is responsible for maintenance of law and order (GoK, 2010).

In exercising their respective mandates, the constitution subordinates the security organs to civilian authority through parliament and the constitution. Further, the National Security Council established under Article (240) of the constitution exercises supervisory control over the security organs. The National Security Council comprises the president and his deputy, the security chiefs, the respective cabinet secretaries responsible for defence, interior and foreign affairs and the Attorney General (GoK, 2010). Kenya's security architecture is organized around the Kenya Security Intelligence and Machinery (KSIM), through which security intelligence is generated and shared in government.[102] Before the promulgation of the 2010 Constitution, KSIM was made up of the Cabinet Security Committee (CSC), the National Security Advisory Committee (NSAC), the Joint Security Intelligence Secretariat (JSIS), the Provincial Security and Intelligence Committee (PSIC) and the District Security and Intelligence Committee (DSIC). In principle, there was no fundamental change in the security architecture even with the promulgation of the new constitution. There was only a little adjustment to conform to the new devolved structures introduced by the 2010 constitution. The Provincial Security and Intelligence Committee (PSIC) was replaced by the County Security and Intelligence Committee (CSIC) while the District Security and Intelligence Committee (DSIC) was reconfigured into Sub-County Security and Intelligence Committee (SCSIC) to reflect the devolved structure. The County Commissioners and Sub-County Commissioners still chair these committees despite contestations that there is no provision for the provincial administration in the constitution.

Power-sharing

Powersharing agreements have in the recent times become popular tools of resolving conflicts in countries in emerging from political crisis. Spears (2000) defines powersharing as a situation whereby government posts are distributed across the most powerful political parties or groupings. Rothchild and Roeder (2005) however distinguish between powersharing institutions and policies to imply formal arrangements in the former and polices that can be formal or informal in the case of the latter.

Whilst different interpretations of powersharing abound, consociationalism (Lijphart, 2008) remains the most cited form. According to Lijphart (2008), societies divided by sharp cultural

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102 *See Appendix B of Waki Commission (2008)*

or ethnic, racial and religious differences are more likely to experience political instability. However, there are instances where such differences do not necessary lead to instability—the societies remain divided yet stable. These are 'consociational democracies' (Lijphart, 2008). In a consociational democracy, leaders of rival sub-cultures may engage in competitive political behaviour thus causing immobilism, they may also make deliberate efforts to counteract the immobilising and un-stabilising effects of fragmentation. Lijphart's early consociational democracy focused on grand coalition, in which power is shared among different factions forming the coalition government. In the 1990s however, the descriptions developed to include three other features namely; cultural autonomy, proportionality and minority veto. Though all the structures described by Lijphart (2008) were present in Kenya's powersharing, the Grand Coalition and devolution remained the primary focus around which post 2007 transformation agenda revolved and upon which proportionality and minority veto invariably determined the reform process.

Reforms of the security sector remain central in power-sharing arrangements. In Zimbabwe for example, the Global Political Agreement (GPA) of 2008, which led to the creation of the Government of National Unity (GNU), made explicit the recognition of the need to make the security sector part of the democratic process, while Kenya's National Accord recognized institutional reforms, including judicial, police and civil service, as critical if the country were to remain a unified nation-state.

Proponents of power-sharing advance a number of advantages of the model as a peacebuilding tool in deeply divided societies. It provides incentives to soften stance of protagonists through close proximity to power (Cheeseman and Tendi, 2010). Skeptics however argue that power-sharing is appealing in theory yet fails so often in practice. It is considered as a means by which losers hang on to power and legitimize their rule through post-election pacts. LeVan (2011) for example argues that in cases where elections are flawed, power-sharing undermines accountability, increases budgetary spending, and creates conditions for policy gridlock. In exploring the hidden costs of power-sharing, Tull and Mehler (2005) argue that power-sharing is a western tool of resolving conflicts that acts to encourage other would-be-leaders to embark on the insurgency path, while Magaloni (2008) maintains that power-sharing is an alternative tool to repression used by dictators to survive in office through co-opting rivals with power positions.

The power-sharing context in Kenya led to a contested environment for the security sector reform process. The challenges posed by the political elite, ostensibly to control the security sector remained one of the greatest threats to the security sector reform process particularly

with reference to the police. Whilst the reforms in the police sector under power-sharing arrangement sought to promote accountability to the citizenry by dispersing powers previously exercised by the President in the oversight of the security forces to the independent offices and commissions, appointments to such offices and commissions remained contested. Politicians defined the compositions of commissions with oversight role in the security sector. In the process, the independence of such offices has been watered down.

Two phases of the security sector reform processes are discernible under Kenya's power-sharing context. The period immediately after the 2007 post-election violence (2008-2009) marked the agenda setting phase. During this phase, there was elite consensus, albeit with some contestations, on the need to reform state institutions, including the electoral system and the security sector. The reforms were pursued through the review of the 2007 electoral process (Kriegler, (2008) and the task force on police reform (Ransley, 2009) respectively. The parties that had opposed each other, ODM and PNU, in the 2007 deeply contested elections also pulled together to support the revision of the constitution in 2010 which provided the anchorage and framework through which the reforms would be implemented.

The period after the promulgation of the 2010 Constitution marked the implementation of the reform agenda set immediately after the elections. It also cushioned the process from political interference. However, as it turned out, vested political interests with the 2013 elections in sight frustrated the reform process. The reforms were implemented to the extent that they did not disempower the elite exercising such powers within the grand coalition.

Because of its inability to wield influence over powerful ministries,[103] ODM, the dominant party in CORD, approached the 2013 elections from a perceived disadvantaged position despite having been in close proximity to power. The result was a power-sharing arrangement in which the ODM side perceived the PNU side to be using its dominance to frustrate reform efforts that would lead to a fair electoral contest in the 2013 general elections. However debates on *who controlled what* under the coalition arrangement had been overtaken by events. CORD had to contend with the situation they found themselves in-that of failing to be strategic during the negotiations for power-sharing arrangement. The following section analyzes the security sector reform process that emerged and determines whether these were sufficient to deliver credible 2013 elections.

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103   *In particular, the ministry of Internal Security and Provincial Administration, was seen as having the potential to provide the required patronage of state resources hence largely remained one of the contested ministries under power-sharing arrangement.*

Security Sector Reforms

Understanding who provides security and justice is central to security sector reform (IDS, 2012). Thus, what constitutes the security sector is the point of departure in conceptualizing security sector reform (SSR).[104] For analytical purposes, this chapter conceptualises the security sector to mean all those state institutions legally mandated to ensure safety of the state and its citizens and also the civilian authorities involved in the management and control of the security forces as well as the defence and internal ministries and parliamentary committees. Though a narrow and state-centric approach, it provides an ideal framework for understanding and discussing the role of Kenya's security sector in the 2013 elections. Reforms of the security sector therefore imply a deliberate process that seeks to make the provision of security more effective, efficient and accountable. All these are presumed to be consistent with the democratic norms and principles of good governance. In terms of electoral processes, security sector reforms were intended to make the sector impartial and secure the environment for successful election after the 2007 post-election tragedy that befell Kenya.

The clamour for reforms in Kenya's security sector was at its highest peak in the 1990's. Moi's firm grip and control of the security sector, particularly the police and the judiciary invited civil society groups and other pro–democracy groups to agitate for reforms. It is in this light that upon the expiry of Moi's constitutional term limit, the Kenyan polity gave Mwai Kibaki a resounding victory against Uhuru Kenyatta, President Moi's preferred candidate in the 2002 general elections. Kibaki's 2002 campaign platform was purely based on the reform agenda, a strategy that resonated well with the public mood.

Kibaki's first major bold step to reform the security sector was under the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme –hereinafter referred to as GJLOS. A number of reform initiatives were undertaken in the security and justice sectors.[105] In particular, the improvement of policing and security as fundamental prerequisites of economic growth were prioritized. Though the construction of the reform process under GJLOS seemed inclusive and brought donors, government and a couple of civil society groups, donor

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104   For the different interpretations of the security sector see; Schroeder and Chappuis (2014) Brzoska and Heinemann-Grüder (2004); Greene (2003); Hendrickson (1999).

105   GJLOS prioritized reform in the: Governance, ethics and integrity, including the fight against corruption; Improving respect for human rights in government institutions; Enhancing access to justice, particularly for the poor, marginalised and vulnerable; Crime prevention, police reforms (including community policing) and penal reforms (particularly decongestion of prisons); Strengthening public prosecutions and legal services available to the public; and Reformist-led capacity building with a focus on attitude and culture change.

influence remained predominant and therefore remained an externally driven process (Akech and Mbote, 2011).

Mixed reactions greeted Kibaki's reform credentials in general. Supporters argued that there were far reaching reforms during Kibaki's tenure, while others were of the opinion these were not enough especially in relation to the security sector. Critics of Kibaki's reform credentials argued that there was no break from the past (Branch, 2011; Shilaho, 2013). More significant is the suggestion that the reform during this period did not meet the normative criteria of security sector reforms - that of making the provision of security more effective and efficient under the democratic control. The security structures upon which impunity during Kenyatta and Moi regimes thrived were never dismantled and the players in the security sector remained opposed to genuine reform initiatives.

The intelligence and the military remained well funded compared to the police, while inter-agency rivalry between the Administration Police and the regular Police thrived due to the perception that the Administration Police was getting preferential treatment in terms of training, recruitment and funding (Onsarigo, 2009). In fact, the phenomenal growth in both capacity and the resources of the Administration Police raised fears that the force was being strengthened for the sole purpose of bolstering Kibaki's presidency (Hills, 2007). It was not therefore surprising that during the 2007 general elections, reports of involvement of the Administration Police in electoral malpractices emerged. Both print and electronic media, for example, KTN ran an exclusive story on how some 2,500 APs were being trained to interfere with the 2007 presidential elections (Kriegler, 2008). Indeed, the National Security Intelligence Service in its submission to the Waki Commission confirmed that there were such claims.[106] However both the Waki and Kriegler Commissions could not verify the reports.

These investigations point to the difficulty of confirming the involvement of the security sector actors in rigging even where there are reports that appear credible in linking the security actors to electoral malpractices. Waki and Kriegler however noted acts of omissions and commissions by the security sector organs and suggested reforms in those sectors. The commissions made far reaching recommendations regarding security reforms in relations to overall operational and service delivery and also in relation to the electoral process. However, the reform that emerged out of the power-sharing deal between Kibaki and Raila had strong reform component relating to the police to the exclusion of the intelligence and the military. This could be attributed to the fact that the police were the most visible security sector actors in the electoral process.

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106   *See Waki Commission (2008: 364)*

A number of reforms in the police sector were thus instituted during the power-sharing period. There was a change of name from *police force* to *police service* to demonstrate a break with the past, where the focus was on the regime survival rather than service to the citizens; the administration police and the Kenya police were merged into the National Police Service (NPS) under the command of the Inspector General of police. The office of the Inspector General was established under the constitution and cushioned from political and executive interference. Above all, for the first time in the history of the republic the National Police Service Commission (NPSC) was established to take care of the welfare of police officers and external/ civilian oversight of the police guaranteed through the establishment of the Independent Policing Oversight Authority (IPOA). Incidentally, most of the reforms in the security sector were limited to the police. The structure and organization of other security organs remained the same. The governance of Kenya's security Kenya's security sector remained intact and depended on presidential attitude.

With reference to the conduct of the security sector in the 2013 elections, electoral management reform within the framework of the IEBC complemented the lethargic reform undertaken within the police service. The Election Act 2011 which prohibited the use of 'a public officer, or the national security organs to induce or compel any person to support a particular candidate or political party,'[107] coupled with the merger of the regular police and the administration police meant that the police approached the elections as a cohesive unit, unlike in the year 2007 in which the security forces were polarized. The regular police was said to be sympathetic to ODM while a large part of the Administration Police and its leadership was said to have sympathies for the Party of National Unity (PNU) (Katumanga, 2010). With a unified command under the Inspector General in the 2013 elections, there was no chance of apportioning blame for electoral malpractice to any of the formations in the police. More significant, the Assumption of the Office of President Act No. 21 of 2012 provided clear guidelines on the transfer of instruments of power and detailed the security and swearing in of the president-elect. These arrangements were a complete departure from the 2007 in which Mwai Kibaki was hurriedly sworn in for a second term.

While institutional reforms were articulated in Agenda Four of the KNDRP, the security sector reform process that emerged emphasized more on police reform to the exclusion of the intelligence and the military. Even then, these focused on building the capacity of the police rather than enhancing accountability. Four developments before and around the election cemented the impression that the security architecture and the oversight mechanism was controlled by the Jubilee Alliance. First, was the appointment of Katoo Ole Metito, Uhuru

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107   See Article 66 of 'The Elections Act' 2011)

Kenyatta's close associate, in September 2012 as the Minister for Internal Security. Second, was the fact that the Parliamentary Oversight Committee on National Security was chaired by Fred Kapondi of URP. Third, the perception that NSAC was dominated by officials viewed to be sympathetic to Uhuru Kenyatta. And, fourth, the security briefing of the president-elect and his deputy by the state's top security officers where the incumbent president was present before swearing in and when the opposition was preparing to challenge the election outcome in court was viewed as subtle intimidation. Although the Assumption of the Office of the President Act 2011 stipulates that a presidential elect can request for such a briefing, there was no clarity as to whether that is possible if the election is being challenged in court.

Without the accountability mechanisms, it remains difficult to put to account those responsible for the failures in the 2013 elections, including the security sector actors who may have contributed to such failures. With the perception that the attitude of the security sector favoured the Jubilee Alliance, the next section evaluates whether the security organs interfered, were (nosy) or remained impartial in the 2013 general elections.

Nosy or Neutral: The 2013 General Elections and the Security Sector

The role of the security sector in the electoral process is to provide and maintain security for voters and electoral officials during elections. The aim of this service is to ensure conducive environment for the conduct of elections (Ajayi, 2006). The overall implementation of the election procedures however is the responsibility of the electoral body. Thus, the imperative to ensure peaceful 2013 election hung heavily on Kenya's security sector and the IEBC in the face of tensions in the country and unfinished post 2008 reform agenda. There were fears the reform agenda had not effectively tackled the underlying causes of the 2007 post-election violence hence the possibility of another relapse. The International Crisis Group (ICG) for example noted that the drivers for conflict—continuing reliance on ethnicity, competition for land and resources, resettlement of internally displaced people (IDPs), and poverty and youth unemployment (ICG, 2013) remained alive despite reforms after the 2007 post-election violence. Amnesty International declared that the Kenya police reform process was a drop in the ocean and doubted the police capacity to deliver credible elections (Amnesty International, 2013).

The hopelessness in the security sector ahead of the vote also raised questions about the preparedness of the sector. The Minister for Internal Security and his Assistant died in a mysterious plane crash in June 2012. Ethnic composition of those leading the security sector

remained a subject of debate and the appointment of the Inspector General of Police who was expected to make security arrangements in the elections was delayed due to wrangles within the coalition. A section of the political elite happy with the then Commissioner of Police argued for postponing of the process of appointing the inspector general citing little time for preparation, while those opposed to the status quo argued that elections under the then Commissioner of Police would mean the police approaching the 2013 elections with the same attitudes as it did in 2007. However, the National Police Service Commission (NPSC) insisted on the appointment before the general elections and the Inspector General was subsequently sworn in on 24 December 2012, barely three months to elections. Clearly, the debates around the appointment of the IG were not in vain. The expectation amongst the political elite was that of manipulating the office for political expediency.

In the face of these aspersions, *did Kenya's security architecture meet the threshold of ensuring security, free and fair elections? Was the sector neutral or nosy?* Indeed the conduct of the security sector in the 2013 general election was a remarkable improvement on that of the year 2007. This is despite the fact that the structure of the security architecture and the actors did not change and that police reform process, which was the most visible attempt to reform the security sector, was behind schedule. Whilst in 2007 impunity was the norm and the security sector actors could get away with electoral offences largely due to weak electoral laws, elections in 2013 were conducted under new constitutional and legal framework that that reduced the incentives for blatant malfeasance. In this sense, incidents of malfeasance were reduced to minimal levels or the agencies in the event of interference developed more subtle techniques.

The verdict of most observer missions was that the security sector made adequate measures to address the security challenges associated with Kenyan elections. Response to the security challenges was prompt, proportionate, robust and preemptive (Carter Center, 2013). The Special Police for Elections (SPFE) were installed all over the country to monitor elections. Training for this force was provided by the National Training for Election Security Arrangement Project (NTESAP) and there was police presence in all the stations visited (AU Commission, 2013). The report of the observer missions are however not faultless. Most only focus on the visible factors of voting on Election Day; voters' right to a secret ballot, to have their votes counted equally, and to be able to exercise their political choices free from intimidation (Kelley, 2010) and ignore the intricacies of the electoral process. They fail to determine whether the security sector actors were neutral or nosy - the idea of being impartial or extending the role of the security sector beyond the legal mandate to abet electoral malpractice respectively.

Compared to the chaotic transition witnessed during Kibaki's presidency, the Assumption of the Office of President Act 2012 provided for the establishment of the Assumption of the Office of President Committee. The committee incorporating the security chiefs ensured smooth transition. There was the need to demonstrate that there was no power vacuum. The President-elect and his deputy got regular security briefings and exuded demeanor of being in-charge. Since the presidential elections outcome was disputed, it would be however argued that in the event the Supreme Court ruled in favour of CORD petition and ordered for a re-run, then the briefings would have given Uhuru undue advantage over Raila Odinga. This would then raise questions about impartiality of the security sector. Uhuru reached out on various domestic constituencies; presidential election losers, the Kenya Private Sector Alliance, members of the diplomatic corps and the religious leaders. These engagements created the impression that all was well amidst the uncertainty regarding the Supreme Court ruling.

The presidential candidates and their running mates were accorded round the clock security. The Constitution under Article 138 (8) provides that the death of any presidential candidate or a running mate before the scheduled election date would occasion rescheduling of election. The candidates, at least according to the Head of Public Service, had access to security briefings in relation to any information they needed in the course of their campaigns. Though these were part of the security arrangement for all presidential candidates, it is not clear whether all the candidates sought these briefings. CORD for example had accused the security chiefs of plotting to rig Uhuru Kenyatta. On 16 February 2013, CORD leadership claimed that top security sector officials including Head of Public Service, the Chief of Defence Forces Julius Karangi, Office of the President Permanent Secretary, Finance Permanent Secretary and a senior official in the Office of the President had attended meetings to arrange the manipulation of the polls in favour of Uhuru Kenyatta (Rugene and Gekara, 2013). With these accusations, CORD viewed with skepticisms the information filtering in from the government.

The common denominator in Kenya's electoral process is violence (Klopp and Kamungi, 2007). The 2013 elections were not different and even with the preparation by the security sector already described above, many ordinary citizens went to the election with the fear of violenceViolence visited some regions and so adversely affecting the people's right to exercise their civic duty in elections. The security personnel were not spared either, the goal being to intimidate them from providing security during the period. In the coastal region for example the proscribed Mombasa Republican Council declared there would be no elections in coast province and staged series of attacks targeting the voters, the police and poll officials. In fact, on the eve of the elections, there were a series of Mombasa Republican Council (MRC) linked

attacks in Mombasa and Kilifi County led to the death of ten members of the security services. Though these attacks did not prevent the people from voting, they undoubtedly contributed to low turnout in MRC dominated regions. The police responded swiftly killing six suspected MRC members believed to have staged the attacks.

In the North Eastern region, particularly Isiolo, Garissa and Mandera grenade attacks by Al-Shabaab sympathizers opposed to Kenya Defence Force incursion in Somalia contributed to low voter turnout. There were also reports of plot to intimidate or kill Yusuf Haji, the then Defence Minister or Presidential Candidate Martha Karua who were meant to speak at Garissa Primary School on 16 February 2013 (Carter Center, 2013). Fears of insecurity led to low voter turnout in hotspots particularly the coastal and north eastern regions.[108] During the Election Day incidents of violence were reported in Marsabit and Wajir. Moreover, after the announcement of the outcome of CORD petition, unrest broke out in Kisumu, particularly in Manyatta and Kondele areas, and Nairobi areas of Kibera, Mathare and Kawangware (EU Commission, 2013). These incidents and many others seemed to give credence to pre-election fears that there would be breakout of violence.

Unlike in the 2007 where the violence was nationalized, the violence in the 2013 vote was mainly localized to regions known to be hotspots during the elections. Indeed the number of hotspots was highest in the 2013 elections with the National Intelligence Service mapping 27 out of 47 counties as having considerable potential to generate electoral violence (Globalr2p, 2013). Most of these regions are poverty stricken urban areas with ethnically divided localities where political elite mobilize ethnic grievances. These areas too have a history of inter communal tensions over access to resources. Whilst campaigns and security during elections in Kenya have in the past focused on internal affairs, the Kenya Defence Forces (KDF) involvement in Somalia and the ICC question influenced the behavior of the security sector.[109] The threat posed by Al-Shabaab led to 24-hour surveillance of the Kenya Somalia border with fears of possible Al-Shabaab attack during the electioneering period. Meanwhile, grenade attacks in Kenya heightened tensions between Christians and Muslims. The Kenyan Somali community remained in perpetual fear of police raids in the event of any grenade attacks.

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108   Voter registration was lowest in North Eastern province (bordering on Somalia, with only 30 percent) followed by uneven registration in Coast province (64 percent). Nairobi, Eastern, and Nyanza provinces all registered approximately 70 percent. Western, Central, and Rift Valley provinces reached approximately 65 percent. Nairobi surpassed the IEBC target with 106 percent registered.
109   See the chapter on; 'Geopolitics and the ICC Question: International Dimensions of the 2013 General Elections' in this Volume.

Though ICC process facing Uhuru Kenyatta and William Ruto and Kenya's presented security complication for the country, at least in the formative stages, it presented an opportunity for an unlikely alliance between Uhuru and Ruto. There were fears that a defeat for Kenyatta and Ruto would be victory to the ICC process and would raise tensions in the country. The alliance significantly reduced the prospects for violence between their respective Kikuyu and Kalenjin communities (Cheeseman et al., 2014) which were at the centre of the 2007 and post-election violence. The Mungiki remained a divided lot. Whilst some members aligned to Raila, the majority supported Uhuru Kenyatta's candidacy. With Mungiki divided and the Kalenjin nation solidly behind William Ruto, the security agencies had an easy task maintaining security. Ethnic identities that have been in the past used to fuel animosities amongst various groups in the country during elections were used to mobilize votes for the purpose of acquiring power in this context.

Some observer missions gave cautious approval on the conduct of the security sector. ELOG (2013) though gave a fair assessment, noting that in cases where violence was witnessed, the police were over stretched and uncoordinated. Human Rights Watch on its part focused on the pre-election gang attacks in Western Kenya and noted that the police did not adequately investigate the attacks thus failing to link the violence to the 2013 elections yet their investigations pointed towards politically instigated violence (HRW, 2014). This then begs the question: *were the security forces well prepared just in cases the violence precipitated to large scale proportions?* Evidently, there was marked improvement in terms of preparedness. The disjointed manner in which the security sector responded to ethnic conflicts that preceded the elections raises doubts about the internal security arrangements responding effectively in the event of a full scale outbreak of violence. In the case of the Tana River the police were unable to halt unfolding violence between the ethnic Orma and Pokomo while the police failed to deploy effectively in the Turkana in pursuit of Turkana cattle raiders. The police were outmanned and outgunned and in the end, 42 officers were killed. With nearly 45,000 polling stations in Kenya, it would be difficult for the police to mobilize had it not been for the peace narrative that dominated the electoral period.

The National Police Service announced that it had made special arrangements for the protection of women and vulnerable groups. However, evidence from the ground established that these groups remained disadvantaged. The women candidates had to go out of their way to employ teams of two to five party activists in order to enhance their protection. Despite these measures, instances of violence against women candidates and their supporters, as well as gender-based rhetoric were reported (EU Commission, 2013).

Isolated cases of the security agencies exceeding their mandate and so raising questions about their neutrality were witnessed. The African Union Observer Mission noted instances where the police participated in the actual counting of votes in Kericho and Meru counties (AU Commission, 2013: 17). In the previous elections, security officials have been used to abet electoral malpractices by conniving with poll officials in areas dominated by a particular party. CORD in its submission accused IEBC of 'boosting', Uhuru Kenyatta's ballots to help him gain 50 percent+1 constitutional threshold for outright win. However, in this instance there was no evidence the police officers were involved in the 'stuffing' of ballot boxes in favour of certain candidates.

The period 9 March 2013, when Uhuru was declared winner to 30 March 2013 when the Supreme Court delivered its verdict was perhaps one of the most challenging to the security architecture. Earlier, the security agencies with the instructions of IEBC Chairman, had ejected the party agents from Bomas Tallying Centre to enable the counting process to move forward. On the eve of the Supreme Court ruling, the Inspector General of Police outlawed public demonstrations and gatherings near the Supreme Court ahead of the ruling which was to be delivered on 30 March 2013. Whichever way the verdict went, violence would break out if the loser did not accept the ruling. The removal of party agents from Bomas and the IG's pronouncements on demonstrations were seen by civil society groups as a wider scheme by the agencies to undermine fundamental rights as enshrined in Articles 37 and 38 of the constitution which guarantee individual freedom to association; and assembly, demonstration, picketing and petition respectively. To the CORD, this was a well-choreographed script to prevent them from exercising their democratic right to petition. At the same time, where electoral offences were committed, there was no admissible evidence to prosecute the culprits. During the electoral period, 45 people were charged with electoral offences, with majority of these in Embu county where 28 people were arrested (EU Commission, 2013). In several other cases, offenders were released without police investigating.

The foregoing discussions suggest that indeed there was marked improvement in managing the security function during the 2013 general elections. However, understanding whether the sector was 'nosy'- the idea that the sector extended security role beyond its legal mandate to support certain candidate(s) - remains constrained by everything that went wrong in the electoral process. The failure of the electronic voter's identification devices (EVIDS), the collapse of the results transmission system and human error arising out of many hours of vote-counting all raise fundamental questions about the integrity of the electoral process- this was a multi-agency failure. After all, electoral fraud is a complex process that involves many agencies (Kanyinga, Long et al., 2010b; Long, 2012). Arguably, this was the most complex

electoral process in the history of the republic. In the event the security sector was nosy, then the malfeasance was subsumed within the complexities of the process. As such, claims of the security sector supporting Uhuru Kenyatta's candidacy though will continue to dominate the discourse on the conduct of the 2013 elections remain hearsay in the absence of hard evidence. If indeed the security sector was involved in the electoral fraud, then this was less detectable in the 2013 elections.

Conclusion

This chapter has examined the conduct of the security sector in the 2013 general elections with particular emphasis on determining whether the sector interfered (nosy) or remained neutral in the electoral contest. The analysis finds no evidence to conclude on that the sector was nosy, though finds grounds to question the impartiality of the sector based on the overall structure of the security architecture. Two study lessons for security sector reform and electoral processes in transitional societies emerge. First, security sector reform processes may not necessary guarantee credible, free, and fair elections in the immediate post power-sharing period, but may provide prospects for success in future polls. The security sector reform process though inadequate, partially contributed towards making the 2013 general elections relatively peaceful. Secondly, security sector reform processes in transitional societies instil false public confidence in the role of the security sector thus opening a window of opportunity for possible control of the electoral process by the executive. Despite the confidence from the public, the sector is not entirely autonomous and independent. Ultimately, there is need for continued campaigns to ensure that institutional reforms focus on de-politicization and de-ethnicization of the security sector, whilst strengthening democratic oversight and accountability to ensure the security sector leadership acts in a neutral manner at all times, including during the election period, and to take appropriate action against officials that fail to do so.

Chapter 7

The Invisible Hand in Ballot Boxes: The Phenomenon of the Deep State in Kenya's Electoral Competition - *George Kegoro*

Introduction

nformal actors exercise varying levels of influence in making the formal decisions of the state. The term 'deep state' has been coined to describe coalitions of informal actors, who position themselves to manipulate decision-making in matters involving public participation, such as elections, with a view to protecting vested interests and retaining their informal influence over, and control of, the state. In Kenya's political evolution, reforms towards democracy have been based on the assumption that only the formal institutions play a role in the management of elections and that by clarifying the rules that govern those institutions, the desired accountability will be achieved in relation to the management of elections. At independence and for a long period thereafter, Kenya's elections were managed by the civil service, which was responsible for carrying out all aspects of the electoral cycle, from the registration of voters, balloting, counting of the votes and the announcement of results. Although established under the Constitution, the Electoral Commission did not have the responsibility to manage elections, a responsibility which subsequent reforms have now conferred on the Commission.

The rationale for overhauling the system of electoral management, and taking away this role from the public service, was that the service, vulnerable to political pressure, could not be trusted to act correctly. As a result of the reforms that have occurred, there has been a growing expectation of greater autonomy in the management of elections than was the case when the civil service was responsible for the management of elections. The reform of Kenya's electoral process has been characterized by this assumption. As a result, formal scrutiny has concentrated on the formal institutions in charge of elections and has left unaddressed, the behavior of those within or outside of the state who retain a say, even though they do not have formal decision-making power in the management of elections. The emerging assumption is

that the reform of the formal institutions would create the possibility of free and fair elections. If, it is possible that informal actors are involved in running elections, it is of interest to identify these actors, the role that they play, how they relate with, and what influence they have over, public officials in charge of elections.

This chapter explores the question of whether Kenya has a deep state that is involved in the making of decisions on elections. For purposes of the chapter, informal decision-makers are all the actors, whether within or outside of the state, who have no formal responsibility for the management of competitive politics but still play a role in the management of elections, even though such a role is often undocumented or unacknowledged. The chapter begins with this introduction, which is followed by a discussion of the phenomenon of the deep state, and understanding of which is important for answering the central questions raised by the chapter. For this, the chapter provides conceptualization of the concept within political science literature and an empirical conceptualization followed by examples from Turkey and the United States. The third part sets out the formal rules that govern the management of electoral competition in Kenya including a brief historical context on these rules. It is against these rules that an evaluation of the relevant actions by public officials can be assessed and understood within the normative principle of neutrality. The fourth part narrates salient incidents in Kenyan electoral competition, in the context of the elections that took place in Kenya in 2007 and 2013. As part of this, there is a case study of the founding and role played by a specific political party that participated in the elections held in 2013 as this is of interest to the discussion in this chapter. The fifth part is a general discussion that draws out the findings made in the chapter and conclusions that might be drawn from those findings.

The Deep State: Towards a Definition

A Theoretical Definition

Institutionalist and neo-institutionalist theories have over the last several decades advanced a case for the significance of institutions in shaping behavior of citizens within a political system. As a result, significant efforts continue to be channeled towards state-building premised on a culture of institutionalism. Since the resulting institutions are expected to cushion polities from vagaries of misrule, when those polities fail or are perceived as such, there is a tendency to view such failure within the prism of institutional setup.

Whereas the argument that institutions matter presents compelling evidence, in the case of new democracies, there is still debate on whether it is the formal or the informal institutions that should be the objects of analysis (Bratton, 2007). In the context of Kenya's 2013 elections,

which followed a period of concerted (formal) institutional reforms after a democratic reversal, the election was largely viewed as a test for the nascent institutions put in place between 2008-2012. Formal institutions, which according to Bratton (2007) are characterized by a sovereign constitution, rule-governed agencies and the legal procedures associated with the constitution, dominate analysis of emerging democracies. However, when the formal institutions come under test, here for example in administration of elections, credible claims of triumph of informal institutions have sometimes emerged. It is therefore useful to expand the framework for understanding political institutions to include the effect of informal constraints just as much as formal constraints (North, 1990). These informal institutions have also been referred to as the 'Deep State'.

The 'Deep State' has been defined as that part of the state which is not publicly accountable, and which pursues its goals by means that would not be approved by a public examination (Scott, 2007; Holden, 2009). Analyzing the relationship between the American national security as an agency and the large American government, Glennon (2014) refers to the concept of deep state as 'Double Government' which he defines as '…network of executive officials who manage the departments and agencies responsible for protecting…national security, and who, responding to structural incentives embedded in the…political system, operate largely removed from public view and from constitutional constraints' (Glennon, 2014: 1). The deep state is associated with deep events run by well-organized covert networks (Scott, 2007). As a result, Scott observes that the deep state creates a dual state hierarchy consisting of the state and its (deep) rival, both to which citizens' allegiances find themselves split. Mehtap (2014) further contends that the deep state emerges in the absence of democratic oversight, in the case of nascent democracies, where the executive misuses its authority. By penetrating the political-judicial sphere, Mehtap further observes that one of the formal state institutions which inevitable becomes a casualty of the deep state is the electoral system. The deep state is also visible in illicit activities such as arms trading, drug trafficking and money laundering (Mehtap, 2014). In established democracies, because of the rule of law and ethic of constitutionalism, the potential of informal institutions are significantly reduced (Bratton, 2007). Conversely, because nascent democracies do not have a clear demarcation of legal limits on state power, they are vulnerable to activities of the informal institutions (Bratton, 2007).

When viewed as informal institutions, the deep state could be defined as to entail 'the patterns of patron-client relations by which power is also exercised' (Bratton, 2007: 97). Helmke and Levitsky (2004) consider bureaucratic norms, legislative norms, clientelism and patrimonialism as means through which informal institutions shape political outcomes. The informal institutions could also be viewed as 'real world politics driven by more contextual dynamics, in which "actual existing" social and power relations—not words on paper—

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determine who gets what, when and how' (Bratton, 2007: 96). The actual existing power relations, according to Helmke and Levitsky (2004) may create interactions between formal and informal institutions characterized by complementarity, accommodation, competition or substantive interaction. This is consistent with the duality of the state as observed by other scholars. In case competition or substantive forms characterize such interactions and political power is highly personalized, there is a likelihood that informal institutions may overshadow formal institutions.

Deep State: Empirical Definition

Beyond the academic efforts to understand the notion of the deep state and use it to explain political phenomenon, the definition can also draw from selected but rich observed phenomena in some countries. This section continues the efforts towards understanding the notion by implanting practical definitions within certain globally known events. The deep state is a presumed network of elite individuals or groups, with no responsibilities within the formal state and who, working behind the scenes, subvert the popular will through the control they exert over formal state institutions, such as the civil service and elected representatives. The term 'deep state' originates from Turkey and is a translation from the Turkish, *derin devlet,* a term that was coined following a well-known incident in that country's public life. Other terms used to refer to the deep include 'the state within a state', 'shadow government' or 'permanent government'.

The exact composition of a particular deep state will vary. However, deep states appear to be concentrated around what President Dwight Eisenhower referred to as the 'military-industrial-congressional complex'[110]. The military and intelligence agencies are regarded as essential players in a deep state which would also have some senior or longstanding non-elected officials within government, for example, top civil servants, select individuals with effective control of key commercial, military or criminal groups, the financial sector, corporate media, as well as individuals who broker agreements between other members of the deep state.

The role that the military plays within a deep state is usually outside of what it is officially mandated to do. As used here, 'the military' is to be understood as segments of formal institution, and may incorporate privately organized militias or vigilantes that fall outside of state control.

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110   *The Military–Industrial Complex: The Farewell Address of President Eisenhower, Basements publications 2006 ISBN 0976642395.*

The Turkish Deep State

In Turkish society, the deep state is discussed in terms of the self-appointed role played by elites in that country, of which the military is central, in suppressing what they regard as threats to the country's secular political order that had been established in 1923 by Mustafa Kemal, or Ataturk. The deep state came to be regarded as a shadow government, working to ensure that its view that Turkey must remain a secular state, always prevailed even if it controverted the will of the majority of the population.

The deep state is often discussed in connection with the role that the military plays in Turkish politics. In the past 80 years, the military has intervened four times to remove a civilian government thought to have lost control or to have strayed too far away from the principles of secularism. The military has become the self-appointed steward of the Kemalist secular Turkey. In an essay in the New Yorker Dexter Filkins wrote,

> The military often acted on behalf of a class of elected officials and civil servants. These people and the institutions they belonged to – including newspapers, such as Hurriyet: the sprawling family-owned holding companies that sometimes received favorable treatment from the government; and the heads of the country's leading universities—represented roughly thirty per cent of the population. They are still referred to, often dismissively, as the White Turks: everyone else is a Black Turk (Filkins, 2012).

Filkins continued that 'few people in Turkey contest the notion that something resembling a deep state existed but its scale, its nature, and its life span are not entirely clear'. (Filkins, 2012) He continued,

> According to Turkish politicians and journalists, the Kemalist elite and its allies in the deep state employed the press to exaggerate threats to the state – from leftists, ultra-nationalists. Provocateurs carried out assassinations and other acts calculated to cause backlash. Then the military, with its claims of suppressing anarchy, would take harsh action, often with the public's approval (Filkins, 2012).

An incident in 1996 is often referred to as demonstrating the nature of the Turkish deep state. A car, with four occupants, traveling near the city of Susurluk crashed, killing all on board, except one. Those killed were a notorious gunman and drug dealer that the police were supposed to be looking for, his girlfriend, and a former police chief. The survivor was a member of parliament. The incident confirmed the existence of an unseen layer of relationships that

allowed politicians and the police to cavort with criminals they are supposed to be standing against.

The American Deep State

In the West, there has always been a longstanding reluctance to acknowledge the existence of the deep state. The following quote explains why,

> The idea of a deep state is usually used to describe countries such as Turkey and Egypt, where shadowy groups of military, intelligence officials and judges have held a sway over public life that is never quite acknowledged. The use of such a phrase in the US was once largely the domain of cranks on the left or right, people who worried about the Masons, the Jews or the Trilateral Commission (Dyer, 2014).

However, there has been a recent surge in the popularity of this term in the West. In the United States, discussions about the deep state have recently mostly been in the context of the country's national security challenges that have been brought about by the terrorist attack in September 2001 and the responses to the attack. Writers argue that an American deep state has emerged around the national security advisors and military contractors that the US has engaged in response to the attack. For example, according to Mike Lofgren, a former long-term congressional staff member,

> The Deep State does not consist of the entire government. It is a hybrid of national security and law enforcement agencies…Certain key areas of the judiciary belong to the Deep State, such as the Foreign Intelligence Surveillance Court, whose actions are mysterious even to members of Congress. Also included are a handful of vital federal trial courts…where sensitive proceedings in national security cases are conducted. The final government component… is a kind of rump of Congress comprising of the congressional leadership and some (but not all) of the members of the defense and intelligence committees. The rest of Congress… is intermittently aware of the Deep State and when required usually submits to a few well-chosen words from the State's emissaries.[111]

The US literature on the deep state also incorporates claims about high-level conspiracies that seek to explain major political and social occurrences. This type of literature and conspiracy theories is regarded as somewhat controversial and is not universally embraced. An example,

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111   *http://billmoyers.com/2014/02/21/anatomy-of-the-deep-state/*

is the book by Laurent Guyenot, *Fifty Years Deep State,* which explains as one continuum all the major American developments during the last 50 years, ranging from the assassination of President J.F. Kennedy, the rise of the Bush family in US politics, the Oklahoma terrorist bombing, and the September 11 bombing. However, the discussion in this chapter is not concerned about, and is not an attempt to prove the existence of a conspiracy theory that explains occurrences about Kenyan electoral politics but merely seeks to document observable behavior and phenomena in Kenyan politics, the rationale for which can only be the actions of individuals and groups that seek to control the country's electoral politics in ways that remain publicly undeclared.

In the US, there are historical references to the notion of the deep state including in the speeches of US presidents. For example, President Woodrow Wilson said,

> Since I entered politics, I have chiefly had men's views confided to me privately. Some of the biggest men in the United States, in the field of commerce and manufacture, are afraid of something. They know that there is a power somewhere so organized, so subtle, so watchful, so interlocked, so complete, so pervasive, that they better not speak above their breath when they speak in condemnation of it.[112]

Moreover, President Theodore Roosevelt said,

> Behind the ostensible government sits enthroned an invisible government owing no allegiance and acknowledging no responsibility to the people. To destroy this invisible government, to befoul the unholy alliance between corrupt business and corrupt politics is the first task of the statesmanship of the day.[113]

Scott (2015) argues the case of the emergence of a deep state in the US politics and makes the point that a number of historical events, such as the assassination of President J.F. Kennedy, the Watergate scandal and the 9/11 terrorist attack which are attributed to marginal outsiders are, in fact, part of a series of 'deep events' coming from the US deep state because each one of them was carried out by individuals in and out of government so as to promote a repressive mindset; enhanced, in the long-term, the power of the repressive mindset; and formed another stage in a continuous narrative which has transformed the United States into a society dominated form above rather than governed from below (Scott, 2015: 5).

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112   *http://www.goodreads.com/quotes/162688-since-i-entered-politics-i-have-chiefly-had-men-s-views*
113   *https://www.goodreads.com/quotes/162686-behind-the-ostensible-government-sits-enthroned-an-invisible-government-owing*

Even though difficult to ascertain, the exact attributes of a deep state are necessary for this discussion. Professor Patrick O'Neil has attempted a discussion on the deep state, covering such issues as why and how the deep state arises, its internal organization, and how it justifies itself both within and to the outside society (O'Neil, 2015). An obvious reason why a deep state emerges is the possibility of financial benefits for its members. Since operating within the formal state institutions would be constraining, the alternative is to operate outside of the state while still benefiting from the cover of those who control the formal state. Thus, a deep state is characterized by clientelist relationships, in terms of which an understanding emerges between those with formal state power, on the one side, and groups or individuals outside the state, on the other side. The relationship delivers benefits for both groups. The benefit to those in power can be access to political support, while the benefit to those outside power would be access to financial resources (O'Neil, 2015).

The deep state 'runs on the logic of tutelage' (O'Neil, 2015). Other than reasons of financial gain, the logic of the deep state is one of 'tutelage'. The deep state emerges as an entity to moderate the country's politics, to ensure that political destiny is confined within an approved orbit that the deep state regards as acceptable. The deep state, therefore, views itself as the guardian of the nation or of society, as the protector of the national interest, or as the defender against the dangers of foreign domination or takeover.

It follows that the deep state has no faith in democracy, which without guidance, would produce outcomes that deviate from its view of the national interest. The deep state does not trust the formal government and does not trust it to act properly where it matters most. Guidance over state and society are the raison d'être of the deep state, not a reserve power. The logic of tutelage is not restricted to the potential need to correct certain situations, but to wage an ongoing war against the perceived threats to the existence of the nation-state (O'Neil, 2015). Because the deep state arises and exists on the justification of acting as the moderator of society, its internal condition if often characterized by paranoia. Members of the deep state are often dominated by a siege paranoia. The enemy may be a specific historical force, perhaps a former colonizer, or a regional or global power. The enemy can also be an internal group or ethnic entity within the country, and there may be perceptions that the internal group has the support of external actors, perhaps a former colonial power or a regional hegemon. National histories of foreign domination are invoked as justification for the ongoing fear. The deep state represents that vigilance needed against the risk of a return of the previous foreign domination or to prevent the takeover by an undesirable local group. The deep state holds itself out as the group that is capable of preventing such a takeover (O'Neil, 2015).

The fears surrounding a hostile takeover justify conspiratorial action on the part of members of the deep state. The actions are seen as necessary to address the external threat. Individuals that are viewed as associated with the external threat can be the subject of surveillance or even elimination. Conspiratorial action is also necessary in order to maintain the siege mentality and therefore the support of the population for the activities of the deep state. The reason why the deep state must let society know about the external threats is not so as to justify itself to society but to amplify its power over society (O'Neil, 2015). Because the deep state creates the notion of an existential struggle with whichever enemy is thought to exist, this gives the appearance of having more power than it enjoys and can lead the formal state to cede power to the deep state. The deep state is also capable of playing in the market where it exchanges economic gain for political support. A layer of financial relationships emerges which complement and reinforce the political relationships (O'Neil, 2015).

One more question concerns why a deep state forms in some countries but not in others. The answer to this question seems to be that the deep state is likely to form in countries where military formations were established before the institutionalization of political organization. For example, in a situation of war or civil conflict, the military or militias would have played a key role during the conflict and in the subsequent peace negotiations, and may afterwards have been upstaged or supplanted by civilian governments in the political settlement. Because of the roles that they played, militaries or militias would have come to view themselves as the true custodians of society and to view the new political actors as outsiders. Although formal power may pass to the civilian government, actual control of the state may be retained by the military or militia group. In order to survive, the new political rulers are forced to establish relationships outside what is formally allowable. In those relationships, the new rulers can allow illegal financial benefits to the military or militias, in exchange for political support (O'Neil, 2015). A second situation leading to the formation of a deep state is where a sufficiently large number of elites believe that society is under an existential threat from an external or internal force. The perception of threat may be the result of specific national or regional events, which invoke

The Principle of Political Neutrality

Political neutrality is the expectation that unelected public officials will do their work professionally and without favouring or disadvantaging any individual or section of the population based on political beliefs. Political neutrality is based on the view that public servants must be able to work with the current and future governments, and in order to do so, must refrain from supporting political causes that will make it difficult to remain in service if there is a change

of government after elections. Political neutrality also signifies that the public service should function the same way irrespective of who is in power.

Public servants come under obligation to use their positions to provide electoral advantage to the party in power. It becomes important, in the context of electoral competition, that public servants remain neutral and are able to resist pressure to act in a manner that undermines public confidence in their ability to serve all, irrespective of political beliefs.

The doctrine of political neutrality now forms part of the ethical foundations of the Constitution of Kenya. The Constitution creates a regime of ethics and integrity in the management of public affairs and requires high-level public official, referred to as state officers, to abide by the regime (O'Neil, 2015). The officials identified as state officers include those holding the offices of the president and deputy president of Kenya, as well as cabinet secretaries, Members of Parliament, judges and magistrates, and members of the independent commissions established under the Constitution.[114]

The Constitution stipulates principles that should guide the identification of persons to serve the public as state officers who must be selected on the basis of personal integrity, competence and suitability, and where selection is based on elections; these should be free and fair elections.[115] State officers are to be guided by objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices.[116]

All state officers come under certain special obligations including the obligation to behave, both in public official life and in private life, or in association with other persons, in a manner that avoids conflict between personal interests and public or official duties, and particularly compromising any public or official interest in favour of a personal interest. A state officer who contravenes its provisions is subject to the applicable disciplinary procedure for the relevant office; and may even be dismissed or otherwise removed from office.[117] The Constitution requires Parliament to enact legislation to establish an independent ethics and anti-corruption commission for purposes of ensuring compliance with, and the enforcement of, the provisions of the Chapter and also to enact legislation establishing procedures and mechanisms for the effective administration of the chapter.[118]

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114   Article 260
115   Article 73(2)
116   Article 73(2)
117   Article 75
118   Article 80

In exercise of this constitutional obligation, Parliament has enacted legislation that elaborates on political neutrality. The Leadership and Integrity Act, an example of such legislation, provides as follows:

> *An appointed state officer, other than a Cabinet Secretary or a member of a County*
> *executive committee shall not, in the performance of his duties:*
> *(a) act as an agent for, or further the interests of a political party or candidate or;*
> *(b) manifest support for or opposition to any political party or candidate in an election.*[119]

The Act further prohibits an appointed state officer from engaging in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections. The Act also prohibits a public officer from engaging in any activities of any political party or candidate or act as an agent of a political party or candidate in an election, and from publicly indicating support for or opposition to, any political party or candidate participating in an election.[120]

The discussion on political neutrality means, however benign, the involvement of unelected public servants in partisan politics is frowned upon and is a contravention of the Constitution. To the extent that unelected public servants are involved in elite groups that control political activity behind the scenes, with a view to promoting a partisan political agenda, they also fall foul of the constitutional requirement about political neutrality.

The Law Managing Elections

At independence, Kenya inherited a simple electoral process, which was made up of a fulltime election official, the Supervisor of Elections as the focal person on elections, supported by a group of public servants whose involvement with elections was on a part time basis. The system was based on trust and virtually lacked any of the mechanisms for checks and balances, which now characterize the electoral system. Notwithstanding the fact that Kenya's independence Constitution provided for an independent Electoral commission, the system for running elections remained unchanged, and was largely the same as had been inherited at independence. Starting with the independence Constitution that had established the Electoral Commission, the process for the independent management of electoral matters has evolved over time.

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119   *Section 23(1)*
120   *Section 23 (2)*

A momentum for the evolution of the system was provided by the re-introduction of multi-party politics in 1991, after years of one party rule, characterized by abuses of the trust on which the simple electoral system was built. Thus, in 1992, an amendment to the Constitution of Kenya occurred, re-introducing multi-party democracy, which had been proscribed by a previous amendment in 1984. The earlier amendment had made the ruling party, KANU, the sole political party in KANU. The 1992 amendment also conferred the responsibility of conducting elections in Kenya on the Electoral Commission, removing this responsibility from the Supervisor of Elections. A subsequent refinement of the electoral process has resulted in the creation of a sophisticated bureaucracy made up of fulltime election managers working under an electoral commission that is clothed in institutional and operational autonomy anchored in the Constitution.

Through a separate process, the country has also undertaken reforms aimed at achieving neutrality on the part of the public service, and towards shielding the electoral process from pressure that previously undermined its independence. While the formal rules have been clarified in favour of an independent and accountable process for the management of elections, there remains a basis for concern as to the fairness of the process from the point of view of the political neutrality of key actors.

The Constitution of Kenya, 2010, provides specific standards governing the management of elections, which are relevant to the current discussion. The Constitution prescribes principles to guide the country's electoral system and, as part of this, declares that elections shall be 'free and fair'. A list of practices and processes that evidence this principle are then provided including the requirement that elections must be 'free from violence, intimidation, improper influence or corruption'. Another measure of the principle of free and fair elections is that they must be 'transparent' and also must be 'administered in an impartial neutral, efficient, accurate and accountable manner'. The Constitution mandates the legislature to enact legislation on elections, and requires that such legislation must ensure that voting at the elections is transparent.

The significance of the provisions of the Constitution governing elections is emphasized when these are compared with the equivalent provisions under the previous Constitution. The previous Constitution avoided much of the elaboration that now forms part of the current Constitution and merely provided that 'in the exercise of its functions under this Constitution, the Commission shall not be subject to the direction of any person or authority.'

Secondly, the institutional independence of the electoral management body was enhanced by the more elaborate process leading to the appointment of commissioners under the

new Constitution. Under the previous Constitution, members of the Electoral Commission were appointed by the president acting alone. However, the new Constitution provides an elaborate process for the appointment of members of all independent commissions, including the electoral management body. While the appointment is still by the president this is after a process that includes the identification of members of the commission through national legislation, approval of the appointment by the National Assembly.

Thus, the principles governing elections in Kenya compel transparency and accountability and prohibit improper influence and corruption, terms whose meaning can be extended to cover issues discussed in this chapter.

The Context of Kenya's Electoral Competition

Kenya has been a single party state for most of the years since its independence from Britain. Political pressure led to constitutional reforms in 1992, which repealed the country's constitutional one-party status, and introduced presidential term limits. The liberalization of the country's politics undercut the dominant position that the ruling party, KANU, once enjoyed, and forced the leadership of the party to contend with competition. An effect of the presidential term limits was that in 2002, President Daniel arap Moi, in power for 24 years, was forced to retire from office. The elections that were held on his retirement, and which saw the opposition take power for the first time, have been hailed as free and fair. It is those that followed in 2007 and 2013 that have been more controversial and which are of interest to this chapter.

Beginning with the run up to the 2002 General Election, the first open presidential contest—one in which the incumbent was not vying, several elite pacts and configurations have characterized Kenya's presidential contest. A monumental crack emerged within the then ruling party after the incumbent handpicked a favorite candidate—Uhuru Kenyatta, the son of Kenya's first president and attempted to force the other political elite within that party to render their support. The disgruntled political elite rebelled, walked out of the party and joined the opposition, creating a loose, hurriedly assembled coalition—NARC but which was able to easily dislodge KANU. The Uhuru candidature was christened as 'project' referring to preference by a section of the Kenyan political elite to perpetuate the tendencies of the KANU regime. The project tag, as this chapter will illustrate would later follow Musalia Mudavadi, one of the salient politicians who did not rebel.

The winning coalition in 2002, a hurriedly assembled coalition would then be characterized by bickering perceived to emanate from different philosophies of political reform and commitment

to the same. The bickering culminated to a Constitution referendum fallout in which the section of the elite that had left KANU was forced out of the government. The elite that was forced out of government would thereafter regroup under Orange Democratic Movement (ODM), setting up a presidential contest with the group that remained in control of the government in 2007. ODM however would again split into two factions and separately contest the 2007 election. The 2007 General Election, a fiercely contested one ended up in an unprecedented postelection violence. A negotiated consociational arrangement bringing back together all these elite factions into a government of 'National Unity'. The power-sharing arrangement retained the incumbent as the president with the closest competitor, Raila Odinga as the prime minister in an arrangement that was in theory of co-equals. With the president completing his second term and the prime minister eligible to contest the presidency, the 2013 saw yet another elite configuration in which a section of the 2007 rebels either went alone or joined hands with the elite faction closer to the outgoing president while some left the outgoing presidents camp to team up with the prime minister. It is in this election where although in a different script, Mudavadi's candidature was perceived as to be 'project'. Both the 2007 and 2013 General Elections were marred with accusations and counteraccusations invoking the hand of the deep state in influencing outcomes.

The Role of Informal Actors (Deep State) in Political Competition in Kenya

The 2007 Campaigns

The internal quarrels inside NARC were carried into, and became the defining issue in the 2007 elections, raising the stakes in the elections. With opinion polls always indicating that the main opposition assembled after the 2005 referendum fallout was more popular; there was a sense of political vulnerability and desperation within the incumbent's campaign.

a. Still Behaving Badly: A KNCHR Report

As the preparations for the 2007 elections got underway, the Kenya National Commission on Human Rights issued a report, *Still Behaving Badly*, a sequel to an earlier report on the use of public resources in partisan political activities. All of those named in the report were also regarded as belonging to an ethnically homogenous inner group of friends of the president, all of them corporate titans, and commonly referred to as the 'Mt Kenya Mafia'. In essence, these were people holding public positions and using those positions to overtly advance partisan political causes. None of them denied the content of the report, and neither did the government (Kenya National Commission on Human Rights, 2007: 4). One of those in this

report would later be named as one of the key drivers of an ill-fated plan (discussed below) which saw the deployment of members of the Administration Police as party agents for the incumbent's party, the Party of National Unity, in the elections and was also identified as a key driver in the formation of a political party intended to manage succession politics in 2012, also discussed below. The involvement of these officials in political matters was open and was well known to the public. At the time, there was no attempt to conceal their involvement on behalf of Kibaki.

b. Post-Election Violence Reports

As the campaigns for 2007 went on, the main opposition challenger Raila Odinga, alleged that 'a clique of people around Kibaki' sought to rig the elections (McCrummen, 2007). Although members of the clique were never named, it was thought that those identified in the KNCHR report would well form part of it, if such a clique existed. After the elections, the report of the Commission of Inquiry into the Post Election Violence, one of the two fact-finding commissions that were established as part of the mediation process, became a useful source of independent information, on the basis of which some these claims can be evaluated.

The commission carried out one of the most comprehensive inquiries into the role of the security forces and the public service in Kenya's electoral politics. The report covered the roles played by the National Security Intelligence Service (NSIS), now National Intelligence Service, the police and the civilian service in electoral politics. The report asserted that in the discharge of its mandate, 'this Commission has been able to open doors previously closed and to hear from the most senior government officials' (Republic of Kenya, 2008a: 355). According to the Waki report, the NSIS had warned, through its periodic intelligence briefings shared with other agencies in the government, of '...emerging allegations that the government is planning to use some sections of government organs including the Provincial Administration and the Administration Police (APs) to rig the forthcoming elections...' (Republic of Kenya, 2008a: 264). This intelligence warning was made on 25 December, 2007 only two days before polling in the elections of 2007.

The Waki Commission regarded this as a particularly disturbing allegation considering that the same intelligence filing identified indicators of the alleged rigging schemes including, 'The revelation that APs are involved in marking ballot papers in advance and that some of them will be deployed in polling stations to disrupt elections and introduce fake ballot papers, particularly in Lang'ata' (Republic of Kenya, 2008a: 264). Further, according to the Waki Report, in warning of the real potential for security organs to be overwhelmed by 'widespread lawlessness' the intelligence agency pointed to a number of factors that it said

would increase its challenges including 'lukewarm working relationships between the regular and administration police as a result of perception that the latter is politicised and favoured by the government', and 'a partisan public service as well as the military'. The report also claimed that the Provincial Administration was 'perceived to be involved in campaigns' (Republic of Kenya, 2008a: 364).

In the view of the Waki Commission, even though the intelligence agency had concerns about the involvement of government departments in partisan electoral politics, the NSIS was itself involved in just the same kind of politics, and that this involvement was manifested in three specific instances. The first concerned an attempt by an NSIS official to secure accreditation badges from the Electoral Commission of Kenya. His written request to the Chairman of ECK was, however, rejected (Republic of Kenya, 2008a). In declining the request, the ECK chair pointed out that, 'It is the first time such a request was ever made by an intelligence agency.' He also noted that, 'The acceptance of your request would contravene all known and well established international norms on elections...there can be no basis for spying on its (ECK) electoral duties... for now your application is impossible to accept' (Republic of Kenya, 2008a).

When the ECK chair appeared before the commission, this issue was raised with him. On that occasion, he said,

> They applied to become observers, election observers and I wrote back and I said they are not qualified. They cannot be election observers and if they were to be taken, it would be one of the biggest blows to the administration of elections. (Republic of Kenya, 2008a).

A second issue arose from what the NSIS described as a 'Socio-Economic Political Barometer field study report December 2007'. This was in effect an opinion poll covering the top three presidential candidates. Following the survey, the head of the NSIS provided results indicating the relative position of the candidates in the polls, and an assessment as to the final results on 27 December 2007 (Republic of Kenya, 2008a). According to the commission, the correspondence about the survey appeared to have been arranged outside the Kenya National Security management framework. The commission could find no reference to this work in any other document and the letter from the head of the NSIS was addressed to the head of the public service in his role as secretary to the cabinet and head of public service and not in his capacity as chair of the NSAC. On this point, the commission concluded that,

The consistent message, frequently communicated by the NSIS, around the need for state organs and their officers to be neutral during the elections seemed farcical in the face of these revelations (Republic of Kenya, 2008a).

The third area of concern for the commission also related to a letter from the Director General of the NSIS to the chair of the ECK, which purported to be on behalf of NSAC although it was not forwarded by the NSAC chair. The letter identified counting, announcement of results and swearing in as elements of the ECK's work that the NSIS felt necessary to comment upon. The letter advised how agents should deal with certificates and that ECK should meet with media house owners, editors, and the candidates 'with a view to striking a deal on the modalities of transmission and announcement of results' (Republic of Kenya, 2008a). In the view of the commission,

…this type of advice had been provided by the NSIS during the referendum of 2005 and was in fact welcomed by the ECK then and during the 2007 elections. Despite this the Commission finds that specific advice of this nature emanating from an intelligence agency is unwise and likely to be outside its stated mandate. (Republic of Kenya, 2008a: 366).

The letter included a caution on the conduct of law enforcement and other agencies in and around the elections processes, 'The involvement of government officials and the use of public resources for campaign purposes could lead to accusations of rigging and provide grounds for violence and subsequent petitions' (Republic of Kenya, 2008a: 367). As to this, the commission observed, 'Clearly the Director General and his officers failed to heed their own warnings' (Republic of Kenya, 2008a: 367).

The report of the commission also addressed an incident involving members of the Administration Police service that took place a few days before the polling day. The evidence received by the commission showed that around the 23 December, four days before the polling day, about 1600 police officers were assembled at the Administration Police Training College at Embakasi on the outskirts of Nairobi, to undertake training to act as agents for a political party during elections polling. The training was conducted by Nick Wanjohi, then a senior academic and later the president's private secretary, and high-ranking government officials including the hierarchy of the Administration Police. The following day, these officers were deployed to Luo-Nyanza, a part of the country regarded as the political base for Odinga, the main challenger to President Kibaki, and, therefore, the most hostile to the government. According to the evidence, their role was to disrupt polling and, where possible, ensure that

government supporters amongst the candidates and voters prevailed. All officers deployed were dressed in plain clothes, but were easily identified as they were not from the local community and were transported in more than 30 chartered buses. They had received Kshs. 21,000 each for their duties.

The entire exercise was, however, called off a day or so later, after some of the officers were killed and many more injured by local residents. Some senior officers from the districts called upon the senior command of the Administration Police to cancel the enterprise as they could see there being greater loss of life if it was allowed to continue (Republic of Kenya, 2008a). Commenting on all these activities, the commission concluded as follows,

> The Commission found a number of examples of activities undertaken by the NSIS as extraordinarily poor judgment, constitute partisanship on the part of a state security organ and are examples of activities that clearly fall outside the mandate of the agency. These included attempts to secure ECK accreditation for NSIS officers to be part of the elections process, a NSIS sponsored survey of how the 3 presidential candidates were polling prior to the elections and communicating this information to the Secretary to the Cabinet and Head of Public Service, and advising the ECK on electoral processes. (Republic of Kenya, 2008a: 373)

The Kriegler Commission[121] also covered the use of state resources in a discussion on campaigning and campaign financing. The commission reported that the use of state resources during campaigns was evident. The commission found that,

> The practice of using state resources in partisan campaigns was again witnessed (as in previous elections, in the Moi and post-Moi era, including the 2005 referendum). This included use of government vehicles and aircraft in the campaigns (some disguised with civilian number plates) and use of high-ranking (and some low ranking) public servants in the campaigns of the incumbent candidates (and, surprisingly, some opposing candidates). (Republic of Kenya, 2008b: 96)

The Kriegler Commission corroborated the finding by the Waki Commission as to the use of Administration Police officers as party agents. In the view of the Commission,

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121   *The Kriegler Commission was the second of the two commissions established through the mediation process and was tasked with dealing with the disputed election results.*

These murders were criminal acts but it is difficult to deny the argument that they were some form of self-help in the face of what was perceived as unfair political advantage by their principals. Impunity may get short-term results but it also breeds anger that an electoral system can ill-afford. (Republic of Kenya, 2008b: 96).

c. The Tambach Incident

The Waki report records an incident that occurred on 28 November 2007, which was a month before the elections. The Officer in Charge of Station (OCS) at Tambach police received information from members of the public about a motor vehicle, with civilian registration, that was found along the Iten-Kabarent road, distributing leaflets that contained hate messages. Once arrested, it turned out that the occupants of the vehicle were two administration police officers based at Harambee House, the Administration Police headquarters, each of whom was armed with an officially-issued pistol, a businessman based in Nairobi, and a fourth person whose identity beyond a name, was not provided in the report (Republic of Kenya, 2008b: 409).

The police recovered from the vehicle several bundles of hate literature in the form of posters. According to the report,

> The posters showed drawings of Hon. Raila armed with a pistol and hanging retired President Daniel Toroitich arap Moi. Next on the hanging line were Ruto, Philip, Cheserem, Kosgei, Gideon, Sumbeiyo, Biwott and Mark Too. The posters had also the following information written on them in both Kalenjin and English languages. (Republic of Kenya, 2008b).

The further information on the posters was to the effect that two months before, Odinga had held a meeting in the US with FBI officials; that the officials had secretly taped his conversation; and that he had said in the conversation that he would 'finish former President Moi, Ruto and other Kalenjins who had ruined Kenya as soon as he became president' (Republic of Kenya, 2008b). In view of the anxiety that the arrested vehicle had caused in the area, the OCS escalated the incident to his superior in Nakuru, the officer in charge of the Rift Valley Provincial police office, who directed that the vehicle and its occupants be transferred there. As part of its investigation, the Waki commission had sought further information on the incident from the administration police headquarters. However, its request was met with a denial of knowledge of the incident (Republic of Kenya, 2008b).

General Observations

The hotly contested elections of 2007 provided opportunity for the use of extreme methods to gain political advantage. The emergence of conservative groups, such as the Kibaki-leaning Presidential Elections Board, whose members straddle between the public sector and government was a feature of the campaigns held during that period. It is clear that at least one member of the board is alleged to have used his position in setting up the misadventure through which serving police officers were deployed as party agents for the president's party. As the Kriegler report noted, in reference to this incident, the use of these illegal methods for gaining political advantage could have been ignored or flatly denied, and that 'things would then have proceeded in typical fashion if things had not got out of hand, and tragically so.'

Regarding the Tambach incident, it is difficult to understand how junior police officers based in Nairobi, could have organized to be involved in the distribution of hate material more than 300 kilometres away from their station. This incident points to the existence of a plan, involving higher-up officials, in a campaign of disinformation, which was calculated at demonizing Odinga as a presidential candidate, with a view to providing advantage to Kibaki.

Informal Actors and the 2013 Succession

In the lead up to the 2013, claims surfaced that one of the candidates was a project[122] of State House, who had been imposed in order to divide the support for one of the other candidates and provide a strategic advantage for another candidate. Of importance to this chapter in this claim is not the individual candidate but the evidence of informal actors' hand in execution of the project. As the 2013 elections approached, this candidate fell out with the then sponsoring party citing a clause in the party constitution that prohibited competitive process for the party's presidential candidate.[123] The party's official spokesperson would later issue a statement linking the fallout to other forces providing dates, venues and participants. The stamen read as follows:

> These forces remain adamantly at work. We know about their recent activities and meetings in Nairobi and elsewhere. We would caution members of ODM not to fall victim to short-term attraction from these forces. ODM is the only party whose presidential ticket is being contested for democratically.[124]

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122   A 'project' is street language referring to a politician regarded as a stooge. The term was first used to describe *Uhuru Kenyatta, when he became Moi's handpicked successor in 2002.*

123   *http://www.nation.co.ke/News/politics/-/1064/1386126/-/view/printVersion/-/15ekf7iz/-/index.html*

124   *http://www.capitalfm.co.ke/news/2012/04/raila-pacifies-mudavadi-assures-him-of-fairness/?wpmp_switcher=mobile*

United Democratic Forum (UDF) and Kibaki Links

In May 2012, the candidate announced his intentions to vie for the country's top seat on the United Democratic Forum ticket. An essay by Nairobi journalist, Godfrey Mosoku claimed that UDF was formed in April 2011, by individuals who were close to the incumbent and was initially also linked to a top presidential candidate. The incumbent's private secretary played a central role in the formation of the party, which began through recruitment training sessions camouflaged as leadership training forums held in secret locations in and around Nairobi. The incumbent's private secretary served as a mobiliser and a trainer and also brought on board other academics who acted as trainers.[125] Other officials working in the office of the president were also involved as facilitators in the training and had been tasked to identify key people across the country to attend the 'training'. The training targeted opinion leaders and youth and women representatives from across the country. Between April and August 2011, more than 20 sessions were held with at least 50 participants attending each session.[126]

When the media broke the story about the training, the party changed tact and sought an alternative, a more secretive venue and also adopted more secretive methods which ensured that no paper trail of its activities was left behind. Delegates would henceforth be transported in unmarked vans and did not have to sign for the per diem paid to them. All the activities of the party were being done in a clandestine way to conceal evidence of UDF spending. According to Mosoku, the money for running the training, leadership and governance symposiums was public funds, and some powerful individuals working in the office of the president were involved.[127]

A cross section of younger members of Kenya's 10th parliament were members of UDF, and came together on the promise of steering reforms to Kenya's governance and boosting economic growth. One of the founders was a junior minister and nephew of the incumbent. The fact that he had a role in the party was one of the reasons that sustained the speculation that the party had the president's backing.

As well as working to streamline the party, there is evidence that State House was involved in a process of raising the presidential contender's public profile as the 2013 elections neared. It started when the candidate was selected to invite the President to deliver his official speech during a public holiday, Madaraka Day, in June 2012, a role that would usually be reserved

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125   http://africanewsonline.blogspot.com/2012/05/how-udf-was-put-together.html

126   http://africanewsonline.blogspot.com/2012/05/how-udf-was-put-together.html

127   http://africanewsonline.blogspot.com/2012/05/how-udf-was-put-together.html

for the Vice President.[128] A few days later, the candidate was flown in a military aircraft to his home area, where he addressed a series of public rallies. An extravagant display of state power was evident during the visit, including an elaborate police presence. Media reported additional security not just in the home area but at several places the candidate stopped to address voters. By then, the image had consolidated that there was a hidden hand that was out to portray the candidate's image as more important than he ordinarily was. Because of these developments, one politician would later issue the following statement,

> This dark force has conscripted vast human and material resources into the building of a tightly knit, highly efficient machine that combines endless money to buy, manipulate leaders, and distort the 2013 Electoral process. The purpose for all this manipulation is simple. How to ensure Rift Valley and Western provinces produce 40% and 30% respectively of the presidential vote to ensure this predetermined game plan succeeds.[129]

Hidden Hands?

The evidence suggests that people working directly for the outgoing president were involved in the formation of UDF. It is not clear what the president, personally, knew and whether the formation of the party was with his express approval. Whatever the case, the president's personal staff as public servants were not expected to be in the business of forming or promoting the formation of political parties. If, as claimed, they were involved in the formation of UDF, and irrespective of what the president's own role might have been, that was a transgression enough. When all known facts are put together, it would seem that people close to the president went into the adventure of attempting to determine the direction of the presidential race, formed a political party to help them do so, identified a strategic person as their presidential candidate and leader of that party, and then started promoting his candidature using the position and influence of the presidency. What is irrefutable from the foregoing account is that public officials whose political neutrality is presumed, or expected were actively involved in the formation of political options for determining the ideal arrangements in the country's presidential race.

Complaints about Interference in the elections

During the campaigns for the elections held in 2013, a series of allegations to the effect that senior members of the public service were involved in campaigns were rife. The Cord flag

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128   *https://www.youtube.com/watch?v=7KsBOGzMASgse*

129   *http://kenyauptodate.blogspot.com/2012/12/wamalwa-is-state-house-project-jirongo.html*

bearer questioned the neutrality of several senior security officials in relation to the impeding elections. A replica allegation had been made by the leadership of the Wiper Party who in a letter to the IEBC, asserted that the head of the public service had instructed local government officials, referred to as the provincial administration, to campaign for Ms. Charity Ngilu who was running for a seat in the senate.

Thereafter, the CORD coalition made a written complaint to the Electoral and Boundaries Commission alleging the involvement of the head of the public service and also the permanent secretary for internal security, in partisan politics in support of their rival, the Jubilee coalition. The letter contained particulars of such involvement constituting meetings that had allegedly taken place, and what was discussed in the meetings. The letter claimed that there had been a meeting between Kimemia and the leader of the Jubilee coalition, Uhuru Kenyatta, on a date and at a venue stated in the letter and further claimed that another meeting took place with senior public servants, referred to as the provincial administration, two days later, during which Kimemia warned the administrators that if Odinga won the elections, they would all lose their jobs. The letter also alleged that a facilitation fee of between sh. 5 million and sh. 10 million had been offered.[130] Kimemia, however, denied the allegations, terming them 'baseless, malicious, horrific and a falsehood, in their entirety...' and expressing his readiness to face any investigation including a public inquiry. [131]

The IEBC thereafter wrote to him, demanding a formal reply to the allegation but the Director of Public Prosecutions later announced that no evidence had been found that would support the allegation made by the opposition. According to the DPP, efforts to get the Cord leaders to record statements were futile as they failed to meet with the investigators.

Conclusion

As seen above, despite the reforms, it remains possible for combinations of dominant political players to act in unaccountable ways the effect of which is to shape the political landscape with a view to achieving pre-determined and partisan political outcomes. While the underdogs who are on the receiving end of the schemes, have publicly and even formally complained when these activities have come to the notice of the public, there has been insufficient action to address those grievances. Further, these grievances are often dismissed by the dominant group, which characterizes them as desperation resulting from the fear of impending electoral defeat.

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130   Valentine Obara and Peter Obuya, 'PM Calls on Kimemia to resign' in Daily Nation, 21 February 2013.

131   Citizen News, 'Kimemia Refutes Allegations he backs Jubilee', accessed at http://www.citizennews.co.ke/news/2012/local/item/8248-kimemia-refutes-claims-he-backs-jubilee

It is also clear that the dominant political players are able to find ways in which to camouflage partisan political plans, thus hiding or understating their real intentions with a view to minimizing public scrutiny. The example given in this chapter is of the activities of the political party, UDF, which misrepresented its activities as benign governance seminars, so as to avoid accusations that public officials involved in the activities were acting contrary to the expected political neutrality. It is noteworthy that some of the officials involved in partisan activities during the 2007 elections, and which were noted in the Waki report, were then also involved in the formation of UDF in the 2013 elections. The point is that there seems to be an ingrained practice of partiality in the public service and that documentation alone, without concrete action is insufficient to address the problem.

The question that this chapter sought to answer was whether a shadow state has developed in Kenya's electoral politics. From the body of the information, there is abundant evidence about the existence of a deep state in Kenya. The deep state has different interests in different countries. In Kenya, the interests of the deep state have been revealed most clearly in the last two elections in 2007 and 2013.

3 Choreographing for Victory: Parties, Women and Youth

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Chapter 8

Party Strengths, Partisan Identities and Voter Mobilization in the Kenya Elections of 2013 - *Patrick O. Asingo*

Introduction

The importance of political parties in an electoral democracy cannot be gainsaid. Indeed, it has been argued that political parties created democracy and hence modern democracy is unthinkable without political parties (Schattschneider, 1942). Accordingly, democracy has been defined as 'a system in which parties lose elections' (Pzerworski, 1991: 10). In this regard, the success of a democracy is defined by the presence of a competing party that loses elections, rather than by the presence of a winning party. While the assumptions underlying the above conceptualization of democracy have been contested (Siaroff, 2009), they nonetheless underscore the centrality of political parties in a democratic set up. To begin with, parties play a crucial gate-keeping role in the recruitment of political leaders, thus regulating access to political office (Dalton *et al.*, 2011). Ideally, parties aggregate citizen interest and mobilize support for the ideal candidate who can best articulate their interests in the political sphere. Besides, 'parties define the choices available to voters… direct the content of election campaigns… and once in government, parties control the policy making process' (Dalton, 2008: 123). Besides, as Downs (1957) argues, parties are vital heuristic cue sources that enable voters to reduce uncertainties that characterize elections.

Although political parties have existed in Africa since the mid nineteenth century, recent systematic studies conclude that African political parties fundamentally differ from those in the advanced democracies of western Europe and North America (Salih, 2003). In advanced democracies, parties tend to be institutionalized, stable and ideology-driven, but in Africa most parties are not institutionalized and lack clear ideology (Bratton et al., 2005). Recent studies have concluded that, 'in many African democracies, political parties are often unstable, with parties appearing and disappearing from one election to another, are often weakly organized, and tend to be top-heavy institutions with weak internal democracy' (Rakner and

Svasand, 2012: 186). Yet, the ability of political parties to perform these tasks depends on the extent to which party system is institutionalized, or 'the extent to which individual parties are well organized, have stable and deep roots in (segments of) society, are consistent in their ideological positions vis-a-vis each other, and experience relatively stable inter-party competition' (Siaroff, 2009: 1).

Against this background, this chapter examines the aggregate national and regional distribution of party strengths; the extent to which ethnic and new identities influenced party support; and the mobilization strategies by major political parties during the 2013 elections. The chapter is organized into four sections. In the first section, I develop a conceptual framework for explaining how voters develop partisan alignments with candidates and parties. The second section examines partisanship and party strengths in the 2013 elections. The third section examines the basis upon which people support parties, particularly whether party support is purely identity-based or issue-based. The final section addresses mobilization strategies adopted by CORD and Jubilee in the 2013 elections.

A Conceptual Framework for Partisan Mobilization

Partisan mobilization in Kenya has to be understood within a conceptual framework that fuses the assumptions of *normative democratic theory* and those of the *Political cue theory. Normative democratic theory* rigidly emphasizes that democracy can only work when there is a critical mass of politically informed citizens. As one scholar has put it, 'political information is to democratic politics what money is to economics: it is the currency of politics' (Carpini and Keteer, 1996: 8). The underlying assumption is that only well-informed citizens can make good judgments and reasoned choices; take actions consistent with their interests; and therefore govern themselves efficiently (Dalton, 2000; Lutz, 2006). Moreover, informed citizens tend to be attentive to politics, devoted to democratic ideals, develop informed perceptions, and properly engage in political activities (Althus, 2003; Craig et al., 2005). In contrast, if the public is not well informed, then 'the public will be unable to cast its ballots wisely and, hence, unable to hold elected leaders accountable for their actions' (Craig et al., 2005: 483). In short, citizens use political information as a basis for making political decisions and engaging in political activity.

The *political cue theory* is one of the theories within the broader *Heuristic Cues Framework.* Heuristics are 'convenient, informal guides that people find helpful and often follow in making decisions or predictions' (Oskamp and Schultz, 2005: 23), or more precisely, 'shortcuts used to understand something when the full range of information about that object is not possessed

by an individual' (Pfau et al., 2007: 52). *Heuristic cues frameworks* rest on the assumption that citizens often think heuristically and not ideologically about political issues (Oskamp and Schultz, 2005). *Political cue theory* begins from the premise that the political environment is characterized by scarcity of political information, and where information is available, it is often ambiguous, and open to varied interpretations (Conover and Feldman, 1984). Hence, most citizens rely on their experience with the political world to circumvent lack of information and make sense of the complex political world. To do this, they take recourse to organized social identities like religion, ethnicity and political parties to derive cues which influence their voting behavior. For instance, parties tend to 'orient the way people think about politics' so that those with links to parties turn to them for cues (Baker et al., 1981). As a result, 'if a person holds a strong party schema, his or her evaluation of a political candidate should be strongly based on the party affiliation of the candidate' (Lau, 1986: 117). Besides, ethnic census theory suggests that citizens from ethnically fragmented societies like Africa rely on ethnicity for cues that guide their voting behavior. In such societies, parties form on the basis of, and thus mirror ethnicity. Thus, what exists in Africa are 'ethnic parties' that embody aspirations of one ethnic group whose course it champions, and which draw the bulk of support from one or few related ethnic groups. Thus, African elections are mere ethnic census punctuated by voter turnout of various ethnic groups (Horowitz, 1985).

In a nutshell, *normative democratic theory* rigidly insists that political information is the basis of voting behavior, and by implications, voters are best mobilized by information packaged to suit their interests. In so doing, it ignores other mechanisms through which uninformed citizens can surmount information deficit. *Political cue theory* seeks to cure this defect by opening an avenue through which the uninformed can emulate the informed by taking cues from identity groups like parties, religion, and ethnicity which can enable them to behave as if they are informed. The two theories also need to be fused with another strand of literature which suggests that voter behavior is largely influenced by perceptions. Although past studies assumed that the relationship between political information and political participation is direct (Zaller, 1992), I advance the argument that the relationship is indirect, so that political information and even partisan cues only serve as raw materials that the mind process into perceptions. In the final analysis, it is perceptions that people develop, rather than objective facts that influence voter behavior.

Figure 1 shows the resultant conceptual framework which fuses the two theoretical standpoints, while taking into account the fact that political perceptions are what ultimately shape behavior.

Figure 1 Conceptual Framework
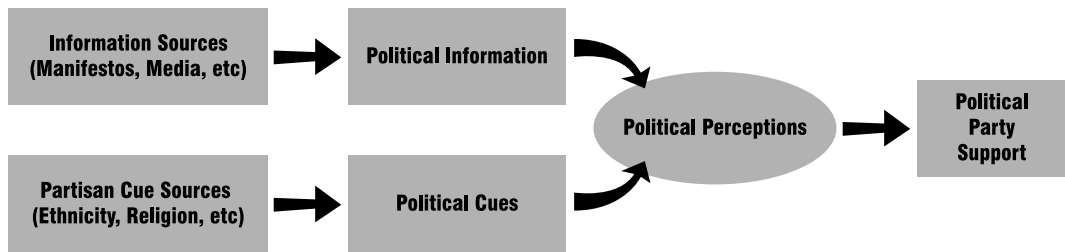
Source: Author's Conceptualization, 2015.

This conceptual framework is fairly straight forward. To begin with, political behavior, including support for political parties, is influenced more by political perceptions. It is what people think or believe about politically relevant issues such as political parties, party leaders, party policies, and electoral institutions that matters. These perceptions can be derived from objective evaluation of available information about issues at play, or may be based on the need to defend group identity. In other words, voters can be mobilized individually and collectively by issues, or by cue sources like ethnicity, race and religion. However, voters do not accept any cues from their political leaders; they evaluate, interpret, and only follow cues they consider credible. This explains why Kisiis refused to follow their supposed leader Simeon Nyachae to the PNU coalition in 2007. Nyachae took over FORD-P and positioned it as the Kisii party, received near-fanatical support from his community for his presidential bid in 2002, but was rejected by the same Kisii voters in 2007 for offering objectionable cues. The same fate befell Musikari Kombo, the then FORD-K leader, whose decision to join PNU in 2007 isolated him from his Bukusu kinsmen.

Data and Methodology

Most studies tend to use survey data to measure party strength and partisanship. For instance, 'party strength in the United States is generally measured by public opinion polls in which respondents report their own partisan identification' (Ceaser and Saldin, 2005: 245). However, past studies have shown that voters tend to hide or overestimate intended political behavior. It has been shown in studies that in opinion surveys, more people indicate the intention to vote than those who actually end up voting. Thus, actual election results can overcome the tendency to hide or inaccurately report voting intentions and behaviors. Indeed, it is argued that 'if one is interested in party strength, it makes great sense to look at how citizens actually vote' (Ceaser and Saldin, 2005: 245). This study therefore, relies on election

outcomes data provided by the Independent Electoral and Boundaries Commission (IEBC) and its predecessor electoral bodies in Kenya.

The greatest challenge with such data is accuracy, given the contested nature of election outcomes in Kenya in recent times. However, it should be noted that the emphasis of this study is less on the actual votes received by parties and candidates and more on the emerging patterns. It is reasonable to expect that even if the IEBC data does not accurately reflect how people voted, it nonetheless provides a useful pointer to the emerging voting patterns. In any case, even if there was ballot staffing or manipulation of vote tally, the resultant vote margin may not be so huge as to fundamentally alter the emerging patterns for all the six elective positions contested in 2013.

Understanding Partisanship in the Kenyan Context

Despite the significance of partisanship in explaining and predicting voter behavior, there is still debate over its meaning and measurement (Blais et al., 2002; Kroh and Selb, 2009). It has traditionally been defined in terms of long-term 'psychological attachment to a particular political party' (Best and Radcliff, 2005: 502), or as 'card carrying party membership' (Baker et al., 1981). Yet, the flaws of this approach are well documented. For instance, 'lifetime loyalties anchoring voters to parties have been eroding in many established democracies' (Norris, 2011: 220). In fact, indications are that 'new electorates are also unlikely to hold long-term party attachments that might guide their behavior' (Dalton, 2000: 925-6).

This conceptualization of partisanship as long-term attachment to political parties has its origins in *The American Voter* and entails a party identification scale which runs from strong Democrats to strong Republicans. Yet, 'while *The American Voter* measure of party identification works well in two party system like that of the United States, it is less readily applicable to a multiparty situation' (Miller and Klobucar, 2005: 245). Kenya has one of the highest numbers of parties per capita so that by November 2007, there were 134 registered parties. This large number of parties, coupled with their ideological impotence, implies that the American party identification scale cannot be used in Kenya, or in any multiparty system (Blais et al., 2002).

Furthermore, the party system in Kenya since 2002 has been both complex and volatile so that partisanship as long-term attachment is virtually non-existent. In 2002 the Kenya African National Union (KANU) lost elections for the first time since independence in 1963. The National Rainbow Coalition (NARC), which won the elections, was itself a coalition of two opposition blocs – the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party (LDP).

When LDP and NAK fell-out, LDP became a *defacto* opposition party, even agitation against government policies, while still legally part of government. The final straw was in 2005, when LDP joined with radical KANU MPs to defeat a government-backed constitutional referendum. President Kibaki, who was from NAK wing of NARC, replaced LDP ministers with conservative KANU MPs. This created a scenario where NARC was legally the ruling party and KANU was the opposition party, yet in reality, legislators from both parties were in government and in the opposition. Thus, the line between the ruling and opposition party was obscure (Asingo, 2013). Moreover, long-term attachment to parties is impossible when the parties are not long-term.

Accordingly, efforts to refine partisanship (Blais et al., 2002; Miller and Klobucar, 2005) have seen it redefined as biased evaluative attitude towards a party (Greene, 2002). Therefore, I adopt the definition of partisanship as 'the intensity with which an individual prefers a victory for one party rather than another' (Powell, 1976: 5). Indeed, it is generally agreed that 'elections are the most common way for people to express their political preferences' (Norris, 2011: 220).

Party Strength and Partisanship in Kenya's 2013 Elections

I identify two strategies for measuring party strength using elections data. First, there is *Single-Election Strategy* that involves using data for only one election. Secondly, there is the *Multiple-Election Strategy* that involves using data for more than one election held simultaneously.

Measuring Party Strength in Kenya: A Single-Election Strategy

Single-election strategies can focus on any one election such as presidential, civic, senatorial, gubernatorial or parliamentary polls as a basis to gauge party strengths. However, in this section, I use only the presidential election results to measure party strength. The focus is on the number of presidential votes received by each political party both at the aggregate national level, and in each electoral unit. A key assumption of this strategy is that parties tend to revolve around one central figure – the party leader - that often doubles up as its presidential candidate. Since most Kenyan parties lack ideology and espouse more or less similar policy promises, party support also tend to be based on trust in the party leadership and not necessarily party policies. Indeed, it is argued that 'African parties tend to be dominated by personalities' (Gyimah-Boadi, 2007: 25). That is, a party is as popular as its presidential candidate. Party strength is determined by the percentage of presidential votes that it received

in the most recent elections. The party or coalition that wins presidential elections for instance is treated as the strongest and vice versa.

Using this strategy, Jubilee was the most popular coalition whose strength was 50.5 percent, followed by the Coalition for Reforms and Democracy (CORD) at 43.7 percent, and Amani coalition at 4 percent. The other parties/coalitions had a combined strength of 1.8 percent. This is notwithstanding the fact that the number of political parties and coalitions that fielded presidential candidates in 2013 was eight, which is an increase from five in 2007. Thus, although many parties and coalitions participated in the 2013 elections, an overwhelming majority of voters (94.2 percent) settled on the two major coalitions - Jubilee and CORD. This is not surprising given that, 'voters prefer parties which are large enough to have a good chance of putting their policies into effect' (Brug et al., 2007: 119). In fact, the trend since 2002 has been for Kenyan voters to converge around two major parties or coalitions. In the 2002 elections, the pooled vote share of the winning NARC and second placed KANU candidates was 93.5 percent. In the 2007 elections, the top two presidential candidates for PNU and ODM had a combined vote share of 96.4 percent. Of course, the 2007 presidential results were disputed, leading to violence and the formation of a government of national unity. In short, Kenya is emerging as a *dejure* multi-party state operating as a *defacto* two-party state.

The regional distribution of party support is equally important. In this regard, it is possible to divide the electoral units into 'party strongholds', 'comfortable zones', 'swing territories' and 'hostile territories'. In this chapter, I adopt Wantchekon and Vermeersch's (2011) definition of 'party stronghold' as an electoral district where a party attains at least 70 percent of the votes cast. In other words, a party's stronghold is an electoral unit where the combined votes of those who do not support it do not reach half of those who support it. 'Swing territories' on the other hand are electoral units where the gap between the winning and the losing party or coalition is very marginal (about 5 percent), and possibly a matter of statistical chance. There is a realistic chance that any of the major contenders could win the elections depending for example on which party mobilizes its supporters more. In 'comfortable zones', the margin of victory is not so small that the elections could go either way, yet not big enough to reach the level of a stronghold. 'Hostile territories' are difficult hunting grounds for a party from where it would be grateful for whatever votes received. In a highly polarized electoral arena as is often the case in Kenya, the strongholds of one party or coalition is almost always a 'hostile territory' for its main rival. Generally, parties are not expected to score more than 10 percent of votes in a hostile territory.

In this section, I use the newly created counties in Kenya as the aggregate unit of analysis for party strength. The primary focus is the performance of CORD and Jubilee Coalitions in 2013 elections. The decision to focus only on the two coalitions is not arbitrary but based on the fact that the two coalitions were the only ones that had strongholds. Table 1 shows party strongholds for both the CORD and Jubilee Coalitions in the 2013 Kenya elections.

Table 1: The Party Strongholds for CORD and Jubilee Coalitions

CORD Strongholds			JUBILEE Strongholds		
County	Presidential Votes	Presidential Votes %	County	Presidential Votes	Presidential Votes %
Homa Bay	303,447	98.9%	Nyandarua	232,808	97.1%
Siaya	284,031	98.5%	Nyeri	318,880	96.3%
Kisumu	337,232	96.6%	Krinyaga	231,868	96.0%
Makueni	228,843	90.7%	Murang'a	406,334	95.2%
Migori	225,645	86.4%	Mandera	94,433	92.9%
Machakos	319,594	85.9%	Bomet	210,501	92.7%
Busia	189,161	85.6%	Tharaka Nithi	128,397	92.4%
Kilifi	182,708	83.7%	Elgeyo Marakwet	113,680	92.1%
Taita Taveta	75,329	81.6%	Kericho	238,556	90.7%
Kwale	101,407	80.7%	Kiambu	705,185	90.2%
Kitui	219,588	79.5%	Meru	384,290	89.4%
Mombasa	189,985	70.0%	Embu	177,676	89.0%
Total	2,656,970	49.8%*	Baringo	138,488	87.9%
			Laikipia	134,111	85.5%
			Nandi	192,587	81.5%
*Total presidential votes received in all the strongholds as a percentage of the total votes received by a presidential candidate in the final vote tally.			Nakuru	494,239	80.2%
			Uasin Gishu	211,438	74.3%
			West Pokot	79,772	73.3%
			Total	4,493,243	72.8%*

Source: Independent Electoral and Boundaries Commission

Several observations can be made from Table 2. First, using the presidential results, the Jubilee coalition had 18 strongholds compared to CORD'S 12. In total, 30 out of 47 or 63.8 percent of all the counties in Kenya were clear strongholds for either of the two major coalitions. This was an increase from 24 out of 47 or 51.1 percent stronghold counties in the 2007 elections. This implies that counties are increasingly consolidating support to just one party or coalition. Since Jubilee had more strongholds than CORD, it can be regarded as more popular. It is also notable that Jubilee relied a lot on strongholds for presidential votes, to the extent that 72.8 percent of its presidential votes were from their 18 stronghold counties. In contrast, CORD

received less than half (49.8 percent) of their total presidential votes from the coalition's 12 stronghold counties.

The third observation is that the Jubilee strongholds appear to be relatively more concentrated mainly in the their presidential candidate, Uhuru Kenyatta's Mount Kenya region comprising of Embu, Meru, Tharaka-Nithi, Kirinyaga, Nyeri, Kiambu, Murang'a and Nyandarua as well as his Kikuyu diaspora counties of Nakuru and Laikipia. These regions have invariably voted together since the advent of multiparty politics in Kenya in 1992 and were therefore not expected to vote any differently in the 2013 elections. The second bloc of Jubilee strongholds comprise of their presidential running-mate, William Ruto's Kalenjin counties of Bomet, West Pokot, Kericho, Uasin Gishu, Elgeyo Marakwet, Baringo and Nandi. In fact, Mandera is the only Jubilee stronghold whose population is neither predominantly Kikuyu nor Kalenjin.

In contrast, although CORD had relatively few strongholds, they were fairly spread, with five out of twelve or 41.7 percent of the stronghold counties found at the Coast and the Western regions. These regions lie outside the CORD ethnic basket comprising of Raila Odinga's *Luo* ethnic base and Kalonzo Musyoka's *Kamba* base. The creation of additional strongholds outside the ethnic basket served CORD well given that *Luos* occupy only four counties (Siaya, Homa Bay, Migori and Kisumu), while *Kambas* occupy three counties (Kitui, Machakos and Makueni). Generally, building parties and coalitions with wider geographical and demographic support bases help not only in improving their national outlook, but also help in the de-ethicization of national politics.

ODM participated in the 2007 elections as one solid party and secured a total of 15 strongholds compared to its main rival, PNU's nine strongholds. Of these 15 strongholds, ODM retained only five as strongholds in 2013 (Kisumu, Siaya, Homa Bay, Migori and Busia). The major reason why ODM lost many strongholds or at least performed poorer in 2013 in some of its 2007 strongholds has to do with the multiple splits in the party. First, William Ruto pulled out six counties predominated by his native Kalenjin ethnic group out of the party into his new party, the United Republican Party (URP), and finally to Jubilee coalition. These counties include Kericho, Elgeyo Marakwet, Nandi, Baringo, Bomet and Uasin Gishu. Secondly, Musalia Mudavadi also deserted ODM for the United Democratic Party (UDF), which marginally won his Vihiga home county. His departure also reduced ODM support in the neighboring Kakamega county from 74 percent in 2007 to 64.0 percent in 2013. Thus the Mudavadi factor changed Vihiga and Kakamega from ODM strongholds to its swing territory and comfortable zones respectively. However, Mudavadi's departure did not affect ODM's

support in the other three largely Luhya counties of Trans-Nzoia, Bungoma and Busia. ODM/CORD'S support remained intact in Trans-Nzoia at 46.0 percent, and increased by 12.8 and 8.6 percent in Bungoma and Busia respectively. ODM also remained the most popular party in Narok and Samburu which were its strongholds in 2007, though its support levels reduced in 2013 by 22.7 and 20.4 percent respectively.

The emerging question is: why was Ruto able to pull Kalenjins out of ODM, yet Mudavadi was not able to pull his Luhya kinsmen from the party in 2013? This question is compelling given that both Kalenjins and Luhyas are not homogenous groups and hence should be relatively difficult to mobilize in equal measure. Kalenjin for instance, is a collective ethno-linguistic term that includes several distinct sub-ethnic groups such as *Kipsigis, Nandi, Tugen, Marakwet,Keiyo, Pokot* and *Sabaot*. The same is true of Luhya which also comprise of several sub-ethnic groups like *Tachoni, Tiriki, Samia, Isukha, Khisa, Idakho, Wanga, Bukusu, Banyala, Nyore, Maragoli* and *Marama.*

Ruto adopted a gradual approach in exiting ODM, initially using lieutenants like Joshua Kutuny to tear into the party and its leadership and then gradually bringing other Kalenjin legislators on board, a majority of whom were elected on the party ticket in 2007. Once assured of sufficient support from Kalenjin elite, he began to take on the party leadership himself. This enabled him to build a broad-based support within his community. In contrast, Mudavadi left ODM hastily, and did not appear motivated by a Luhya community agenda. Moreover, his initial support was from non-ODM Luhya legislators. He therefore appeared to be pushed more by enemies of the party than by genuine grievances against the party. Moreover, Ruto took an issue-based approach to mobilize Kalenjins, by constructing a strong ethnic narrative laced with powerful propaganda revolving around issues dear to the Kalenjins such as land. He reframed a purely environmental policy of resettling Mau forest inhabitants as a way of conserving the water tower into a political tool for stirring his community against ODM. Yet, he participated in the crafting of this policy in the cabinet. His narrative was that the ODM leader whom Kalenjins had voted for in 2007 had turned against them and was now evicting them from Mau forest. He shifted the narrative from environmental conservation to political persecution of Kalenjins by a leader they voted for.

It was not all loses for ODM in 2013. It is notable that although the party had won nearly all the coastal counties in 2007, its support levels in all the counties were below a stronghold threshold of 70 percent. The party was able to raise its performance in four of those counties (Mombasa, Kwale, Kilifi and Taita Taveta) to stronghold levels. Moreover, despite losing the

coastal county of Tana River to PNU in 2007, ODM perhaps with the support of its coalition partners in CORD was able to win it at 61.4 percent in 2013. What is surprising is that ODM remains the most popular party in Lamu, like in the rest of the Coast region, yet its performance in that county remains less impressive of all coastal counties, only managing 45 percent in 2007 and slightly improving it to 51.9 percent in 2013. Relatedly, while Nairobi was a swing zone in 2013 as in 2007, the ODM/CORD vote tally increased by 6 percent, beating the PNU/TNA axis that won it in 2007.

The National Alliance (TNA) started off by inheriting nine Mount Kenya counties from PNU. In fact, one could argue that TNA is just PNU by a different name. Not only did its leader, Uhuru Kenyatta, abandon PNU which became moribund, but the new party basically inherited the PNU support base. Ordinarily, political elites do not freely disband an existing popular party to create new parties unless voters show signs of displeasure with that party, or the party's support base considerably shrinks. A likely reason for 'rebranding' PNU as TNA is that the former carried the burdens of incumbency and would have been ironical to use it to sell TNA/Jubilee agenda of a new beginning. Also, evidence from the rest of Africa suggests that new parties with a set of political newcomers hardly succeed in penetrating the African political market. Most of the so-called new parties emerge from mergers or splits in existing parties, or are formed out of intra-elite fall outs. By and large, 'party newness' is symbolic. While new parties may have fancy names and catchy slogans, the policies and actors are essentially the same (Bogaards, 2008). Voters recognize this comedy and adjust party support accordingly. It is not surprising that in Kenya, 'new parties have had little or no impact upon the elections' (Cowen and Laakso, 2002: 149).

Although Nakuru County was just a PNU comfortable zone in 2007, TNA inherited and turned it into its stronghold in 2013. The difference between PNU's performance in Nakuru in 2007 and Jubilee's performance in 2013 is attributable to Kalenjin support. In the first place, Kalenjins have visible presence in Nakuru constituencies of Kuresoi and Rongai. Moreover, with Kalenjin support, the TNA/Jubilee presidential support increased by 16.9 percent in 2013. At the same time, after being deserted by the Kalenjin in 2013, ODM/CORD presidential vote reduced by nearly the same margin of 17.9 percent. Relatedly, URP grabbed West Pokot County which was ODM comfortable zone in 2007 and turned it to a Jubilee stronghold in 2013.

The strengths of the two major coalitions in the non-stronghold counties are shown in Table 2.

Table 2 Performance of CORD and Jubilee Coalitions in Non-Stronghold Counties

County	CORD Presidential Votes		JUBILEE Presidential Votes	
	Votes		Votes	
Kisii	236,831	67.9%	95,596	27.4%
Turkana	68,402	67.5%	30,235	29.9%
Nyamira	121,590	66.3%	54,071	29.5%
Kakamega	303,120	63.8%	12,469	2.6%
Tana River	39,666	61.4%	22,419	34.7%
Samburu	31,086	57.6%	22,085	40.9%
Bungoma	185,419	52.8%	42,988	12.3%
Lamu	22,962	51.9%	17,677	40.2%
Narok	118,623	50.3%	109,413	46.4%
Wajir	49,712	49.6%	38,927	38.8%
Nairobi	691,156	49.0%	659,490	46.8%
Marsabit	43,843	48.8%	42,406	47.2%
Garissa	44,724	48.7%	41,672	45.3%
Vihiga	77,825	46.4%	2,542	1.5%
Trans Nzoia	92,035	46.0%	74,466	37.2%
Kajiado	117,856	44.4%	138,851	52.4%
Isiolo	14,108	29.6%	26,401	55.4%
Total	2,258,958	42.3%	1,431,708	23.2%

Source: Independent Electoral and Boundaries Commission

Table 2 shows that the CORD presidential candidate outperformed his Jubilee counterpart in fifteen out of seventeen, or 88.2 percent of the non-stronghold counties. In fact, a part from Vihiga County where CORD lost to UDF by a paltry 2.8 percent, CORD won in the remaining 14 or 82.4 percent of all non-stronghold counties. The results coupled with the distribution of strongholds as shown in table 1 demonstrate that CORD, or at least its presidential candidate, was the most popular in 26 out of 47 (55.3 percent) of all counties compared to Jubilee's 20 counties (42.6 percent). The level of popularity of these coalitions varies, but can be classified into swing territories and comfortable zones. As already noted, in swing territories, there is the possibility that any of the competing parties and coalitions could win. This is the case in Narok, Nairobi, Marsabit and Garissa where the contest was between CORD and Jubilee. In Vihiga, the fiercest tussle was between CORD (46.4 percent) and Amani coalition (49.2 percent).

Vihiga is the home County of Amani's presidential candidate, Musalia Mudavadi, who defected from ODM to the United Democratic Party (UDF), which then joined with other fringe

parties to form Amani coalition. However, Mudavadi's victory in Vihiga (though marginally) is indicative of an emerging trend whereby, whenever an aspiring 'ethnic leader' forms an 'ethnic party', voters from his community tend to support him in that election. While some parties consolidate this support in later elections, this initial ethnic support often withers away with time. In 2002 for instance, the Forum for the Restoration of Democracy for the People (FORD-P) led by Simeon Nyachae won all the ten parliamentary seats in his Gusii backyard, but in 2007, he could not even retain his own parliamentary seat which he had won easily by 93.4 percent in 2002. In 1997, Kambas supported Charity Ngilu, the first Kamba to seriously bid for the presidency, but they later shifted that support to Kalonzo Musyoka in 2007 (Asingo, 2014). Similarly, in 2013, Kiraitu Murungi formed the Alliance Party of Kenya (APK) which performed well in his native Meru County and even in the neighboring Embu County as partly shown in Table 4. The case of APK is interesting because, unlike other 'ethnic parties' formed and used by aspiring 'ethnic leaders' to seek presidency, Kiraitu did not seek the presidency. This shows that 'ethnic party' support is not inexorably driven by the allure of using it to make 'one of our own' the president.

The other 12 counties that are neither strongholds nor 'Swing Territories' are the 'Comfortable Zones'. Three of these counties (Kisii, Turkana and Nyamira) just fell short of attaining the status of CORD strongholds. Jubilee had only two 'comfortable zones' (Isiolo and Kajiado), while the rest were leaning towards CORD. This underscores the point that CORD's support was fairly well spread across the country as compared to Jubilee whose support was concentrated in Mount Kenya and Rift Valleywith exception of Mandera. Despite the huge Jubilee win in Rift Valley, CORD sliced away four counties from the region –Turkana, Samburu, Narok and Trans-Nzoia.

So far, the outcomes of only one election—the presidential elections have been used to determine the strength of the coalitions. However, this may not adequately reflect the actual party support. A party may perform well in presidential elections in a particular electoral area but do badly in the other elections held simultaneously. It is possible even outside a formal pre-election coalition arrangement that voters may support a particular presidential candidate without necessarily being supporters of the sponsoring party. This is particularly true of voters who are either not aligned to any party or whose parties do not field presidential candidates. The performance of a party or a coalition presidential candidate in elections can also be influenced by the character, personality and general standing of the candidate, rather than a reflection of partisanship or party popularity.

Measuring Party Strength in Kenya: A Multiple-Elections Strategy

In multiple-elections strategy, party strength is measured in terms of the number of elective seats won by each political party. The larger the number of seats that a party gets, the stronger it is. Where there are multiple elective seats as was in 2013, a stronger party is one that either wins most seats in each category of elective seats or wins a higher aggregate number of elective seats.

Table 3 shows the seats won by the major parties, and independent candidates in five elective seats contested in 2013, besides the presidency. The parties shown are those that won at least one of the three county level seats - governor, senator and women's representatives. These parties won a total of 96.2 percent of all parliamentary seats, and 89.3 percent of all county assembly seats.

Table 3: Distribution of seats among Parties and Independent Candidates in 2013 Elections

Parties	Number of Seats won				
	Governor	Senator	Women Rep.	MP	MCA
ODM	16	11	15	78	382
TNA	8	11	14	72	353
URP	10	9	10	62	248
WDM-K	4	4	6	19	81
FORD-K	1	4	-	10	41
UDF	1	2	-	11	55
KANU	1	2	-	6	23
APK	1	2	-	5	21
New FORD-K	1	-	2	4	25
Muungano Party	1	-	-	1	11
GNU	1	-	-	-	17
PDP	1	-	-	1	10
PPK	1	-	-	-	3
NARC	-	1	-	3	10
FPK	-	1	-	3	12
Independents	-	-	-	4	1

Source: Independent Electoral and Boundaries Commission

It should be noted that the number of parliamentary parties reduced slightly from 23 in 2007 to 20 in 2013. However, the distribution of seats per party has never been uniform. Table 3 shows that 87.0 percent of all the parliamentary seats in the 2013 elections were won by just 6 out of the 20 (or 30 percent) parliamentary parties. Moreover, in terms of provincial parliamentary parties, Nairobi and North-eastern are the most difficult campaign grounds for

fringe parties. Only two parties won in Nairobi (ODM and TNA) and only three parties won in North-Eastern in 2007 and 2013. Eastern province remains a soft spot for fringe parties, with eleven parliamentary parties in 2007 and ten in 2013. The most significant change occurred in Central Province where the number of parliamentary parties reduced from eight in 2007 to just three in 2013 (TNA, APK and NARC). One significant consequence of this vote consolidation is that TNA won 91.2 percent of all the seats in the province in 2013 compared to PNU's 62.1 percent in 2007.

It is clear that ODM was the single most popular political party in the 2013 general elections. It had the highest number of elected leaders in each of the five elective positions, besides the senate which it tied with TNA. Despite, ODM's impressive performance, its CORD partners, the Wiper Democratic Movement Kenya (WDP-K) and the Forum for the Restoration of Democracy in Kenya (FORD-K) were not equally strong. For instance, FORD-K only won one gubernatorial seat and no women representative's seat. Moreover, apart from senatorial seats, the combined strength of FORD-K and WDP-K in each of the other seats did not come even closer to half of ODM's seats. In contrast, the two Jubilee partners (TNA and URP) had almost equal strengths. Whereas TNA performed better than URP in most of the seats, URP had more governors than TNA. In essence, CORD is a 'coalition of unequals' while Jubilee is a 'coalition of equals'. Nonetheless, a major flaw in this approach to measuring party strength is that it does not reveal the geographical and demographic distribution of party support base and sources of electoral strength, or show whether and how fringe parties ate into major parties' supposed support bases.

While the number of elective seats won by each party is a significant macro-level indicator of party strength, it is equally critical to establish the geographical and demographic distribution of party support base as well as party strength a cross various elective seats. Table 4 shows the extent to which support for party/coalition presidential candidates in their strongholds is replicated in the other elective seats. It is reasonable to expect that a stronghold does not just give a party super-majority presidential votes, but also votes for the party's candidates in all the other elective seats.

Table 4: Performance of Major Parties in Five Elective Seats in 2013

Stronghold Counties	Popular Party	County-Level Seats			Grassroots Seats %	
		Governor	Senator	Women Reps.	MPs	Ward Reps.
Homa Bay	ODM	ODM	ODM	ODM	100%	74.4%
Siaya	ODM	ODM	ODM	ODM	83.3%	86.7%
Kisumu	ODM	ODM	ODM	ODM	71.4%	87.9%

Migori	ODM	PDP	ODM	ODM	62.5%	63.2%
Busia	ODM	ODM	ODM	ODM	42.9%	52.9%
Kilifi	ODM	ODM	ODM	ODM	57.1%	61.8%
Taita Taveta	ODM	ODM	ODM	ODM	66.7%	60.0%
Kwale	ODM	ODM	ODM	ODM	50.0%	31.6%
Mombasa	ODM	ODM	WDP	ODM	71.4%	100%
Makueni	WDP	Muungano	WDP	WDP	83.3%	41.9%
Machakos	WDP	WDP	WDP	WDP	37.5%	48.8%
Kitui	WDP	WDP	WDP	WDP	87.5%	67.5%
Kiambu	TNA	TNA	TNA	TNA	100%	91.8%
Nyandarua	TNA	TNA	TNA	TNA	80.0%	83.3%
Nyeri	TNA	GNU	NARC	TNA	83.3%	76.7%
Kirinyaga	TNA	TNA	TNA	TNA	100%	95.0%
Murang'a	TNA	TNA	TNA	TNA	85.7%	91.2%
Tharaka Nithi	TNA	TNA	TNA	TNA	33.3%	33.3%
Meru	TNA	APK	APK	TNA	44.4%	28.9%
Embu	TNA	TNA	APK	TNA	75.0%	52.4%
Laikipia	TNA	TNA	URP	TNA	66.7%	66.7%
Nakuru	TNA	TNA	URP	TNA	63.6%	67.9%
Bomet	URP	URP	URP	URP	90.9%	96.0%
Elgeyo Marakwet	URP	URP	URP	URP	100%	85.0%
Kericho	URP	URP	URP	URP	90.9%	96.6%
Baringo	URP	URP	KANU	URP	83.3%	70.0%
Nandi	URP	URP	URP	URP	100%	80.0%
Uasin Gishu	URP	URP	URP	URP	100%	92.9%
West Pokot	URP	KANU	KANU	URP	75.0%	40.0%
Mandera	URP	URP	URP	URP	100%	73.1%

Source: Reconstructed from data from Independent Electoral and Boundaries Commission

Although parties won a significant number of the county-level seats in their strongholds, eleven of these seats were nonetheless won by parties that are not considered to be the strongest in those counties. Each of the four parties that had strongholds lost at least one county-level seat in their strongholds. TNA was the most affected, losing three senatorial seats in Nyeri, Meru and Embu as well as two gubernatorial seats in Nyeri and Meru. At the same time, URP lost three seats; ODM lost two, while WDP-K lost one seat. However, the dominant parties were mostly losing seats to coalition partners. In the case of ODM for instance, the loss of Mombasa senatorial seat and Migori gubernatorial seat was largely due to flawed nominations which led the eventual winners to decamp from ODM to its coalition partners. URP is a different case because it lost its seats to KANU which was not its coalition partner at the time of elections. This suggests strength of individual candidates—Gideon Moi in Baringo and Lonyangapuo in West Pokot. Interestingly, the election of women representatives' seats followed the script so that each party won all seats in their strongholds. Unlike the case

with senatorial and gubernatorial seats, no party won a women representative seat in the stronghold of a coalition partner. This is may be an indication that most women candidates were unable to mobilize support outside the ambits of dominant parties.

The vulnerability of parties in their strongholds is even more evident in the two grassroots seats – parliamentary and ward assembly seats. There are very few cases where major parties won all the parliamentary seats in their stronghold counties. For instance, out of ODM's nine strongholds, it is only in Homa Bay where it managed to win all the eight parliamentary seats. Yet the party won all the seats in Homa Bay, Siaya, Kisumu, Mombasa, and Busia in 2007. Some of ODM's worst parliamentary performances in its strongholds in 2013 were in Busia, where it won only three out of seven parliamentary seats, and Kwale where it won four out of seven seats. Among ODM strongholds, it is only in Kwale where it managed to increase its parliamentary strength from 33.3 percent in 2007 to 50 percent in 2013. In all the other seven strongholds (excluding Homa Bay), its parliamentary strength reduced by as much as 57 percent in the case of Busia.

In contrast, TNA won all the parliamentary seats in two out of its ten strongholds, Kiambu and Kirinyaga in 2013. Its predecessor, PNU, had only won all seats in Laikipia County. Apart from Tharaka Nithi and Meru, where TNA performed poorer than PNU in parliamentary elections, the former had greater parliamentary strength than the latter in its other seven strongholds. URP did fairly better, winning all parliamentary seats in four out of its eight strongholds. In fact, even in the other four counties, it lost only one seat each. WDP-K was the greatest loser as it was unable to win all parliamentary seats in any of its three strongholds. The party's greatest loss was in Machakos where it only won three out of eight seats. This is not surprising given that an analysis of past parliamentary election results reveals that the Kamba voters tended to exhibit 'impulsive voting patterns and an eccentric appetite for fringe parties' (Asingo, 2013: 16). It is notable that at this level, parties are not just loosing seats to coalition partners but also to parties outside their coalition. That is, voters were reaching out to candidates outside the dominant party or coalition, thus enabling parties to win seats even in hostile territories as exemplified by ODM's two seats in Meru and one in Laikipia; URP's two seats in Busia; and FORD-P's one seat in Machakos.

Parties' vulnerability in their strongholds goes a notch higher in the elections for the Ward representatives. Mombasa is the only county throughout the country, where one party (ODM) won all the 30 Ward seats. No other party was able to win all Ward seats in any county. In some counties, dominant parties won all seats except in one or two constituencies. For instance, all

the four Ward seats that ODM lost in Siaya County are in Alego-Usonga constituency where a fallout in parliamentary primaries led the eventual winner to decamp to WDP-K. Alego-Usonga is also the constituency of William Oduol who felt short-changed in the ODM gubernatorial primaries and defected to the National Agenda party. It seems that these incidences irked voters who gave ODM/CORD presidential votes but rejected the ODM parliamentary and ward candidates. This scenario was replayed in Muhoroni constituency in Kisumu County, where a 'loser' in the ODM primaries defected to People's Democratic Party (PDP). Muhoroni voters then elected him on this CORD affiliate party's ticket alongside three out of the four Ward representatives.

Identity Versus Issue-based Party Support in Kenya

The question which arises is: on what basis did these counties overwhelmingly give support to the respective parties or coalitions? Our conceptual framework suggests that people vote either on the basis of rational reflection on relevant issues (issue-based mobilization and voting), or as expression of passionate solidarity with group identity (identity-based mobilization and voting).

a) Ethnic Identity and Party Support in Kenya

Ethnicity first appeared in Kenya's political scene in the period just before independence. More specifically, ethnicity is traceable to the refusal by Daniel Arap Moi and Ronald Ngala to accept their leadership positions in KANU on the pretext that the party was dominated by the Kikuyu and Luo, which were the two largest ethnic groups then. Instead, they formed the Kenya African Democratic Union (KADU), which was supposedly a party for smaller ethnic groups. The party then sanitized its ethnic orientation by adopting federalist ideology to counter KANU's clamor for a unitary government (Asingo, 2003). Today, ethnicity is the major identity group that has been used to rationalize voter behavior in Kenya and indeed in Africa. However, evidence from 2013 elections shown in Tables 1 and 2 only provide partial support for the ethnic voting theory. It is true for instance that out of the 18 Jubilee stronghold counties, only Mandera voters belong to an ethnic group (Somalis) that is not associated with the coalition's presidential candidate or his running mate. For instance the TNA strongholds are predominantly occupied by Kikuyu, Embu, Meru, Tharaka and Mbere ethnic communities. These communities constitute some sort of politically compatible ethno-linguistic network, which I define as two or more ethnic groups that usually reside within the same geographical location, have contagious borders, and though distinct from each other, largely share political orientations such as voting behavior. In short, these ethnic communities constitute more or less one voting bloc. URP on the other hand derived support from Kalenjin sub-tribes, with the

exception of Somalis in Mandera. The foregoing discussion, coupled with the fact that 72.8 percent of the Jubilee presidential votes came from these strongholds, strongly suggest that Jubilee support was largely ethnic.

A similar scenario plays out in the Kamba and Luo dominated CORD strongholds. Seven out of the 12 CORD strongholds are inhabited by the Luo and the Kamba and can be said to constitute ethnic voting blocs since these are the ethnic communities of the coalition's presidential candidate and his running mate respectively. It is notable that in 2007, Raila Odinga managed to get only 1% of the votes in Kitui and Makueni, and 2 percent in Machakos as the ODM presidential candidate. These Kamba counties largely voted for WDP-K in 2007. The fact that they became CORD strongholds in 2013 underscores the idea that 'ethic voters' tend to follow their 'ethnic leaders'. This trend is not unique to Kambas. When Raila deserted FORD-K to the National Development Party (NDP) in 1994, Luos followed him; when he again asked Luos to vote for a Kikuyu presidential candidate in 2002, they religiously obeyed; when Ruto asked Kalenjins to abandon ODM, they dutifully obeyed; and Kikuyus always vote for a Kikuyu presidential candidate. These are signs of ethnic voting and manifest the influence of ethnic identity on party support.

It is not only voters who cast votes along ethnic lines, but an even more worrying trend is that certain parties are largely presenting to voters 'ethnic candidates' in most elective seats even in cosmopolitan set-ups. For instance, in the 2007 elections, seven out of eight, or 87.5 percent of PNU's parliamentary candidates in Nairobi were Kikuyus. In contrast, only three out of eight, or 37.5 percent of ODM candidates were Luos. Indeed, two of the ODM candidates were in fact Kikuyus, with one (Margaret Wanjiru) winning Starehe seat. Regrettably, TNA has walked into PNU's ethnic trap so that 82.4 percent of its Nairobi candidates in 2013 were Kikuyus. On its part, ODM maintained ethnic balance in fielding candidates in cosmopolitan areas. In 2013, only 35.3 percent of its Nairobi candidates were Luos. The fact that a huge majority of TNA parliamentary candidates were from the party leader's ethnic group even in a cosmopolitan city like Nairobi underscores the relative ethnic nature of the party as compared to its nemesis, ODM.

There are several possible explanations why voters support the candidates and parties with roots from their ethnic groups. First, ethnic identity is a default cue that voters resort to in the absence of either a strong mobilizing ideology or distinct and meaningful issue-based political choices. In a situation where parties do not have distinct agenda, and reproduce each other's manifestos, the most easily accessible criteria for preferring one party over others could be

ethnicity. Secondly, Kenya's history is replete with politics of exclusion epitomized by skewed resource distribution and state-mediated economic and employment opportunities; as well as disproportionate resource flow to regime-friendly regions. All these promote politics of patronage, corruption, poverty, and inequality. Such politics has given rise to discontent which in turn provide the impetus to change the constitution or get 'one of your own' at the top. Kenyans have always hoped for change, often feel betrayed, and hence resent perceived beneficiaries of the government's patronage rewards.

This political history of exclusion is concisely depicted by The Economist,

> Under Kenyatta's presidency (1964-78) his own Kikuyu, easily the largest, richest and best-educated single group, dominated politics and business….to some extent he shared out the spoils of office across a tribal spectrum, giving chosen leaders of each group juicy rewards, while ensuring that his Kikuyu sat atop the pile…Under Daniel Arap Moi (1978-2002), the pendulum swang away from the Kikuyu, though they continued to dominate business. A coterie around Mr. Moi, particularly from his own much smaller Kalenjin group of tribes, amassed vast wealth and accumulated a lot of land….Under Mr. Kibaki, the pendulum swang once more towards the Kikuyu, causing resentment among those who have perennially missed out, especially the sorely neglected Luo, the third biggest tribe whose unchallenged leader is Mr. Odinga (and which numbers Barrack Obama as one of its own) (The Economist, 2010).

The zeal with which those from the president's ethnic group defend these exclusionary acts only serves to fortify the perception that indeed, they are benefiting than those from other regions. As one reader noted in response to an article in the Daily Nation Newspaper,

> Admission of a problem is always the first form of therapy. But the problem is that most Kikuyu never admit nor do they talk against Kikuyunization of the government. It is this defense of this biasness that confirms to the rest of Kenyans that the Kikuyus are actually benefitting from the vice. Otherwise, if they were not, they would shout hoarse about it.[132]

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132   *Anonymous comments on Gaitho Macharia The Daily Nation Newspaper (2011).*

The Limits of Ethnic Voting in Kenya: Issue and Personality-based Voting?

The ethnic voting story changes when the focus shifts to the five CORD strongholds outside the Luoland and Ukambani. Four of these counties - Mombasa, Kwale, Kilifi and Taita Taveta - are found at the coast and are mainly occupied by the Mjikenda, Arabs, Taita, Taveta and Pokomo. Mjikenda does not refer to a homogenous community but is a collective ethno-linguistic group that comprise of nine sub-ethnic groups of Giriama, Digo, Duruma, Kauma, Rabai, Kambe, Ribe Chonyi and Jibana. Busia, which is the other stronghold, is populated by Luhya sub-tribes of Samia, Marama, Banyala and Marachi. None of these sub-groups is linked to CORD candidates – Raila and Kalonzo. In fact, ODM was the most popular party in these counties even in 2007.

Several facts make the voting patterns in the coastal counties in 2007 and in 2013 very curious. To begin with, when Raila Odinga first offered himself as a presidential candidate in 1997, he performed dismally at the Coast, getting a paltry 6.1 percent of the votes. President Daniel Arap Moi, who was seeking last term, was then the most popular candidate at the coast, convincingly winning by 63.1 percent. Mwai Kibaki came second to Moi at the coast with 12.7 percent of the votes. Apart from the fact that Moi was no longer a candidate in 2007, it is unclear what shifted the ground by 2007 so that Raila's support increased phenomenally to 59.4 percent compared to Kibaki's 33.1 percent. The point to note is that the Coast was not originally an ODM stronghold.

The other curious fact about the coastal voting patterns is that in both 2007 and 2013, they did not seem to have any visible collective ethnic stake in ODM, yet they overwhelmingly voted for the party. It has been suggested for instance that ODM's coastal support in 2007 was attributable to the inclusion of Najib Balala, who is from the coast, to ODM's highest decision-making organ, the Pentagon (Oloo, 2010). This line of argument appears to overstretch ethnic voting beyond its elastic limits. If Balala was the reason for ODM's coastal support, one would have expected him to be able to move with that support to any party/coalition he joined, the way Ruto moved with Kalenjins to URP. The 2013 elections served as a suitable laboratory to test Balala's political influence at the coast. He defected from ODM, formed the Republican Congress Party (RC), and affiliated it to Jubilee. Not only did Balala lose his quest for the Mombasa Senatorial seat, but RC did not win any seat, not even a Ward Representative seat, in the entire coast region. In fact, CORD won all the seats in Mombasa County. Thus, the 2013 elections unmasked Balala as a paper-tiger, riding on ODM wave, yet masquerading as the party's coastal pillar (Asingo, 2014).

Similarly, the impressive performance of ODM in the 2013 elections is often attributed to Ali Hassan Joho. However, to be able to mobilize support for a party among communities as diverse as in the coast requires that one is popular among those communities. Such popularity can best be attested by one's own support levels. Yet even in his home county of Mombasa, Joho won the gubernatorial seat with 49.3 percent of the votes, compared to the CORD presidential votes of 70 percent in the county. It is thus not farfetched to argue that the coastal voters stuck with ODM even though they had no anointed ethnic kingpin to carry their mantle in the party. The idea here is not to belittle the role of grassroots leaders in the performance of the party in their regions, but to suggest that other factors besides the leaders' mobilization efforts account for party success.

It is notable that the coastal counties were not the only ones that considerably supported ODM despite not having any easily discernible ethnic stake in the party in 2013. Other counties whose support for CORD in the 2013 transcends a mere expression of ethnic passion include Kisii (67.9 percent), Nyamira (66.7 percent), Turkana (67.5 percent), Kakamega (63.8 percent) and even Samburu (57.6 percent). The voting pattern for the latter is particularly interesting because they were expected to vote alongside their Rift Valley neighbors, the Kalenjin, as they have done since 1992. The two communities voted for ODM in 2007, but while Kalenjins shifted support to URP and Jubilee, the Samburu maintained considerable support for ODM/ CORD presidential candidate. It is intriguing though that despite the support that the Samburu gave to the CORD presidential candidate, the only seat that CORD won in the whole county is just a single Ward assembly seat! Yet, in 2007 ODM won the two parliamentary seats and 80.6 percent of civic seats in Samburu. Thus, the Samburu support for CORD in 2013 was neither ethnic nor based on party loyalty, but an expression of confidence in the person of the CORD presidential candidate.

There are other emerging trends that suggest that Kenyans are slowly outgrowing ethnic voting. First, there is an increasing number of elected minority parliamentarians. These are legislators from ethnic groups or races that are a clear minority within an electoral unit. In 2007, the only such legislator was Shakeel Shabbir Ahmed who is of the minority Asian race in Kisumu but was elected by an electorate that is predominantly Luos. In 2013, this number increased to four. Besides Shabir who retained his seat, Junet Sheikh Nuh won Suna East seat in Migori County, Abdul Rahim Dawood won North Imenti seat in Meru County, and Irshadali Mohamed Sumra won Embakasi south seat in Nairobi. Junet who is of Somali descent was previously elected as the Mayor of Migori whose inhabitants are largely Luos. Rahim is of Asian origin but was elected by an ethnic Meru electorate. Even in Taveta in Taita

Taveta County, Basil Criticos, who is of Greek descent, has previously served as the MP for Taveta constituency whose inhabitants are largely of Taveta ethnic group. In fact, in the 2013 elections, Criticos sought the same seat on a peripheral party, Restore and Rebuild Kenya (RBK). He narrowly lost by just 106 votes to Naomi Shaban, who is a Taveta. Similarly, Ken Obura of ODM won the Kisumu Central seat, but had to contend with a strong challenge from yet another candidate of Asian race, Abdulqadir Mohamed Omar.

The second major development in the 2013 elections is the rise of de jure coalitions, courtesy of the 2010 Constitution and the Political Parties Act. These are coalitions that are based on legally binding agreements. Section 10 (1) of the Political Parties Act provide that parties entering into a coalition have to deposit their coalition agreement with the Registrar of Political Parties. All the coalitions formed before 2010 such as NARC and PNU were de facto coalitions, since they were gentlemen's agreement and not legally binding. The formation of de jure coalitions has enabled smaller parties to win seats in their coalition partner's strongholds which they would otherwise not win. For instance, ODM won all parliamentary seats in Luo Nyanza in 2007, but in 2013 it lost four seats to coalition partners. As already noted, voters in Alego-Usonga and Muhoroni constituencies in Siaya and Kisumu counties, gave presidential votes to ODM/CORD candidate but rejected ODM parliamentary candidates and all Ward Representative candidates except one each. Instead they gave the seats to the ODM coalition partners. NARC, which is also a Jubilee affiliate, won Mathira and Gatanga parliamentary seats in the TNA strongholds of Murang'a and Nyeri counties respectively. These results depict an electorate that is only weakly attached to the 'ethnic parties' and which can defy the party and vote independently even in party strongholds.

The third trend that discredits ethnic voting theory is the emergence of independent candidates, again as a consequence of the 2010 Constitution and the Political Parties Act. As shown in Table 3, four independent candidates won parliamentary seats in the 2013 elections. These include Wesley Kemboi of Cherangany (Trans-Nzoia), Boniface Gatobu of Buuri (Meru), Patrick Musimba of Kibwezi West (Makueni), and John Serut of Mt. Elgon (Bungoma). To the extent that voters can reject candidates sponsored by key political parties including the so-called 'ethnic parties', their voting cannot be considered ethnic. This is a clear indication that voters are going for the quality of individual candidates rather than the party tags. According to the issue-salience theory, 'when a candidate's agenda stresses issues that voters already consider important, voters see them as responsive to the public [and vote for them]' (Asingo, 2008: 53). Independent candiates are also a confluence of leaders whom voters deem as good and who are victims of flawed party primaries process.

The fourth indicator that Kenyan voters do not blindly support the so called 'ethnic parties' is reflected in the fact that in the 2013 elections, some parties were able to win Parliamentary and Ward seats even in hostile territories. In this regard, ODM won two parliamentary seats, in Meru (Tigania East) and in Laikipia County (Laikipia North) even though these were Jubilee strongholds. Likewise, URP won two parliamentary seats in the CORD stronghold of Busia (Teso North and Teso South) and Migori (Kuria West) while Ford-P won a seat in Machakos. In fact, in some cases, candidates for the dominant parties won parliamentary seats in the party strongholds after facing strong challenge from other candidates. As already noted, in Kisumu Central for instance, Ken Obura of ODM barely scrapped through after a strong challenge from Abdulqadir Mohamed. This however, was more of a protest vote as Obura was perceived to have been unfairly nominated by the party at the expense of the more popular Abdulqadir.

The final trend which suggests that voter preferences, especially for legislators, often transcends ethnicity and party dominance is the rising number of constituencies where the voters repeatedly elect parliamentary candidates from parties that are either fringe or are generally unpopular in the region. In the last three elections held since 2002, a total of twelve constituencies exhibited this penchant for candidates from fringe or unpopular parties by electing them at least twice. These constituencies include Kinango, Ganze, Magarini, Lamu West, Garsen, Kangundo, Tigania East, Tharaka, Marakwet East, Mogotio, Mt. Elgon and Baringo East (renamed Tiaty). Kinango constituency located at the Coast is a particularly interesting case where one politician has mastered the art of winning elections on fringe or unpopular party tickets. Gonzi Rai has been elected three times consecutively on parties that are not popular in the coast region. In 2002 and 2007, he won the seat on Ford-P ticket and was re-elected in 2013 on a TNA ticket which was equally unpopular at the Coast. Marakwet East constituency is also worth mentioning. Voters here not only elected the first female Marakwet legislator, Jebii Kilimo in 2002, but markedly did so on a NARC ticket, despite the party being so unpopular among the Kalenjins. She was re-elected in 2007 on a fringe party, Kenya National Democratic Alliance (KENDA). However, her attempt to go against the grain again in 2013 was fruitless as she lost the seat while on TNA ticket.

The foregoing discussion shows that although ethnicity is important for political mobilization in Kenya, its role is more complex than always thought. On the one hand there are voters who do not fully embrace 'ethnic parties' and 'ethnic leaders' such as Luhyas from Busia, who neither joined UDF nor fully supported Mudavadi's presidential candidature. On the other hand, there are voters who embrace 'ethnic parties' and 'ethnic leaders' like Kalenjins who readily deserted ODM and accepted William Ruto as their 'ethnic leader' and URP as their

'ethnic party'. The Kikuyu are an extreme case, and the only ethnic group that has never cast presidential votes for a candidate from another ethnic group in all the five elections held since 1992. As one writer puts it, 'the Kikuyu, the most numerous and influential of the Mt Kenya communities, are infamous for their insular voting habits, their tenacious collective refusal to vote for anyone else, but one of their own at presidential elections' (Adama, 2011). Amidst these extremes are ethnic groups, notably from the coast, that always support one party without ethnically rewarding motivation.

Thus, as has been noted, 'in Africa, ethnicity is almost never absent from politics, yet at the same time it does not provide its basic fabric' (Bayart, 2009: 55). In essence, Kenyan voters sometimes 'consider factors other than ethnicity in deciding how to vote' (Bratton et al., 2008: 1). These factors may include the personality of the candidates as demonstrated by the voting patterns for the presidential candidates in Samburu County and in the four constituencies where independent candidates won. Another critical non-ethnic factor could be policy issues. There is no doubt that coastal support for ODM is not ethnic. Raila may be a beneficiary of real or perceived historical injustices at the coast, particularly those relating to land, which are blamed on President Jomo Kenyatta, and by extension, the Kikuyu. Since 1992, coastal voters have tended to prefer a strong non-Kikuyu to a Kikuyu presidential candidate. It is therefore not entirely correct to argue as has been done, that 'the dominant characteristic of divided societies is the ethnic political party, with individuals casting votes for parties of their own ethnicity' (Choudhry, 2008: 23).

b) *Newer Identities and Party Support in Kenya*

The aggregate nature of Kenyan electoral data makes it difficult to assess the impact of the newer identities on voter mobilization. Moreover, the constitution outlaws the formation of identity-based political parties. Nonetheless, religion is one of the newer identities that are increasingly being exploited to mobilize voters in Kenya. In 2007 for instance, Pastor Pius Muiru and Bishop Margaret Wanjiru tried to construct political support bases out of their huge religious following. This appeared a realistic strategy in a country where 80 percent of the population is Christian. However, while Wanjiru succeed in winning the Starehe parliamentary seat, Muiru fared badly in his quest for the presidency and the Kamukunji parliamentary seat. Muiru's failure has been attributed the fact that 'his religious following is too slim and potentially inconsequential' (Oloo, 2010: 46). This is not entirely true since he enjoyed huge religious following as exemplified by thousands who attended his crusades. The problem is that he thought that religious following was sufficient and hence contested on the ticket of a nondescript political party. He did not appreciate that religious following does not readily

transform into political support. Wanjiru contested on a popular party, ODM, and blended religious following with the already mobilized party support.

Perhaps the most successful religious mobilization occurred during the campaigns for the 2010 constitutional referendum. It was the first time that the church engaged in direct political contest with political parties by mobilizing voters to reject the proposed constitution, against a spirited campaign by parties for its adoption. To be precise, not all Christian denominations and churches opposed the new constitution. The greatest religious opposition came from evangelical Christians who used church sermons and campaign rallies to mobilize follows to reject the constitution. The church was mainly opposed to the entrenchment of the Kadhis Courts in the constitution and the provision that abortion can be permitted under certain conditions. The referendum results show that campaigns influenced the referendum outcome. For instance, the average gap between Yes-No votes in the 17 Kamba constituencies, where evangelicals concentrated their campaigns, was very close (9.9 percent). This underscores the hard choice voters faced between obeying 'ethnic party' and obeying religious leaders. In fact, 'No' won in seven constituencies while 'Yes' won in ten (Asingo, 2014). As the Kenya National Dialogue and Reconciliation Monitoring Report (KNDR) notes, 'the voting pattern in Lower Eastern emerged from a combination of factors: one, Indecisive leadership by the area leaders; two, the strong influence of the Church….Voter loyalty was also split between political and religious leadership' (KNDR, 2010: 24).

Furthermore, there is no clear partisan alignment for Christian or Muslim dominated counties during the 2013 elections and in past elections. For instance, Mandera and Wajir are adjacent counties in North-Eastern Kenya, with a largely Muslim population. Yet, voters in Mandera gave URP all the three county-level seats and all parliamentary seats, while those in Wajir gave ODM all the three county-level seats and all but one parliamentary seat. If Muslims were voting in one particular way, then the two counties and other Muslim counties could have voted for one party. The Mandera and Wajir voting patterns show that religion did not influence the 2013 elections.

The other newer identity that was used in mobilizing voters during the 2013 elections is age, particularly youthfulness. It is however a very transient identity group whose boundaries are not clearly demarcated. For instance, Jubilee Alliance projected itself as a youthful political outfit yet its presidential candidate was 51 years old, underscoring the difficulty in circumscribing the notion of youth. Moreover, within Jubilee Alliance's ranks were some fairly old politicians such as Yusuf Haji and Geoffrey Kariuki who were eventually elected as senators on its ticket.

Likewise, Peter Kenneth and his Eagle coalition coined the 'Tunawesmake' slogan which is a corrupted fusion of English and Kiswahili languages that is so popular with urban youths. The slogan translates into 'We can make it'. Kenneth also picked a youthful running-mate in attempt to mobilize youth support. The new media, particularly the twitter, facebook and blogs became the theatre of contest for youth votes. Despite this posturing by parties, the results of the 2013 elections do not suggest that the youths voted differently from other voters. The emphasis on youth votes was based on the fact that they constitute over 50 percent of the voting population. Yet Kenneth's performance as a presidential candidate was so poor that his best score was a paltry 1.68 percent in Wajir County. In any case, if youths voted for Jubilee, it would have performed better even in hostile territories.

Partisan Mobilization Strategies in the 2013 Elections

One of the most critical components of voter mobilization is how political parties communicate with voters. Effective voter mobilization requires two conscious decisions about voter targeting. The first decision has to do with whether to concentrate on the strongholds, go for swing voters, or focus on hostile territories. The second decision is about what messages are suitable for each of the three categories of voters. Usually the best way to mobilize strongholds is to urge voters to 'come out and vote', stress undesirable consequences of not voting, and use propaganda phrases such as 'failure to vote is to vote for opponents'. More specific strategies applied in this regard by CORD and Jubilee includes use of whistle blowers to wake voters up on the voting day. To the extent that Jubilee counties registered relatively higher voter turnout than CORD's, it would appear that Jubilee was more successful at stronghold mobilization. Jubilee also cashed in on the fact that Uhuru and Ruto were facing trials at the International Criminal Court (ICC) to portray Raila as having fixed them. They used the ICC issue to draw sympathy votes and mobilize their strongholds arguing that if CORD won, they would be jailed in The Hague. Hence, supporters had a duty to protect them from this by turning out in large numbers to vote for the coalition.

When it comes to hostile territories, CORD appeared to have done much better than Jubilee. For instance, CORD received 7.9 percent of all their presidential votes from hostile territories which was marginally higher than Jubilee's 6.9 percent. This is not surprising since the results in Tables 1 and 2 suggest that CORD may have considerably spread voter mobilization efforts beyond its strongholds. While ODM held several rallies in the hostile territories in the Mount Kenya region, Jubilee avoided campaigns in Luo Nyanza. For instance, Raila was in Meru on 5 January 2015 and on 14 February 2013. However, when the Jubilee team went to Nyanza they focused on Kisii and Kuria areas. Even though Jubilee planned a campaign tour of Migori

County on 4 January, they only campaigned among the minority Kuria ethnic group and not the whole county. Jubilee's forays in Nyanza and other hostile territories were not designed as campaigns in hostile territory, but as efforts to woo minority communities in those territories thought to be swing voters. The Jubilee team used their visit to assert that it has support from all over Kenya and is not tribal.

In terms of campaign agenda, CORD carefully crafted campaign messages for hostile territories. For instance, when campaigning in Meru on 14 February 2013, Raila urged voters to reject the call by Jubilee that Merus should vote Mundu wa Nyumba (for someone from their community) in an attempt to make Merus view Kikuyus as part of them. In order to delink Merus from the Kikuyu bloc, CORD argued that Merus are not adjuncts to another ethnic group and can make independent decisions. They urged voters to elect capable leaders not necessarily from their ethnic group. The Meru economy depends on the cultivation and sale of a controversial stimulant drug, miraa (Catha edulis), and have supported Kikuyu presidential candidates since 1992. Since the sale of Miraa is forbidden in many western countries such as the United States, the UK and the Netherlands, Raila told Merus that he will engage these countries to lift the ban on Miraa.

Among Kalenjin voters, CORD took Uhuru head-on while avoiding direct attacks on Ruto to avoid further antagonism with Kalenjin voters. During a rally held in Eldoret, in January 2013, Raila said he had no grudge with Rift Valley leaders in apparent reference to Ruto. However, the CORD team dramatized how the country nearly lost billions due to Uhuru's 'typing errors' in the budget when he was Finance minister. They told voters that CORD had people of integrity who could not manipulate computers to steal public funds. The message was that Uhuru is unreliable (The Standard, 7 January). At a rally in Bomet on 17 February, Raila explained to locals that their eviction from Mau forest was a government Cabinet decision and not his. Kalonzo also appealed to Kalenjins to trust him to protect their interest even if they no longer trusted Raila.

Although it has been argued that Jubilee won the presidential elections because they were better at mobilizing voters especially in their strongholds, careful analysis of the 2013 results reveals otherwise. Assuming that those who did not vote are randomly distributed and hence would vote more or less the same way as those who voted, the 2013 presidential election results would not have changed significantly even if all registered voters voted. Raila's votes would have increased slightly by 1.0 percent, while Uhuru's votes would have reduced by nearly the same margin (1.2 percent). Had this happened, then there would have been a run-

off between the two. Thus, it is wrong to argue, as is often done, that CORD lost because its supporters did not turn out to vote.

Conclusion

This chapter has accomplished four tasks in line with its objectives. First, I have built a conceptual framework for understanding how voters acquire the kind of partisan orientation that enables them to identify with certain political parties and candidates. This framework is a fusion of three scholarship traditions in the extant literature – normative democratic theory, heuristic cues theory, and the political perceptions literature. It transcends the single ethnic lens offered by the ethnic voting theorists. While acknowledging that partisan identities influence party support and hence party strength, it flexibly accommodates the prospect of issue-voting.

Secondly, I have examined in great details the aggregate national as well as regional distribution of partisanship and party strengths in the 2013 elections. I began by demystifying the traditional view of partisanship as long-term attachment to parties and adopted a view of partisanship that resonates well with the evolving party system in Kenya. Moreover, while most studies tend to use survey data to measure party strength and partisanship, this study uses elections data. In so doing, I have used two strategies to measure party strength and partisanship. One is the single-election strategy which largely focuses on presidential election results only, and the other one is the multiple-election strategy which uses election data for all contested seats.

The single-election strategy reveals that Jubilee was the most popular coalition, not just because its presidential candidate had the highest number of votes, but also because regional distribution of the votes shows that Jubilee had 18 stronghold counties compared to CORD'S 12. However, CORD strongholds appear to be fairly more spread than those of Jubilee which are relatively concentrated mainly in counties populated by their presidential candidate and running mates' ethnic groups. On the other hand, using multiple-election strategy, ODM was the single most popular political party in the 2013 general elections. This is because it had the highest number of elected leaders in each of the other five elective positions, besides the presidential elections.

Given that the latter strategy provides a much more comprehensive view of party strength, the conclusion is that ODM was the strongest party during the 2013 elections. Nonetheless, despite ODM's popularity, its coalition partners, WDP-K and FORD-K did not have much

grassroot support. Hence, CORD is a 'Coalition of Unequals', while Jubilee is a 'Coalition of Equals'. It is also noteworthy that party support is strongest for presidential candidates, and diminishes as one moves to county-level seats, parliamentary seats and Ward Representative seats. That is, while voters overwhelmingly vote for the presidential candidates of their preferred parties, their support for the party's parliamentary and Ward Representative seats is not guaranteed.

Thirdly, the chapter has shown that while ethnic identity significantly accounts for party support, it does not provide a complete explanation of party support. The continued support for ODM by coastal communities, the rise and increase in the number of independent and minority candidates, and the voting patterns in counties like Samburu, among other factors, show that Kenyans are not glued to the so-called 'ethnic parties', but sometimes look out for other factors besides ethnicity in deciding the party to support. These other factors include issues as well as candidate attributes. Attempts to use newer identities such as religion and youthfulness as a basis for mobilizing party support in Kenya have not been very fruitful as these identities remain subservient to ethnicity. The only time religion emerged strongly as a mobilizing force was during the 2010 constitutional referendum, but even then religion played second fiddle to mobilizing forces like party identity.

Finally, this chapter has explored the mobilization strategies adopted particularly by CORD and Jubilee in the 2013 elections. Jubilee performed better than CORD in stronghold mobilization as exemplified by relatively higher voter turnout in its strongholds as compared to CORD's. With respect to hostile territories, CORD appeared to have done much better than Jubilee. In fact, to a very large extent Jubilee avoided political campaigns in hostile territories. Their strategy was to consolidate assured support in the stronghold rather than spreading out to uncertain territories.

As a way forward, parties need to develop better voter mobilization strategies that include voter registration, particularly given that the 2013 presidential election results would not have changed significantly even if all those registered had voted. Once a party/coalition's support base records low voter registration, its vote basket will not be full no matter how voters are mobilized. That is, assuming that the electoral process was free and fair, which is hardly the case in most African countries, then the 2013 elections were won during voter registration rather than during voting. While parties need to mobilize voters to register, especially in their strongholds, the electoral body must ensure that voter registration opportunities are uniformly

available in all regions. Cases of registration of underage, or at odd hours in some regions must not be allowed at all costs.

Political parties also need to attain and maintain national outlook as a way of promoting national unity, stemming ethnic polarization, and reducing the extent of hostility in hostile regions. This can be attained if parties reach out to more regions outside their ethnic baskets. Moreover, parties should strive for ethnic, gender, and religious balance in fielding candidates in the cosmopolitan areas even if it means using affirmative action. It is also critical for parties to conduct free and fair primaries and strengthen their grassroots support to avoid losing seats in their strongholds.

Chapter 9

Much Promised, Little Delivered: Women in the 2013 General Elections - *Elizabeth Adika*

Introduction

Women's participation and contestation in electoral competition is a fundamental prerequisite of gender equality and an inclusive democracy. Increasingly, the need to accord the rightful significance of women in Kenyan politics is getting pronounced. This is a constituency that in the past has been disproportionately underrepresented within political competition. In addition to the fact that the new Constitution of Kenya (2010) increased the spaces up for political contest, Article 81(b) of the Kenyan constitution prohibits more than two thirds of the same gender holding elective public offices. What was witnessed in the 2013 election, was a noticeable increase in number of women contesting for various positions but not necessarily successfully. At the same time, there emerged a dangerous rhetoric around the constitutional provision for gender quotas which among other things created 'Women's Representative' position. This rhetoric propagated by male contestants conveniently but erroneously interpreted the constitution to have restricted any form of women participation in the elections to the Women's Representative position.

This chapter focuses on the performance of women in the 2013 General Elections particularly in the context of a progressive new constitution. It observes that despite the promises contained in the progressive new Constitution, the number of women elected for various positions did not improve as was expected. On one hand, this is a cause of concern since it warns that a progressive Constitution in itself may not stimulate the shift needed to achieve gender balance in political participation. Yet, on the other hand, it pushes us to attempt to answer the question of how to translate a progressive new Constitution into tangible gains for historically marginalized constituencies like women in such contexts as that of Kenya's electoral competition. What explains the underwhelming number of women elected in the 2013 General Elections under a progressive new Constitution?

This chapter begins with a historical context of women and electoral competition in Kenya. It then analyzes specific constitutional provisions in the new Constitution that held promise for enhancing better performance in the election, here it also isolates and examines effectiveness of gender quotas as a strategy for increasing women's numbers. The chapter then delves into a detailed analysis of women's performance in the 2013 elections on the basis of which it identifies some possible explanations as to why the performance was underwhelming. Finally, the chapter draws conclusions on how best to prepare for the next cycle of elections.

Women and Politics in Kenya: A Background

The history of Kenyan women's political participation illustrates the uphill struggle that women have wedged and still face today (ECWD, 1993). Kenya's first Parliament (1963-1969) had neither an elected nor a nominated woman (Akech, 2010). This in itself can be viewed as a setback considering that the colonial government had in 1961 nominated the first woman to Legislative Council (Legco). In fact, even though she was only restricted to submitting a written memorandum at the Lancaster House Conference in 1962, the nominated woman Priscilla Abwao underscored the importance of women in political representation in the then soon to be independent Kenya (Chesoni, 2006). In 1969 Grace Onyango was elected mayor of Kisumu thus becoming the first Kenyan woman to hold political office. That same year Jemima Gecaga became the first female Member of Parliament following her appointment by the then president Jomo Kenyatta. Between 1969 and 1974 women constituted 0.56 percent of the elected MPs and just 8 percent of the MPs nominated by the president were women (ECWD, 1993).

The 1979 election resulted in remarkable performance with five women namely, Chelagat Mutai, Dr. Julia Ojiambo, Grace Onyango, Phoebe Asiyo and Nyiva Mwendwa being elected to parliament. Eddah Gachukia was nominated by the president. This was an improvement by one on the outcome of the 1974 elections. In 1983, just two women –Grace Ogot and Phoebe Asiyo were elected to parliament and one woman—Rose Waruhiu was nominated. Between 1988 and 1992 only Grace Ogot and Agnes Ndetei were elected while Nyiva Mwendwa was nominated towards the end of the five year term (ECWD, 1993).

At least 70 women declared their intention to contest parliamentary and other offices in the 1992 general elections with 20 women contesting in 19 of the 188 parliamentary constituencies (ECWD, 1993). As a result, six women namely Phoebe Asiyo, Agnes Ndetei, Martha Karua, Charity Ngilu, Nyiva Mwendwa and Mary Wanjiru Mwangi were elected.

*Chronology of Women's Representation in Parliament, 1963-2007*

Year	No. of women candidates	Elected	Nominated	Total No. of women MPs
1963	7	-	-	-
1969	13	1	1	2
1974	11	4	1	5
1979	15	5	1	6
1983	7	2	1	
1988	6	2	-	2
1992	19	6	-	6
1997	53	4	5	9
2002	44	9	8	17
2007	269	15	6	21

Source: Data collated from various sources

The table above shows that there has been a progressive increase of women contesting for political offices since 1992 when the first multi-party elections were held. In the 2002 general elections, 44 women were able to secure party nominations to contest but only nine were elected to Parliament. This represented a 20 percent success rate in contesting political office. In the 2007 elections, 269 women were able to secure party nominations and 15 were elected as MPs, a 6 percent success rate.

The 2002 parliament had nine elected women members while in 2007, the number increased to 15 (Women's Shadow Parliament-WSP-K, 2008). Out of the 15, nine were new comers to parliament, and one was previously a nominated member. Only four retained their seats. Of these 15 women, most of them were elected from either of the two main political parties Orange Democratic Movement (ODM) - 6, or Party of National Unity (PNU)- 4 or a party affiliated by the two: National Alliance Rainbow Coalition (NARC) - 1, KANU -1 and KENDA -1. ODM-Kenya which fielded the second highest number of women candidates after NARC (17) was unable to deliver even one woman MP. Only two seats went to fringe political parties (United Democratic Movement (UDM) and Chama Cha Uzalendo (CCU) that were not associated with any of the three main political parties. Regionally, Rift Valley produced the highest number of women MPs (6), followed by Nairobi (3), Eastern (3), Central (2), and Coast (1). Nyanza, Western and North Eastern did not deliver any woman MP into the Tenth Parliament. A further six women were nominated into parliament. ODM nominated three women, PNU one, KANU one and ODM-K one woman. This was a reduction from 75 percent in 2002 when eight women were nominated to 50 percent in 2007 (WSP-K, 2008).

Whereas the 2007 election produced the highest number of women legislators compared to all other previous elections since independence, it reveals a fairly complicated situation for women in Kenyan politics. It shows a more than 500 percent increase in the number of women contesting elections just five years later and ironically, a 14 percent fall in success rate (6 percent) after nomination compared to the 2002 figures. The number of men contesting for parliamentary seats in 2007 was a 120 percent increase from 1,037 to 2,279.[133] If one for instance assumes that the over 500 percent increment in number of women allowed to contest the 2007 election is because of a bourgeoning interest by women in electoral politics then it depicts an complex electoral terrain. Moreover, considering that the number of women contesting parliamentary seats in this election was just 11 percent of the total contestants of 2,548, there is ground to believe that political parties are still intolerant of women (WSP-K, 2008). Ironically, the WSP-K study found that 26 political parties in Kenya had achieved a minimum of 30 percent women as officials within the party structures before the 2007 elections. The graph below shows the trend on how women have been elected or nominated from independence to 2007. It illustrates relatively low numbers since independence.
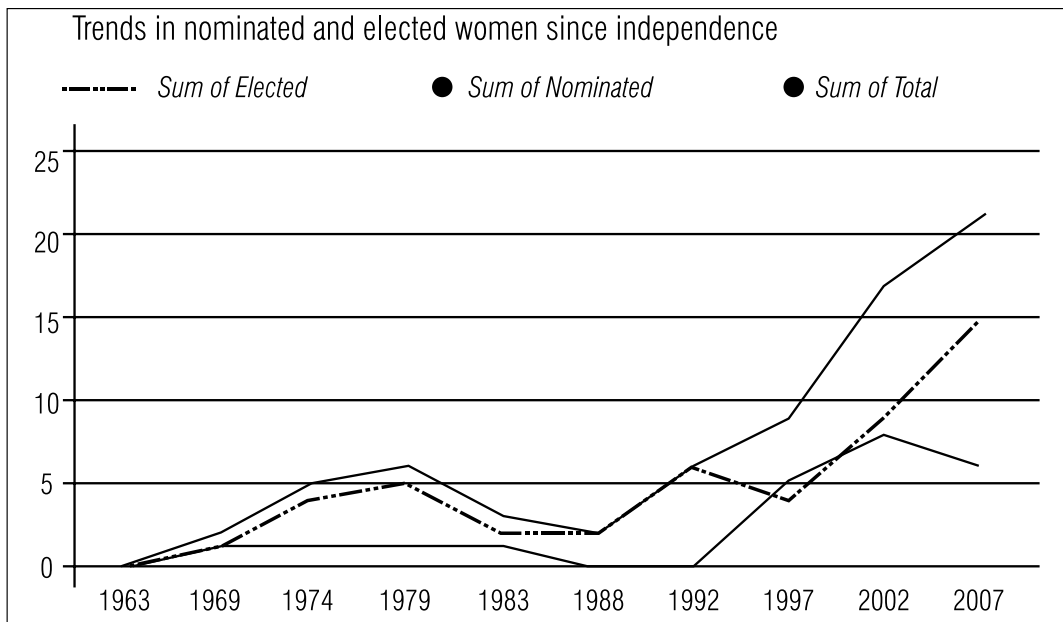
Source: data collated from different sources by author

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133   Figures calculated from statistics provided in WSP-K Gender audit report

Shifting Attitudes towards women and Leadership?

Theories of socialization have long emphasized the importance of gender roles—especially the predominance of either egalitarian or traditional attitudes toward women in the private and public spheres (Norris and Inglehart, 2001). In cultures with conservative attitudes toward the role of women in the home and family, many women may be reluctant to run and, if they seek office, may fail to attract sufficient support to win (Norris and Inglehart, 2001). A recent study in the US shows that partly due to socialization at college, significant gender gaps in political ambition which favour men begin to emerge (Lawless and Fox, 2014). These scholars observe that culture continues to be a significant influence on the proportion of women parliamentarians, even with the introduction of prior structural and institutional controls. The context of political participation and contestation by women in Kenya has not been an exception to these cultural dynamics.

However, it is important to discuss recent indicators of shifting attitudes which suggest that the political culture in Kenya is increasingly becoming accommodative of women holding leadership positions. Ideally, the confluence of a progressive societal attitudes towards women and a progressive new constitution, which in itself is an indicator of progressive society should yield tangible results in numbers of women being elected.

Since 2007, surveys have painted an encouraging picture of remarkable positive shifts in attitudes towards women among voters. For instance, four months before the 2007 election, a survey revealed that 51 percent of Kenyans were 'ready and willing to vote a woman president'.[134] In 2010, 53 percent of Kenyans indicated in a survey that they were ready to vote a woman president, this figure jumped to six in every ten Kenyans in 2011 with a revelation that more females (71 percent) were increasingly ready to support a woman presidential candidate.[135] Exactly one year before the March 2013 election, a survey showed that almost half of Kenyans (48 percent) were ready to elect a female president, a figure that steadily increased for other elective positions such as governor, senator and MP.[136] More recently in 2014, an Africa-wide representative Afrobarometer survey found 'broad support for women's equality among both men and women, and widespread acceptance of women's leadership capabilities'[137]. Conversely, the same survey found that women are still discriminated across

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134   *See publication by Netherlands Institute for Multiparty Democracy on http://www.nimd.org/news/704*

135   *See article in the Standard Newspaper http://www.standardmedia.co.ke/article/2000030701/poll-kenyans-ready-for-woman-president?articleID=2000030701&story_title=poll-kenyans-ready-for-woman-president&pageNo=1*

136   *See article by Norwegian Council for Africa on http://www.afrika.no/Detailed/21242.html*

137   *See http://afrobarometer.org/publications/support-african-women%E2%80%99s-equality-rises-education-jobs-and-political-participation-still*

formal and informal institutions in Africa.[138] It is therefore imperative that this chapter examines institutional impediments that might have stood on the way of women even with a new constitution and progressive societal attitudes.

The New Constitution, Women and Political Representation

The Constitution of Kenya 2010 has brought forth many gains for women and in particular women's political representation. Right from the preamble the Constitution speaks to values of human rights and equality. The supremacy of the Constitution espoused in Article 2(4) (5) and (6) speak to entrenching international law, treaties and conventions which have often been cited as an anchor to agitate for gender equality[139]. Further, the determination that any law, including customary law, that is inconsistent with the Constitution is void[140] has been a long demand of women rights activists who have viewed retrogressive customary law as a hindrance to women's equality[141].

The spirit of non-discrimination, equity, equality and inclusiveness runs through the Constitution of Kenya and is further elaborated in the national values and principles of governance of the Constitution. This brings women's representation into key focus and lays a strong foundation for inclusivity. Article 27 goes into detail with regards to equality and freedom from discrimination. Article 27 (6) speaks to the State taking measures to redress any disadvantage suffered by individuals or groups because of discrimination including legislative measures. This provides a key pathway for women to use to address past discrimination as described above. Most celebrated by women rights advocates is Article 27(8) of the Constitution which says that in addition to the measures contemplated in clause (6) the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members elective or appointive bodies shall be of the same gender. The not more than two thirds gender principle is further reinforced in Article 81 of the Constitution which states that the electoral system shall comply with the following principles (b) not more than two thirds of the members of elective public bodies shall be of the same gender. Article 100 places the responsibility on Parliament to enact legislation to promote the representation of women, amongst other groups, in Parliament.

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138   *See http://afrobarometer.org/publications/support-african-women%E2%80%99s-equality-rises-education-jobs-and-political-participation-still*

139   *See 7th Periodic Report of The Government of The Republic of Kenya on Implementation of The International Convention on The Elimination of All Forms Of Discrimination Against Women (Cedaw)*

140   *Article 2(4) Constitution of Kenya, 2010.*

141   *See 7th Periodic Report of The Government of The Republic of Kenya on Implementation of The International Convention on The Elimination of All Forms of Discrimination Against Women (Cedaw)*

The Constitution of Kenya goes further to provide for special seats for women within the National Assembly in Article 97(1) (b) and within the Senate in Article 98(1). In line with Article 27 (8) and 81(b) Article 177(1) provides for special seats members necessary to ensure that not more than two-thirds of the membership of the assembly are of the same gender. A corresponding provision to actualize Article 27(8) and 81(b) however does not exist for the National Assembly or Senate hence there is no mechanism to implement the principle of 'not more than two thirds gender' within Parliament. Attempts are currently on going to seek a solution to this including proposals to amend the Constitution.

Prior to the 2013 General Elections this gap was identified and various groups were looking for ways in which to actualize Article 81(b)[142]. These efforts culminated with the Attorney General seeking an advisory opinion from the Supreme Court on whether Article 81(b) as read with Article 27(4) (6) and (8), Article 96, 97, 98, 177(1) (b), 116 and Article 125 of the Constitution of Kenya required progressive realization of the enforcement of the two-third gender rule or required the same to be implemented during the general elections scheduled for the 4th of March 2013. The Supreme Court advised by a majority that Article 81 (b) stood generally as a principle which would only transform into a specific enforceable right after it was supported by a concrete normative provision. Therefore Article 81 (b) was not capable of immediate realization without certain measures being taken by the State. The legislative measures for giving effect to the two thirds gender principle under Article 81 (b) and in relation to the National Assembly and Senate should be taken by the 27th of August 2015. The Chief Justice of the Supreme Court dissented and stated that Parliament by its silence could not deny women the right to equal participation.[143] It just so happens that the country is back to this same position of indecision and inaction on this matter.

In February 2014 the same Attorney General constituted a Technical Working Group to implement the Supreme Court's Advisory Opinion Number 2 of 2012 and coming out of that process are initiatives both within and without Parliament aimed at actualizing this principle[144].

Boosting Women's Numbers through Gender Quotas

As discussed in the foregoing section, the new constitution stipulates gender quotas intended to correct dominance of public and elective offices by men. As a new concept in the Kenyan constitution with potential of realizing gender parity in political representation, it is imperative

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142   *http://www.aljazeera.com/indepth/features/2013/01/20131391623637158.html*

143   *http://www.judiciary.go.ke/portal/assets/files/Rulings/Majority%20Decision-One%20Third%20Rule.pdf*

144   *http://www.the-star.co.ke/news/time-unlock-two-thirds-gender-rule-parliament*

that this chapter broadens its discussion in attempts to identify specific mechanisms through which the quotas may work. Indeed, as mentioned in the introduction, there emerged fears that as (mis)understood in the context of the 2013 General Elections, and in the absence of strict enforcement of related laws, gender quotas may have had a counterproductive effect on boosting women's numbers.

More than half of the countries in the world have implemented some type of political quota in the last 20 years leading to a dramatic increase in female leaders across the globe (Pande and Ford, 2011). In the mid-1990s, as a response changing attitudes towards women pushed by civil society organizations, the UN Economic and Social Council set a target of 30 percent female representation in decision-making bodies (UN, 2005). The UN Beijing Conference of 1995 further solidified the push for increased women participation in decision-making bodies. Political quotas thereafter began to emerge as a viable and popular policy option across the world.

Generally, it is the Nordic countries which first introduced quotas, the region has since registered remarkable progress on representation women. Quotas were introduced in these countries only once female representation in parliament had already reached approximately 25 percent thus serving as a tool for consolidating strong female representation (Ballington and Binda, 2005). As research turns to the question of how and not why gender quotas are implemented (Schwindt-Bayer, 2009), gender policymakers in Kenya will need to actively engage in the 'how' conversation. Tripp (2004) argues that the rate of increase of numbers of women in Parliament has been faster in sub-Saharan Africa in the last 40 years than in any other region of the world, primarily through the use of quotas. As of 2008, 18 of the 22 countries that boast 30 percent or more women in national assemblies applied quotas in some form.

Research on gender quotas show that they operate in diverse electoral and socio-economic contexts, such contexts produce variegated outcomes (Schwindt-Bayer, 2009). However, such research largely suggest three conducive circumstances where gender quotas tend to work. First, when implemented in systems that follow Proportional Representation (PR) as an electoral system as opposed to First Past The Post (FPTP), the number of women not only tends to rapidly improve but also become sustainable. The electoral system under which Kenya's 2013 General Elections was conducted was a mixture of both PR and FPTP, with the former only applied for party nominations after the election. Because the PR system in the Kenyan context as applied when parties are nominating to fill up seats after the election is based on number of seats won rather than votes won, it produces a disproportionate outcome favoring larger political parties (FIDA, 2013).

Second, gender quotas have tended to work best when implemented through political parties. Political parties must however be incentivized to adhere to the gender quota provisions and not expected to willingly do so. For instance in Niger where the quotas have registered marked success, the quotas stipulate that a party list must have both sexes, with women being put in proportions reasonable enough to translate to high numbers being elected. Parties that fail to meet the gender quotas risk their entire party list being invalidated (Samuda, 2015). Third, and related to the second condition, quotas work where they are accompanied by strong enforcement mechanisms regardless of whether within parties or not (Schwindt-Bayer, 2009).

Performance of Women in 2013 Elections

The foregoing discussion highlights three important points for consideration in assessing the performance of women in 2013 elections. First, the discussion reveals that throughout the history of electoral politics in Kenya, the number of women in political representation has been below par. Second, in the last decade or so, there appear to be a shift in societal attitudes towards women and leadership in Kenya, if such data is anything to go by, then we might need to explore factors other than cultural barriers while attempting to explain why the number of women being elected are still comparatively low. Third, and related to the second point, Kenya passed a new progressive constitution which provides for specific mechanisms for realization of gender equality through elections. How then did women perform in the 2013 elections? A full picture on this question useful to the broader question in this chapter is only possible if the analysis begins from party primaries then to the actual electoral outcome.

Party Primaries

Ordinarily, the odds of increasing the number of a group being elected should improve if as many members of that group as possible make it to the party lists. It therefore follows that the manner in which political parties conduct their primaries, and the resultant party list is an important explanatory variable for understanding the overall performance of women in elections. Political party primaries happened within a constitutional framework that postulated fairness to various groups including women. Specifically, the 'Two-Thirds' principle on gender representation in Article 27(8) on rights and fundamental freedoms, Article 81(b) on representation of the people and Article 91(e) of the constitution which stipulates that political parties respect the rights of all persons including minorities to participate in political process should have been the basis of party primaries.

Unfortunately, data on the number of women who contested in political party primaries in 2013, critical to this section seem unavailable, descriptions of the manner in which party primaries were conducted suggest that it was a murky process for all aspirants. One can only imagine that it got worse for women aspirants given what we already know—an overbearing masculinization of political parties in Kenya. The party primaries have been described as 'shambolic, chaotic, disorganized and undemocratic' (CMD, 2013: 3). Political parties intentionally delayed their primaries, opting to conduct them only three days before the deadline stipulated by IEBC. The electoral management body would later postpone the deadline twice to accommodate the crisis created by delays in party primaries (CDM, 2013). In the end, party primaries resorted to opaque criteria for constituting party lists, circumventing constitutional requirements. Because in a practical sense, women's influence within political party structures in Kenya is still largely on paper (WSP-K, 2008), they were a more likely casualty of the process. In fact, the National Gender and Equality Commission (NGEC) successfully petitioned IEBC that women's representation through party lists had been threatened (FIDA, 2013). Milly Odhiambo, the only female MP elected through ODM in the party's stronghold, for instance observes that the process was so murky and testosterone filled that twice, she had to 'man-up' and disrupt the nominations to make it democratic. Still, the MP adds, she was initially issued with a fake nomination certificate after winning fairly.[145]

According to FIDA (2013), the electoral laws such as Political Parties Act (2011); the Elections Act (2011) and other gender responsive laws lacked clarity at the time of the primaries and election. Political parties thus half-heartedly attempted to fulfil the gender provisions and in many cases circumvented the law. As a result, the institutional expectations on the electoral management body—IEBC and the Registrar of Political Parties to cushion women candidates participating in party nominations failed.

Women's Numbers in 2013 Election

Despite being slightly more than men in Kenya, women have historically been elbowed out of political representation. The much promise in the country's new constitution discussed earlier did not deliver as much as was expected. The false start during the party primaries reduced the likelihood that the few women who successfully navigated the murky party primaries would perform better in the actual elections.

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145   *Hon Odhiambo was reflecting on 'Two-Thirds' gender rule workshop by IED at the Intercontinental Hotel, Nairobi on Wednesday, 22nd July, 2015.*

A total of 16 women were directly elected out of 290 constituency Members of National Assembly, just a paltry 6 percent. Compared to the 2007 cycle of elections, this was a 2 percent fall. Out of the 1,450 County Assembly positions, a total of 82 women were elected, representing just about 6 percent of the County Assemblies position. For the senatorial position, not a single woman was directly elected, similarly, no woman was elected as a governor. However, 6 out of the 47 successful gubernatorial candidatures had women as their running-mates (FIDA, 2013). For the presidential race, the only female candidate garnered just 0.36 percent of the votes.

Analysis

Although the figures of elected women are still low by any standards, analysis of trends from past elections offers optimism for possible future success of women in political competition. When comparing the success rates for men and women in elections, where success rates is defined as the proportion of each gender that is elected against the absolute number of that gender contesting a position, the statistic seem interesting. While the number of men contesting a given position are significantly higher than that of women, the success rate are more or less similar.

The following table summarizes the data on the total number of candidates nominated by various parties, proportion of candidates that was female, number of each gender elected and success rates for men and women after nomination since 1992. Apart from 1997 where the success rates for men was slightly more than thrice that of women, the success rates for both men and women appear more or less comparable. In fact, for 1992 election, the success rate for women was 9 percent higher than that of men. A clear reason for concern and that which needs urgent intervention is the ratio of men to women making it onto party lists. As the figures below show, in 1992, out of every 98 men being nominated by parties, there were only 2 women; throughout the five multiparty elections, it is only once in 2007 when the ratio reached double digits for women at 11:89. Granted, in the 2007 election the number of women contesting increased by 511 percent compared to the number in 2002 while that of men increased by 120 percent.

Data for Parliamentary Elections in Kenya since Multiparty politics in 1992

Year	Total Candidates	Men	Women	% Women	Elected Men	Elected Women	Success Rates for Men	Success Rates for Women
1992	854	835	19	2	182	6	22	31
1997	882	829	53	6	206	4	25	8
2002	1081	1037	44	4	201	9	19	20
2007	2548	2279	269	11	195	15	9	6
2013	2097	1968	129	6	274	16	14	12

Data collected from various sources[146]

While inferences on the statistics on success rates should be made with caution, it suggests that both the men and women have similar odds of success once they jump the primaries hurdle. As already discussed, a disproportionately lower number of women were able to pass the primaries. However, for those who did, the chances of succeeding do not look different. The graph below shows success rates after nominations for men and women since 1992, the gap between the orange line (women's success rates) and the blue line (men's success rates) appear small except in 1997 where the gap is huge (25 percent compared to 8 percent).

Success rates for men & women since 1992

—— *Success rates men* **·—·—·** *Success rates women*
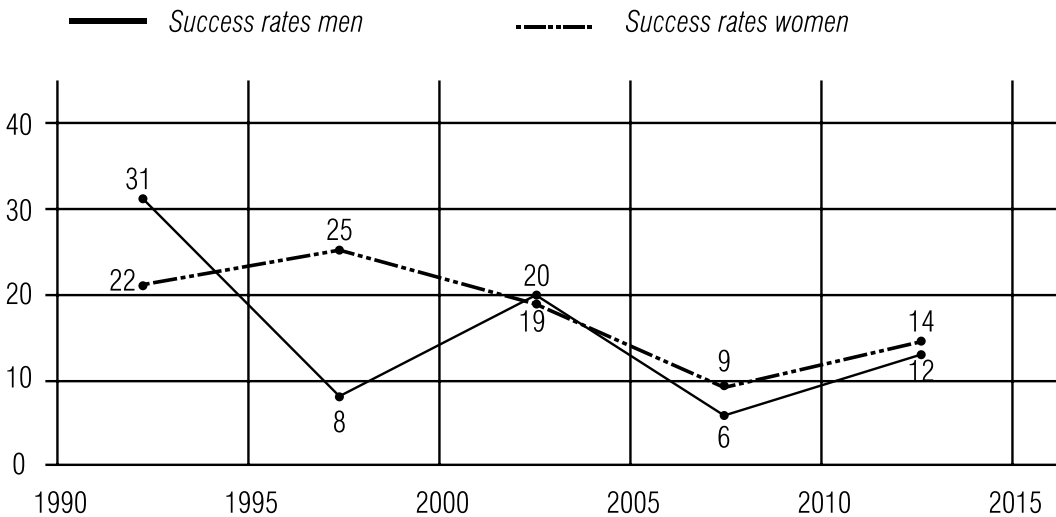
Data for graph collected from different source[147]

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146   *This data was collated from previous election observer mission reports, EISA, WSP-K and FIDA*

147   *This data was collated from previous election observer mission reports, EISA, WSP-K and FIDA*

Explaining the 2013 Performance

The discussion throughout this chapter portrays a context of election in which the number of women elected should have been markedly higher than that in previous elections. The narrative on the historical context, changes in societal attitudes towards women and leadership and a progressive new constitutional framework suggest that in explaining the comparatively low numbers of women elected in 2013, perhaps the focus should be on the institutional duty bearers created to implement various electoral related provisions of the 2010 constitution intended to realize women's numbers.

Specifically, the last parliament, the electoral management body (IEBC) political parties and the Registrar of Political Parties could have done more to realize improvement of the number of women in the 2013 elections. The last parliament, tasked with enacting various laws pursuant to realization of the new constitution passed the Elections Act (2011) and the Political Parties Act (2011) with general provisions on gender requirements. It is unclear whether the failure to specify mechanisms was deliberate or an oversight. What is clear however is that the failure to specify mechanisms through which gender requirements would be attained was easily exploited by political parties. The electoral management body inadvertently aided the political parties in scuttling women's chances of succeeding in party primaries by not advising parties to begin their primaries well in time and by extending the deadlines. The fierce contest witnessed in party primaries and which were held within a compressed timeframe did not favor women. Political parties thus deliberately or otherwise frustrated women, only nominating a few to contest in areas where these parties were not popular in lackadaisical attempts to meet the gender requirements. The office of the Registrar of Political Parties failed to provide the guidance to the political parties.

An in-depth analysis of party primaries list in their strongholds on one hand illustrates the half-hearted manner in which parties treated women candidates while on the other hand offers a strong case that women could have actually performed better if they were supported by political parties where these parties are popular. All dominant parties did not nominate a significant number of women candidates to run for positions in their strongholds. To further understand the odds of women in contesting elective positions, this chapter analyses the National Assembly contest in lower Eastern region of Kenya—Ukambani and parts of Central Kenya. The former region is perceived to be the stronghold of Wiper Democratic Movement-Kenya (WDM-K) while the latter is perceived to be The National Alliance (TNA) party stronghold.

In the lower Eastern region, out of 22 constituencies within the three counties in the region—Kitui, Machakos and Makueni, 22 women contested in 14 constituencies.[148] WDM-K the dominant party in this region, fielded candidates in all the 22 constituencies, 2 of these candidates were women. The region produced a total of 3 elected women Members of Parliament, 2 through WDM-K, the same women nominated by the party to contest in Kilome and Kibwezi East constituencies. The party won 15 out of the 22 National Assembly seats in this region. In what further strengthens the claim that women can perform well if nominated by parties where these parties are popular, the other 1 elected woman MP was through National Rainbow Coalition (Narc), arguably, a popular party in this region.[149]

From the second region with 48 constituencies within 7 counties—Nyandarua, Nyeri, Kirinyaga, Murang'a, Kiambu, Laikipia and Nakuru, 28 women contested the national assembly seat in 21 constituencies. TNA, a dominant party in this region, fielded candidates in all the 48 constituencies; 5 of the party's candidates were women.[150] The region produced a total of 5 women members of the National Assembly in Othaya, Nyeri Town, Kandara, Thika Town and Ruiru, all through TNA. The analysis of popular parties by region here suggests an important trend useful to the debate on achieving gender parity. In regions where parties enjoy a great degree of popularity, voters tend to choose candidates presented to them in the ballot papers by these parties, the gender of those candidates notwithstanding. It therefore follows that political parties may be a critical avenue through which gender parity in electoral representation can be achieved.

Conclusion

This chapter sought to examine the performance of women in the 2013 elections in the context of a progressive new constitution that held great promises for women in electoral representation. It started by highlighting the historical context of women's political representation in Kenya, arguing that the struggle has not yielded much but changing societal attitudes and the new constitution are sources of optimism. The chapter observed and underwhelming performance by women in the 2013 general elections. It was therefore critical that the chapter attempts to find out what explains such an underwhelming performance when a new progressive constitution with specific provisions towards gender parity in electoral representation. The chapter draws the following three conclusions.

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148   The chapter uses IEBC's official National Assembly election results.
149   This party is arguably popular in this region because the party leader is an influential political personality, actually at the time of this election, the main rival of the WDM-K party leader.
150   The chapter uses IEBC's official National Assembly election results

First, an analysis of success rates—defined here as the probability of being elected after passing the party primaries hurdle suggests that men and women have more or less similar odds of being elected. The few number of women elected may not necessarily be explained by conservative cultural attitudes of voters towards women. However, this observation has to be subjected to more rigorous statistical tests and scrutinized alongside other variables that might be at play. One, for instance, would imagine the performance in a hypothetical situation where half the total number of candidates contesting in an election are women and a reasonably good number of them are listed by parties in their strongholds.

Second, lack of specificity on implementation mechanisms of electoral laws enacted in pursuit of the constitutional provisions affected women's performance. Third, and related to the second point, various duty bearers charged with the responsibility to implement gender provisions in the elections failed to enforce the law. Political parties, the Registrar of Political Parties and IEBC could have done more at various stages of the electoral process especially during party primaries to increase odds of success for women during the election. The chapter therefore recommends reexamination of the electoral laws related to gender equality. Specifically, more clarity on implementation of the gender provisions within the Political Parties Act and Elections Act should be achieved. Similarly, as the country debates viable options for implementing gender quotas, emphasis has to be put in implementation strategies and enforcement mechanisms within political parties, as evidence discussed here suggest.

Chapter 10
Digital Slogans, Analogue Habits: Youth and the 2013 General Elections - *Michael Orwa, Charles Wafula*

Introduction

The 4 March 2013 General Election in Kenya was unique in many ways, but four aspects are particularly relevant for our purpose in this chapter. First, the election was one with the highest number of registered voters in Kenya's democratic history. According to the Independent Boundaries & Electoral Commission (IEBC), by December 2012 14.6 million voters had registered in readiness for the 4 March 2013 elections. Secondly, and being the first elections under the Constitution of Kenya 2010 that introduced a system of devolved government, , the number of electable positions doubled from three previously (President, Member of Parliament, Councilor) to six representatives. The positions were the President, Governor, Senator, Women Representative, Member of the National Assembly and Member of County Assembly. The President and Governor were each required by law to have a running mate.

The third notable aspect of the 2013 election was the place of youth, not only as a critical demographic group among registered voters but perhaps more importantly, as a powerful sub-text in the narrative of generational change that permeated the campaigns and public debates. The fourth and final aspect was the role of youth in the elections. If their numbers in the voters roll set them up as potential swing vote, their ingenuity, 'hustler mentality' definition and outright industry ensured that young Kenyans not only cheered their favourite candidates to electoral victory or loss, but also contested for nomination and election into political offices across the country. Similarly, an unprecedented number of young people played a pivotal role as duty bearers both in campaign teams and within political party ranks. Whether as volunteers, community organizers and mobilizers or consultants, service providers or paid positions in campaign management, youth were making decisions and holding positions that helped various candidatures gain traction.

This chapter attempts three things. First, it evaluates the nature, spaces and extent, of youth's participation in the 2013 elections. In so doing, the chapter provides a forward looking review of these various aspects of the youth's contribution to the country's electoral democracy. Secondly, it evaluates the actual outcome of youth participation in the 2013 elections. Finally, the chapter maps and proposes existing opportunities for broadening, deepening, increasing and improving the quality of youth participation in future elections and political processes in Kenya.

Conceptually, this chapter broadly follows Dahl's definition of participation in democratic theory (1971) which envisions both contestation and inclusiveness while assessing youth and the 2013 General Elections. Contestation is understood as the realistic opportunity to run for office, which could include but not limited to: running as individual (independent candidates), belonging to political parties and the wherewithal. Inclusiveness here should be understood to mean the extent to which the youth were able to exercise their right to choose leaders through the ballot. Put differently, this chapter defines participation of youth both as contestants running for elective office and as voters choosing the leadership during Kenya's 2013 General Election.

Broad Political Context of Youth and Leadership in Kenya

Perhaps more than any other demographic group, young people in Kenya often present a huge source of political energy and excitement during elections. When youth are not contesting elections, they are most visible as frontline foot soldiers mobilized for mass appearance in political rallies, demonstrations and other campaign related activities. Sometimes seen as cheap political hirelings and contract rubble-rousers, the youth play an important role in demonstrating the political muscle and show of might by candidates.

The history of youth and politics in Africa is awash with exploitation by the elderly ruling elite, exclusion from formal spaces of state policymaking and socio-economic disillusionment. Abbink (2005) observes that this situation has led to the African youth being overrepresented in armed rebel groups and criminal gangs advancing interests of the political class. The Kenyan context is no different. Peter Kagwanja (2005) argues that the first two regimes of independent Kenya rendered the youth politically powerless through patrimonial politics characterized by constitutional encumbrance, public executions, assassinations and co-optation. The post independent historical development of youth and politics in Kenya has been generally defined by some key episodes. These are, the era of youth wings, jeshi la wazee, lobby groups, Young Turks and the renewed generational change narrative (Mwangola, 2007).

According to Mwangola, it is in the first three decades after independence that the youth were engaged in politics in the form of youth wings. The youth wings, popular in Kiswahili as 'Watu wa Mkono' (loosely translated as handymen) basically characterized a relationship between the youth and the elderly political elite from different factions where the former were deployed to execute the latter's instructions in physical political spaces. This period was followed by one at the advent of multiparty politics in 1990s in which these youth wings were gradually transformed either into private armies or lobby groups (Kagwanja, 2005; Mwangola, 2007). The private armies, referred to as *'Jeshi la Mzee'* were groups which identified either with political parties or powerful wealthy individuals. These groups were often associated with political violence with instruction from their masters. Mwangola asserts that the lobby groups were a sophisticated version of the youth wings and who, in contrast to the goon image ubiquitous of the jeshi la wazee youth groups, oozed an academic, professional and moneyed image, but an image nonetheless created and exploited by the older politicians for votes. The current Deputy President was in this category under the name YK'92 (Youth for KANU-1992) lobby group that was campaigning for the (re)election of the then incumbent president Daniel Arap Moi in the multiparty elections of 1992.

There is no consensus among analysts of youth and politics at this point as to whether the lobby groups were distinct from those branded as Young Turks. Nonetheless, the early 1990s represent the period in recent history when the involvement of an evidently younger generation of activist politicians became most pronounced in the struggles for Kenya's democratic transformation. This was the context in which 'Young Turks', a group of political apprentices emerged and began crafting their own identities off the older politicians (Mwangola, 2007). The formation of the Forum for Restoration of Democracy (FORD) in 1991 as a formidable opposition gave the so-called Young Turks' like Kiraitu Murungi, Gitobu Imanyara, Paul Muite, Wamalwa Kijana, Raila Odinga among others a platform to rise into national limelight and leadership. FORD availed a political space that enabled these rising lights to contribute to the struggle for multi-partyism. As these emerging leaders found tutelage under the founding leaders of FORD among them Joseph Martin Shikuku, Masinde Muliro, Jaramogi Oginga Odinga, Ahmed Salim Bamahriz, George Nthenge and Philip Gachoka.

President Moi's government responded by creating the equally youthful platform dubbed Youth for KANU 92 (YK'92) as a means to counter the 'Young Turks' phenomenon within the opposition forces. Among the leading lights within the outfit are current deputy president William Ruto and Cyrus Jirongo, a wealthy businessman-cum-politician. With time, YK'92 would turn into a vigilante-like entity that threatened both citizens and opposition supporters with political violence. It is thought that the energy of YK'92 contributed significantly to Moi's

re-election and KANU's retention of political power. Although YK'92 was revived a decade later in 2002 and rebranded as KANU Action Group, it had minimal impact as KANU faced a resounding defeat across the country by the opposition National Alliance Rainbow Coalition (NARC). That different political parties consciously created space for youthful politicians and sought political credit for it demonstrates the significance of youth both in practice and perception in competitive politics.

Today as the Young Turks of the multi-party struggle tread between their 50s and 70s, most of them still hold significant positions in their current political parties, and the emergence of a younger generation of leadership, the post-Young Turks generation seem to have hit a snag. Different factions of the Young Turks class that emerged in the 1990s have taken stints in government without meaningful transformation of the grievances often advanced by the youth as a constituency. Consequently, there seem to be a renewed interest in revisiting the youth question in Kenya partly because of these frustrations and as an exploration of spaces created by the new constitution. Within political parties, new calls for a generational change now emerge. As a result, in the CORD coalition for instance, vibrant conversations calling for change in party leadership ranks rose in the run up to the elections, and again almost immediately in the aftermath of the coalition's electoral loss.

The 2013 Presidential Elections and the Generational Change Narrative

Young people in Africa often present their problems in terms of generational opposition (Abbink, 2005). Understandably so therefore, the politics of generational change is not a new phenomenon in Kenya's recent electoral history. Every election presents an opportunity for democratic renewal for both political parties and citizens. Young people, elected for the first time, often feel the need to coalesce and caucus with one another in search of their space and voice within political parties and parliament. The Kenya Young Parliamentarians Association is an example of spaces for youthful legislators to engage.

One dominant narrative was that of continuity versus change at the top political level of national leadership. This narrative to a large extent aimed at appropriating the youth as a vote bank. Principally, the call for a generational change defined the binary rivalry between the two leading coalitions, Jubilee Alliance and the Coalition for Reforms and Democracy (CORD). The presidential campaign media razzmatazz and glitz was meticulously designed to appeal to the respective youth constituencies across the country. While Jubilee coalesced around the identity of a 'digital' group while portraying their main challengers as 'analogue',

NEW CONSTITUTION, SAME OLD CHALLENGES:

CORD developed a narrative of consistency, stability and a tried-and-tested leadership for their flag bearers. To counter Jubilee's claim to 'digitality', CORD ensured the mushrooming of largely informal youth-oriented and/or youth-owned pro-CORD groups to build the profile of the coalition as youth centred, youth friendly and youth dominated. In addition to the two major coalitions, a potential presidential candidate whose campaign eventually failed to take off launched his bid with a media statement recorded in sheng,[151] perceived by many as an attempt to reach out to the younger voters.

Where youth were not being wooed to vote for particular candidates, young people were managing the day to day activities in campaign secretariats for the presidential candidates. In Narc Kenya candidate's campaign secretariat for instance, up to 80 percent of the staff both paid and volunteers, were young people under the age of 40. Peter Kenneth and his equally youthful running mate relied on the energy of the younger generation of Kenyans to mobilize and popularize their call to hope through the mantra of *'Tunawesmek'*, a dignified corruption of president Obama's 'Yes We Can'.

The election of the youthful duo of Uhuru Kenyatta and William Ruto has been attributed as much to operational discipline, effective command structures and strong financial muscle as it has been attributed to the ability of Jubilee campaign to inspire, mobilize and direct youth imagination towards a possible electoral victory. Within the opposition CORD, the newly elected and younger generation of politicians have argued that the old guard bungled the elections, were out of touch with the new generation of Kenyan voters and hence were ill-prepared to respond to this reality. This notion partly informed the calls for generational change that emerged in the immediate aftermath of the 4 March elections.

Spaces for Youth Participation in the 2013 Elections

The 2013 elections was, in more ways than one, a watershed as regards youth participation. By and large, this was a result of various 'spaces' that allowed youth to engage in the electioneering process at different levels, a culmination of years of lobbying and campaigning to secure these pivotal spaces for themselves. Participation in these spaces found expression in many ways and forms including social media engagements, vying for elective positions, acting as service providers, using talents as entertainers and mobilizers, being in the campaign teams of different candidates among others. We discuss the above

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151   *A dynamic mixture of (predominantly) Swahili and English and some local languages, popular among urban youth.*

expressions under legal and institutional frameworks that enabled youth to participate in the election.

a) Legal spaces

The Constitution of Kenya enacted in 2010 is one of the major legal premises that allow for participation of youths in civic matters. Article 55 (b) of the constitution provides that the State shall take measures, including affirmative action programmes, to ensure that the youth have opportunities to get representation in social, economic, political and other spheres of life in the country (Muhavi, 2012). This placed the burden of enforcement of this provision on the shoulders of the state. Subsequently, it means that in situations where the state might fail to proactively provide for the youth in this regard, the constitution makes it difficult for the state to deliberately curtail participation of the youths.

In article 97(1), the constitution provides for political parties to nominate twelve members to represent the special interest groups which include the youth. This was a marked departure from previous years where nomination of youth to parliament was mostly dependent on the discretion of the party luminaries. Another platform for youth representation and participation is found in the constitutional requirement in article 98(1) (c) that two individuals, one male and one female be nominated to represent the interests of the youth at the Senate level (Muhavi, 2012). Presently, the two senate members nominated to represent the youth are Hosea Ochwangi (TNA) and Daisy Nyongesa Kanainza (ODM).

At the county level, the youth are assured of participation and representation under Article 177 (1) (c) of the Kenyan constitution. Article 21(3) of the Constitution states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. This means that the government as at 2013 general elections had the duty to ensure that the youth have necessary documents such as identification cards or passports so as to participate in the elections. All the above laws coupled with article 27 of the constitution, which talks against discrimination of any kind in the country, provided a basic legal framework for youth participation in the 2013 elections in Kenya (Muhavi, 2012).

In a nutshell, the 2010 constitution is a critical reform tool that provides a normative set of rules which if followed will continue to empower the youth. This chapter is interested in the extent to which the constitutional spaces, normatively provided were translated into tangible gains both by the duty bearers and the youth themselves.

b) Institutional spaces

A number of institutions offered the youth a platform for participation in the 2013 general elections including civic education and trainings on the political process. Perhaps the most important institutions of all these were the political parties and civil society organizations (CSOs). Political parties ensured that the youth took part in the electioneering process through various ways and means.

The various political parties in the run up to the 2013 general elections had youth wings and the youth were pro-active in recruiting and subsequently campaigning for their preferred candidates as well as contesting on their own both in the party primaries as well as in the general elections. The youth leagues were very active in campaigning for their parties (Nyadudi, 2010). For instance, ODM had the Vijana Na Raila (VINARA) led by Brian Weke, Ali Noor, Ababu Namwamba and Dr. Oduwo Noah Akala. Later on, this morphed into ODM Mashinani as the elections drew nigh. The National Alliance Party had groups like Vijana Na Uhuru which was an initiative driven by the youth to lobby support for their preferred candidate, Uhuru Kenyatta (Wasswa, 2013). The youth who were managing campaign affairs in TNA include Johnson Sakaja, Lydia Maithia and Machel Waikenda.

Among the most notable occurrences was the decision by Kenya Social Congress presidential candidate, Peter Kenneth to nominate the youthful Ronnie Osumba as a running mate in the run-up to the general elections. Peter Kenneth had a group on social media and an initiative within his camp dubbed, Vijana Na PK (Peter Kenneth) which coined the catchy street slang, 'tunawesmek'[152] all in a bid to attract the youth and enhance youth participation (UNDP, 2013)

Qualitative data from other sources seem to support the perception that some political parties indeed provided space for the youth to participate in the management of the 2013 general elections but only to some extent. A significant majority of personnel (up to 70 percent it is believed) that managed the campaign secretariat of NARC Kenya presidential candidate Martha Karua were young people who held influential positions including Director of Policy and Strategy, Communications, Scheduling and Outreach & Mobilization.[153] These young people had responsibilities including recruitment and talent acquisition, budgetary oversight as well as logistics management. Some youth have observed that in more than any other

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152   *A street slang word which is a corruption of two combined words that mean 'together we can make it'.*

153   *Interview with NARC Kenya party leader Martha Karua, corroborated by CMD (2015) report which found that youth were generally involved in such aspects as party campaigns, strategies and branding but their input was not significant on important matters that party leadership made.*

election, youth received better support in 2013 general elections.[154] This support was in the form of campaign materials such as posters and t-shirts.

In Nairobi, the youth permeated different aspects of party campaign processes. These aspects of party campaign provided different opportunities for either contestation or inclusion. In terms of contestation, so many youth expressed interest to contest especially county assembly, women representative and MPs positions. Such interest was more pronounced earlier on before party primaries but as the party nominations neared, influential older party officials easily elbowed them.[155] In terms of inclusion, many youth took paid positions in political parties as strategists and grassroots mobilizer. In Kariobangi Ward for example, ODM had twelve youth, TNA had six youth, WIPER-K had one youth, NARC Kenya had nine youth.[156] Nationally, youth in critical campaign management positions was most visible in TNA although many other parties had the youth.[157] Johnson Sakaja, Lydia Mathia, Denis Itumbi and Michael Waikenda were some of the youthful TNA campaign managers. Some of these youth would later be nominated to parliament, like in the case of Johnson Sakaja or given appointments in the national or county governments like in the case of Denis Itumbi and Michael Waikenda.

There are other institutions and non-governmental organizations which played a vital role in offering youth the necessary skills and resources to participate in the 2013 General Elections. One of these institutions was the Center for Multiparty Democracy (CMD). In collaboration with various stakeholders, CMD organized trainings for the youth in the run up to the elections to empower them in line with Political Parties Act (Center for Multiparty Democracy, 2012). Over 300 youth from 25 political parties took part in the political education programmes organized to consolidate and strengthen the political parties with an increased participation of the youth. The programme was to increase the level of political awareness among the youth and to sharpen their skills and interests in political parties and politics in general (Center for Multiparty Democracy (2013b).

The Youth Agenda was the other major institutional player. Working with partners such as Youth Alive Kenya, the Youth Agenda provided the youth with skills and space necessary to articulate their needs and priorities for the 2013 General Elections, including advocating for increased participation of the youth in the political parties and other political processes. These efforts were instrumental in offering civic education in relation to registering as voters and

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154   *Musembi Peter-Youth Initiative Kenya (YIKE) youth leader interview done at YIKE offices, Nairobi, June 13th 2014.*

155   *This point is repeated across many of the interviews with youth leaders in Nairobi.*

156   *Musembi Peter. Interview by author. Personal interview. YIKE offices, Nairobi, June 13th 2014.*

157   *Ratemo DFB. Interview by author. Personal Interview. NYC offices, Nairobi, June 8th 2014.*

as party members. The current youth leagues are a result of the push by the Youth Agenda Kenya to encourage more youth to take part in political processes.[158]

On its part, Kenya's Inter-Party Youth Forum (IPYF) held a series of nationwide meetings and seminars in a bid to get the youth to participate in the elections. This forum brings together young political activists across the country to discuss matters affecting the youth and their participation in the political arena in the country. The National Democratic Institute (NDI) worked hand in hand with IPYF to bring the youth together in order for them to participate peacefully in the 2013 elections.[159]

Quantitative Analysis of Youth Participation and Performance in the Elections

Analyzing youth participation in the last General Election conclusively is quite a difficult task given the scanty information available in the public domain. The various offices charged with the duty of providing such information are laden with encumbering red-tape. Institutions such as the IEBC and the Registrar of Political Parties could not allow the researchers access to information about the registration of persons in the various political parties, the nominated persons and the winners in the last general elections or even the nominated persons. This therefore means that youth participation in the last General Election as a topic is subject to opinions from various quarters and organizations, which may not be 100 percent accurate, but all the same, this section will try to use some relevant documents, which could be accessible in order to come up with the pattern of participation and the performances.

Over three thousand (3,000) young women and men were nominated by the various political parties in the elections to vie for various political posts across the country.[160] Majority of the youth participating in elective politics were mainly attracted to the post of County Assembly Representatives, an estimated 54 percent of the candidates who vied for the post were under the age of 35 years.[161] This is perhaps because older politicians opted for other positions deemed as more lucrative. Most of these youth contesting were either nominated by small

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158   Youth Agenda Kenya. 'Impact', Impact. http://www.youthagenda.org/about-us/impact.html (accessed June 28, 2014).

159   "Forum Brings Kenyan Youth Together Across Party, Ethnic Lines (2012). ndi.org/Kenya-IPYF-pledge. https://www.ndi.org/Kenya-IPYF-pledge (accessed June 28, 2014).

160   This information is courtesy of Center for Multiparty Democracy report and IEBC 'Download Archive - Search through our download archive', Downloads. http://www.iebc.or.ke/index.php/resources/downloads (accessed June 6, 2014).accessed June 6, 2014

161   Youth participation in 2012/2013 political parties. Nairobi: The Youth Agenda, 2014.

parties or were running as independent candidates having been locked out of large parties due to prohibitive nomination fees. Some of these are Hon. Wesley Korir from Cherengany and Hon. Kinoti Gatobu who was elected as an independent candidate in Buuri constituency at the age of 26.

The representation of youth in higher elective offices is still quite low as results from the last elections indicate. For instance, in 47 counties, only two youth were elected as governors, translating to 4.3 percent of the gubernatorial seats. In the National Assembly there are only 35 youthful members inclusive of the nominated members and women representatives. This translates to about 0.1 percent. This implies that the youth in the national assembly are unlikely to marshal the numerical threshold required to influence legislation in their interest. The best performance by the youth was at the level of the Member of County Assembly where more than 415 young people were elected as MCAs in the 1,450 wards nationally. This translates to 27 percent. Mirrored against the demographics of the country which shows that over 70 percent of Kenya's population is between 18-35 years of age, the outcome is dismal. The following tables summarize youth's performance in the 2013 elections.

Governors

NAME	GENDER	PARTY	COUNTY
Amason Kingi*	Male	ODM	Kilifi
Alex Tolgos Tanui	Male	URP	Elgeyo/Marakwet

Indicates that at the time of the elections in 2013 Amason Kingi was a youth but at the time that this research was being conducted he had passed the constitutional youth bracket.

Senators (Elected)

NAME	GENDER	PARTY	COUNTY
Onesimus Kipchumba Murkomen	Male	URP	Elgeyo/Marakwet
Stephen Sang	Male	URP	Nandi
Isaac Melly Kipkemboi	Male	URP	Uasin Gishu

Senators (Nominated)

NAME	GENDER	PARTY
Naisula Lesuda	Female	TNA
Daisy Nyongesa	Female	ODM
Hosea Onchwangi	Male	TNA
Halima Abdile	Female	ODM
Joy Adhiambo Gwendo	Female	TNA
Martha Wangari	Female	UDF
Mshenga Mvita Kisasa	Female	URP
Linet Kemunto Nyakeriga	Female	TNA

Women Representatives (Elected)

NAME		COUNTY
Annah Nyokabi Gatecha	TNA	Kiambu
Priscilla Nyokabi Kanyua	TNA	Nyeri
Gladys Nyasuna Wanga	ODM	Homa Bay
Sabina Wanjiru Chege	TNA	Murang'a
Roslinda Soipan Tuya	URP	Narok
Dennitah Ghati	ODM	Migori
Nasra Ibrahim Ibren	ODM	Marsabit
Eusila Jepkosgei Ngeny	URP	Uasin Gishu

Members of the National Assembly (Elected)

NAME	GENDER	CONSTITUENCY
Boniface Kinoti Gatobu	Male	Buuri
Vincent Musyoka	Male	Mwala
Francis Mwangangi Kilonzo	Male	Yatta
Steven Mutinda Mule	Male	Matungulu
Anthony Kimani Ichung'wah	Male	Kikuyu
Alice Wambui Ng'ang'a	Female	Thika Town
Wesley Korir	Male	Cherengany
David Kangongo Bowen	Male	Marakwet East
Alexander Kosgey	Male	Tinderet
Alfred Kiptoo Keter	Male	Nandi Hills
Benjamin Langat	Male	Ainamoi
Benard Kipkirui Bett	Male	Bomet East
Dan Wanyama	Male	Webuye West
John Bunyasi Sakwa	Male	Nambale
Ken Obura	Male	Kisumu Central
Silvance Onyango Osele	Male	Kabondo Kasipul
Aghostino Neto Oyugi	Male	Ndhiwa
Jared Odhiambo Opiyo	Male	Awendo
Ben Momanyi	Male	Borabu
George Theuri	Male	Embakasi West
Paul Simba Arati	Male	Dagoretti North
Kenneth Odhiambo Okoth	Male	Kibra

Members of the National Assembly (Nominated)

NAME	GENDER	PARTY
Johnson Sakaja	Male	TNA
Isaac Mwaura	Male	ODM
Janet Mariana Teiyaa	Female	TNA
Abdi Noor Mohamed Ali	Male	URP
Sara Paulata Korere	Female	URP

Source: All tables adapted from Youth Representatives Elect- March 2013[162]

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162   *Youth Representatives Elect- March 2013. Nairobi: The Youth Agenda, 2013.*

Analysis

An analysis of the performance of the youth in the 2013 General Elections thus should focus on the extent to which various actors in the electoral process seized the legal and institutional spaces discussed above. Such analysis should also test the amplified generational change narrative ('digital migration') during the campaigns. A number of observations are therefore useful here. First, and on a broad sense, the new constitution both emphasizes participation of marginalized groups in governance. More importantly, the constitution doubled the number of offices from three to six and increased the number of National Assembly's electoral districts by 38 percent from 210 to 290. As a result, there was a renewed belief among the youth that the opportune time to contest political seats was 2013. Mathematically, there was also a significant increase in probability that contesting the many available positions would yield seats for the youth.

Second, however, realization of increased representation by the youth was still largely dependent on political parties. Unfortunately, despite the generational change rhetoric, political parties, especially popular ones half-heartedly involved the youth in the 2013 election. This was manifest in a number of ways. First, the popular parties prevailed upon the youth not to run, for example in Wajir a youthful women representative candidate, Halima Abdile was prevailed upon by ODM to step down in favor of her opponent. Although she was later nominated by the party, it is unclear how many youth were prevailed upon but were not rewarded through nomination given that nomination slots were few. Second, dominant political parties charged high nomination fees, generally locking out interested but financially incapable youth.[163] In some instances, popular parties only issued nomination certificates to the youth in regions where the parties are unpopular perhaps to meet the constitutional requirements on party lists (Center for Multiparty Democracy, 2013a). It is important to note that in instances where the youth were included in party lists in regions where those parties are popular, the youth performed well. For example in Dagoretti North, ODM a popular party in Nairobi, issued the nomination certificate to Paul Simba Arati who won. Similarly, URP enlisted Alex Kosgey in Emgwen and he won the parliamentary seat.

However, it is the manner in which the youth were treated within political parties that most youth either contested as independent candidates or through fringe parties which diminished their chances of winning. An important policy question on youth and participation in elections is what made the youth win wherever that happened. First, an obvious explanation already alluded to in this chapter is meaningful support by political parties especially where they were

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163   *This observation is repeated throughout the youth leaders' interviews and also corroborated by a CMD report on party primaries.*

popular. Youthful leaders won through URP in the Rift-Valley, ODM in Nyanza and Wiper in the Eastern region. Second, the case of Simba Arati in Dagoretti North also suggests that previous relationship with a popular party matters. In 2007, the MP unsuccessfully contested as a councillor in Nairobi through ODM but was later nominated as a councillor.[164] Third, the election of Alex Kosgey in Engwen, the son of a veteran politician who is also a wealthy businessman in his own right suggests that the confluence of 'right party', wealth and existing social capital matters. Finally, the election of Kinoti Gatobu and Francis Mwangangi in Yatta could be useful in explaining enablers of youth in the 2013 elections. While the former was elected as an independent candidate, the latter was elected through a fringe party—Muungano Development Movement, but which was under CORD coalition, popular in that region. These two cases show that in some instances, the youth were also elected on their own merit.

Third, the number of youth elected for various positions was impressive compared to previous elections but this must be treated with caution. With the evidence that popular political parties did not adequately support the youth, and that majority of seats won by the youth in the election was that of the county assembly, it is plausible that the improved performance could be because of the sheer doubling of the numbers of elective offices and a reluctance by the seasoned politicians to vie for the MCA's position.

It is therefore important for this chapter contend with the question on mechanisms through which future participation of youth in Kenyan politics could be enhanced. How does one dismantle the hurdles faced by the youth within promising legal and institutional spaces to deepen future participation of the youth in electoral politics in Kenya?

Conclusion: Deepening future participation

This chapter has focused on several aspects of youth and politics in Kenya. First, it has reflected on the historical context of the youth and (electoral) politics in Kenya. Here, it has argued that the renewed relevance of this question is explained in part by frustration that has met previous hopes with youthful leaders and the spaces created for the youth in the new constitution. Second, the chapter has discussed the perennial generational change narrative, illustrating how it has largely remained a rhetoric, exemplified by how seasoned politicians treated the youth within political parties in 2013. It has also shown that older politicians still limit youth's place within the party ranks to duties other than actual contestation of elective offices. Third, the chapter has analyzed two key spaces which were available for the youth

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164   See http://mobile.nation.co.ke/news/-From-broke-baba-mboga-to-Railas-rival-in-key-ODM-post/-/1950946/2197332/-/format/xhtml/-/114lk4c/-/index.html

to engage in the electioneering of 2013. It contends that these spaces are culmination of previous struggles. Fourth, the chapter has then looked at the performance of the youth in 2013 elections quantitatively. Such a quantitative analysis of data on youth is however difficult both because concerned authorities do not discern data on the basis of age and the fluidity with which the concept of youth is understood in the Kenyan society. Available statistics and the research interviews for this chapter generally suggest that the youth did better in 2013 than in previous elections. Against this background, the chapter draws the following concluding recommendations around which future participation of the youth in electoral politics in Kenya could be deepened.

First, before the next elections the relevant duty bearers must operationalize broad constitutional provisions such as 'the State shall take measures, including affirmative action programmes, to ensure that the youth have opportunities to get representation in social, economic, political and other spheres of life'. Such operationalization need to be done within political parties, especially in the composition of party structures, party nomination fees and when composing party lists during primaries. Second, because the youth tend to be elbowed from large and more popular political parties, programs that encourage the youth to work with smaller political parties and gain meaningful influence within those parties' leadership hierarchies may be appropriate. Third, measures that strengthen the youth as viable political leaders through the path of independent candidates could equally be effective in realizing meaningful participation of the youth in electoral competition.

Chapter 11
Financing Elections in an Opaque Fiscal Economy: Kenya's 2013 Elections - *Attiya Waris*

Introduction

The role of money in politics arguably is the biggest threat to democracy worldwide today (International IDEA, 2014: v). The challenge of financing political campaigns is one of the hurdles facing any future political party and politician globally. Today, the whole world is experiencing a rapid growth in political campaign expenditure (International IDEA, 2014). As a result, not all individuals and political parties are able to fairly compete in elections. The unequal access to political finances, has led to uneven playing field which in turn has a net negative impact on representation as a tenet of democracy (International IDEA, 2014). The pressure to finance election campaigns today has forced politicians and parties into even illegal resources, an observation more prevalent in polities characterized by a weak or malfeasant fiscal state.

Specifically in Africa, International IDEA has recently identified six trends associated with election financing. First, the campaign financing landscape is characterized by uneven access to resources as incumbents are largely advantaged over opposition groups, with unparalleled access to, and abuse of state resources. This development has significantly underprivileged minorities such as women and youth. Second, campaign financing trends have created a patron-client relationship between politicians and voters in a fashion that dents the tenets of democracy. Obviously, the wealthier politicians are therefore better placed to exploit the attendant clientelist arrangement for support. Third, and related to clientelism, the terrain of campaign financing in Africa is also littered with massive vote buying where money triumphs innovative campaign ideas. Fourth, illicit funds from kickbacks received from extractive industries and illegal drugs are increasingly encroaching into campaign financing. Fifth, campaign financing in Africa is also now more than ever dependent on foreign funds flowing into and out of politics. Finally, and perhaps the most detrimental aspect of campaign financing in Africa is the cash nature of the African economies. This makes it extremely easy

to subvert existing infrastructural mechanisms in finance, from banking to tax revenues in a manner that distorts the economies.

This presumption that finances drive an election more than any other issue is a constant obstacle in the democratization of political processes. Using the information on election campaign laws, policies as well as anecdotal evidence, this chapter attempts a number of objectives. First, it endeavours to unpack the sources of campaign financing that are utilized in standing up for elections. Second, it threads available evidence to paint a picture which is helpful in estimating what Kenya's 2013 General elections might have cost, in the unfortunate absence of hard evidence. Third, the chapter explores the phenomenon of the extremely wealthy politicians as witnessed in the 2013 election campaigns, what some quarters have christened as the "Sonko Phenomenon". Finally, the chapter also enquires broadly into the phenomenon of unexplained fluctuations in wealth, with the sudden wealth of some and poverty of others, a re-distribution of wealth that entails national, regional and global levels in some cases.[165] This chapter however is limited by the absence of concrete data on election financing.

Context of Campaign Financing in Kenya

Political parties in Kenya struggled for state funding since the re-introduction of multiparty politics in Kenya in 1992 until 2007 when The Political Parties Act established a Political Parties Fund (FES, 2010).[166] However, it took two more financial years for the national treasury to allocate funds to the political parties. Even then, the figure allocated was paltry with a contested criterion of allocation and made available to just a few of the political parties. The established political parties benefited from the Political Parties Fund under the earlier Political Parties Act of 2007. However the practicality of these provisions remain unclear. Auditing a political campaign is costly and receipts may be missing or never issued and so mechanisms of legislation and enforcement remain unclear.[167] Consequently, raising of funds by parties and candidates has been and still remains a matter of self-help or *harambee*. In the absence of adequate state funding and the practical need for large funds to participate in political processes, political financing remains under-regulated in Kenya. Before, Kenya had constitutional limits on campaign spending by political parties, a clause which was removed in 1992 before the first multiparty elections.[168]

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165   *The author uses part of data obtained through the support of the STEAL project funded by the Norwegian Research Council.*

166   *Also see http://www.content.eisa.org.za/old-page/kenya-political-party-finances for more details.*

167   *Observations made by both Constitutional Law Professors interviewed for this research.*

168   *Human Rights Watch (1993).*

Kenya's laws prohibit foreign funding of parties, however the laws allow foreign funding of candidates, this opens up the potential of self-funded monies from illicit sources held internationally.[169] Corporate funding is allowed for political parties but there is nothing in the law regarding candidates. There is a ban on donation from companies in which the state has a 'controlling interest' for both parties and candidates. There is also a ban on donation from both anonymous donors and trade unions to either parties or candidates. There are restrictions on public officers in political party activities and states that a public officer is not eligible to be a founding member of a political party; not eligible to hold office in a political party; should not engage in political activity that may compromise or be seen to compromise political neutrality of that person's office; not publicly indicate support for or opposition to any political party or candidate in an election. However, these restrictions do not apply to the president, deputy president, a member of parliament (MP), governor or a member of a county assembly.

The annual donation limit to parties in Kenya is 5 percent of the party's spending in the previous year, a very high figure. The 5 percent limit of the total expenditure of a political party does not apply to any contribution or donation whether in cash or kind made by any founding member of the political party as his contribution to the initial assets of the party within the first year of its existence. However, since candidates are not required to submit financial reports, this limit is largely unenforceable.

The limits for election campaigns are to be set by the Election Monitoring Body (EMB) during each election period. The Political Parties Fund is administered by the Registrar of Political Parties. The sources of funds among others include not less than 0.3 percent of the revenue collected by the national government. Funding is only available to political parties that won 5 percent of the total votes at the preceding general elections, and ensuring that not more than two-thirds of its registered office bearers are of the same gender. 95 percent of the funds are allocated proportionately to votes won in the preceding general elections; 5 percent for administration expenses of the fund. Anyone who buys or sells votes is liable, on conviction, to a fine not exceeding one million shillings [US$ 12,000], to imprisonment for a term not exceeding six years, or to both.

There are provisions for subsidized media access but only for parties and not for candidates. There is a limit on how much a political party can spend, which is announced periodically. Political parties are required to publish sources of funds within 90 days of the end of its

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169   IDEA, Political Finance Database – Kenya; http://www.idea.int/political-finance/sources.cfm: Accessed: Wednesday, 25th June, 2014

financial year. Parties are also required within 90 days before a general election, to submit to the registrar of political parties a register of its members and a statement of its asset and liabilities. Only independent candidates report directly to the EMB. Candidates nominated by a political party report via their political party. Parties have to publish annual reports. For campaign finance reports, there is no mention that expenditure information needs to be made public, whereas information about donations is 'confidential'. Donations during election campaigns should be disclosed if they exceed a limit; the limit is to be decided by the EMB.

Political parties are required to submit to the Auditor-General the accounts of the political party in respect of that year. The Auditor-General is required to audit the accounts of political parties annually, audited accounts are submitted to the registrar and tabled in the national assembly. Campaign finance reports are submitted to the EMB. The Auditor-General, the Registrar of Political Parties and the EMB are the three institutions responsible for auditing the accounts. In Kenya, 30 out of 44 political parties reportedly failed to submit their financial reports for 2009–10 (IDEA, 2014). These parties were threatened with de-registration, but such sanction has not been applied to any party to date. Sanctions upon failure include: fines, prison, forfeiture, loss of public funding, loss of nomination of candidate, loss of political rights as well as any other the court sees fit. Sanctions also include warnings, and prohibiting candidates/parties from campaigning during certain times or in certain areas.

Campaign funding takes the form of donations and indirect funding with party leaders generally bankrolling their campaigns. Nohlen et al., (1999) for example observed that three major opposition parties that were formed to contest the December 1992 elections were headed by multimillionaires. The then incumbent president also directly and through his proxies, spent an estimated KES 2 billion (US$ 208 million) in the 1992 election, this was in addition to the vast state resources pressed into service on his behalf (Throup and Hornsby, 1998). In addition both local and foreign personal friends usually make large unregulated donations. Though regulated by law, without proper mechanisms of enforcement, donations as a source funding for political parties and candidates in Kenya remain opaque.

The Constitution of Kenya 2010 also directed parliament to enact a new comprehensive Political Party's Act (2011), which in addition to having provisions on sources of funding can be seen as efforts to improve earlier challenges on political financing and regulation. Further, there came the Election Bill (2011) and the Election Campaign Finance Act (2013). The latter, though conveniently passed only after the 2013 elections, is a precise guide to campaign finance in Kenya with comprehensive law, which governs the raising of funds, and their

disclosure. However, implementation will be best tested in the General Election of 2017.[170] Meanwhile, the need to raise money for elections continue to be cited as a driver behind some of the country's largest corruptions scandals. This money however is rarely reflected in the accounts and other financial transactions of the parties and candidates. The context in which political campaign financing takes place thus does not inspire hope for regulation that will level the playing field.

The framework for the 2013 elections was guided by the requirements set forth in the new constitution, but some aspects such as campaign finance reform, were not implemented. As a result the IEBC did provide some guidelines but these were not comprehensive.

The 2010 Constitution and Accompanying Legislation

Kenya's new constitution, promulgated in 2010, was a watershed document that covers broad under the bill of rights, but more specifically here, outlines a robust framework for administration of elections. Specific laws were however required to translate the provisions of the constitution to succinct guidelines for administration of elections.

Under Article 38 (1) all citizens have political rights to form, or participate in forming, a political party; to participate in the activities of, or recruit members for, a political party; or to campaign for a political party or cause. While under article 38(2) every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the voters. Finally, sub-section (3) states that every adult citizen has the right, to be registered; to vote and to be a candidate and, if elected, to hold office. The use of public resources and abuse of incumbency for campaigning is a punishable offence. However, at the time of the 2013 General Elections, there was no limits set on amounts candidates may spend on campaigning.

Article 91(1) (d) requires that every political party abides by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. In addition, sub-section (2) states that a political party may not (d) engage in bribery or other forms of corruption; or (e) except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections. However it has also been pointed out by scholars that these provisions were substantially weakened and that the drafts prepared by the constitutional review commission

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170   *EISA, Kenya: Political Party Financing; http://www.content.eisa.org.za/old-page/kenya-political-party-finances: Accessed: 24 June, 2014.*

were much stronger and had more controls on financing.[171] Article 92 states that parliament must enact legislation to provide for:

(a) the reasonable and equitable allocation of airtime, by State owned and other mentioned categories of broadcasting media, to political parties either generally or during election campaigns;

(b) the regulation of freedom to broadcast in order to ensure fair election campaigning;

(c) the regulation of political parties;

(d) the roles and functions of political parties;

(e) the registration and supervision of political parties;

(f) the establishment and management of a political parties fund;

(g) the accounts and audit of political parties;

(h) restrictions on the use of public resources to promote the interests of political parties; and

(i) any other matters necessary for the management of political parties.

Despite the failure of the National Assembly to pass the Election Campaign Financing Bill 2012 and of the electoral management body to fulfil its constitutional responsibility (Article 88(4)(i)) to cap campaign spending, there were still some restrictions and transparency provisions on political parties' funding set out in the Political Parties Act 2011 as well as the general provisions in the 2010 Constitution. However, these provisions are too general in nature to effectively control excessive spending. There was no limitation on how much cash parties or candidates could distribute at election rallies. Although such activity constituted an election offense, the European Union Election Observer Mission, for instance, reported that the practice was widespread among various parties and candidates.

As this chapter attempts to illustrate, the 2013 General Election was extremely expensive even when one's analysis is limited only to eyeball assessment of the campaign activities involved. In the absence of any tight regulatory framework, candidates and parties spent vast resources, severely perverting any rules of fair political competition.

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171   *Observations made by two Constitutional Law Professors at the University of Nairobi interviewed for this research in April, 2015.*

Theoretical Framework: Fiscal Sociology, Global Wealth Chains and the Impact of Campaign Financing

Goldscheid and Schumpeter perphaps provide an important entry point to understanding the significance of fiscal sociology,

> 'There is hardly any other aspect of history … so decisive for the fate of the masses as that of public finances. Here one hears the pulse beat of nations at its clearest, here one stands at the source of all social misery' (Goldscheid, 1962: 2).

> 'The modern state cannot exist where all centers of life rest in the community. It only emerges with a setting where bonds of community have disintegrated and the individual-the lesser lord and the voting citizen-moved to the center of gravity. Only there does the state become necessary either by a common need or the community even broken retains functions which the newly created individuals are unwilling or unable to take over' (Schumpeter, 1991: 110).

In order to understand the impact of campaign finance money on local, regional and international economy, this chapter uses fiscal sociology to conceptually unpack the political economy of campaign financing. It follows Ormrod and Bonney's model on typologies of the fiscal state to understand how today, the fiscal state system uses global wealth chains to facilitate withdrawal and return of funds in a well calculated but surreptitious fashion that significantly impacts economies. Fiscal sociology here broadly refers to the analysis of taxation and public finances undertaken through studying the lives of individuals, groups and societies (Backhaus, 2002). Other scholars have further contended that fiscal sociology ought to consider the extent of functional interdependence between a state's finances and social development (Goldscheid, 1962). Financing of election campaigns in Africa, which as highlighted in the introduction of this chapter, is characterized by complexities including complacent institutions and clandestine money transfer and transactions. This could thus be understood through analysis of the fiscal sociology of a state conducting elections.

The evolving tax bargain between the state and society, and the confidence that the society has in the state can be best assessed through history. The analysis of the background to the commencement of taxation, its growing complexity in collection and distribution, and the reactions of society to this process are some of the key elements in understanding the level of fiscal legitimacy of a state. Fiscal sociology approaches the analysis of taxation and public finances by studying the lives of individuals, groups and societies through history. This includes the unintended impact of taxation as well as regulation and has implications

for almost every activity of the state that somehow affects the private sector and society (Backhaus, 2002: 73).

Goldscheid defined fiscal sociology as the historical nature of the state at a point in time and its functional interdependence between finances and social development (Musgrave, 1992: 99). Schumpeter concurred with this argument by stating that the best starting point from which to study the state is fiscal sociology, stating, 'the budget is the skeleton of the state stripped of all misleading ideologies' (Schumpeter, 1991: 100) Most recently, Mumford posited that the legitimization of tax could be seen through the culture of taxation prevalent in a society, the method of collection, the ease as well as the societal response to the use of state's resources and the forms that their redistribution takes (Mumford, 2001: 2). Mumford's argument is the point at which this chapter will analyze the method by which wealthy individuals either pay, avoid or evade taxes and that this is part of a strategy to set up political careers in Kenya. Ormrod and Bonney in their model of the development of the fiscal state set out that the type of state is reflected by those in rule and the decisions that they make as set out in the table below.

Table A: Excerpt from Ormrod-Bonney Table on Development of the Fiscal State

	Tribute	Domain	Tax	Fiscal
Form of Government	'Predatory', peripatetic rulers (dynastic) or tribes	Personal, few limits in decision making	Highly developed institutions and legal procedures	Precise credit and tax legislation and 'fiscal constitution'.
	Kinsmen, marital allies and clients of the ruler	Small staff in more primitive forms.	Well staffed; specialised departments defined authority	Sophisticated organisation of departments. planning; administration
Local administration	High levels of local autonomy but with the sanction of royal intervention and/ or punishment		Regularly controlled by central government	Highly developed control by the centre
Office holders	Royal kinsmen and families of rank. Sometimes Church officials.		Professionally trained personnel.	
			Many of these may still be holders of venal offices.	appointments more or less on merit and presumed competence

Political Participation	Restricted to a small number of families	Little and infrequent activity of the estates of the realm	Initially on the increase; authorization and administration of taxes, in some countries later limited or removed by 'absolute' rulers.	Highly variable, but tendency towards participation because of the reliance on and sophistication of , credit structures
Public finance	Plunder and extortion. Surplus produced by those colonized	Surplus produced by domain or other regalian rights. Exploitation	Increasing importance of taxation	Precise planning of taxation with reference to the economy and public opinion.
Method of financing	Mix of payments in money and in kind		Mainly Monetization	High levels of monetization
Revenues	Taxes an infrequent aid, limited to specific purposes. Exactions and extortions play an important role. Systematic debasement of the coinage in wartime.		Regular direct and indirect taxes, no longer limited to specific purposes. Exactions and extortion play little or no role. Debasement of the coinage, even in wartime, becomes unusual. Attempts to unify the tax structure, avoiding regressive taxes and relating the burden of taxation much more closely to the sources of wealth.	Direct and indirect taxes of a highly sophisticated kind, with income taxes, property taxes and other duties levied with a view to maximizing fiscal efficiency and assisting economic development. Unified tax structure with greater or emphasis on 'progression'. Levels of economic growth and inflation play an increasing part in taxpayers' expectations.
Revenues	Taxes an infrequent aid, limited to specific purposes. Exactions and extortions play an important role. Systematic debasement of the coinage in wartime		Regular direct and indirect taxes, no longer limited to specific purposes. Exactions and extortion play little or no role. Debasement of the coinage, even in wartime, becomes unusual. Attempts to unify the tax structure, avoiding regressive taxes and relating the burden of taxation much more closely to the sources of wealth.	Direct and indirect taxes of a highly sophisticated kind, with income taxes, property taxes and other duties levied with a view to maximizing fiscal efficiency and assisting economic development. Unified tax structure with greater or emphasis on 'progression'. Levels of economic growth and inflation play an increasing part in taxpayers' expectations.

Source: Waris (2013)

Ormrod and Bonney argue that the fiscal state will develop more based on a set of characteristics that are evolving. Although they set out an entire set of characteristics, for the purposes of this chapter only the elements relating to rulers and taxes will be discussed. The characteristics on rulers state that the more the state moves away from ethnic or family based political rule, the more likely it is to develop generally. In addition, the characteristic of this state clearly sets out that the more formal forms of financing and taxation are used in a neutral manner the more likely the state will develop. However, where the state relies on informal systems and illicit finances are allowed to flow readily, the more likely it is that the state will not develop.

This theory of fiscal sociology and the development of the fiscal state in today's world must reflect the globalization of finance and free movement of money across the world which seemingly remains either totally unchecked or if noted, unacted upon. The theory could help assess the existence of documentation of wealth movements during campaigns that reflect the use of business to shift finances. In addition, the theory on global wealth chains also holds that the continued existence of an international chain of low tax states allows for the secret movement of finances. The continued existence of this global arrangement is more likely to allow these wealth chains, which are used by corrupt leaders as well as businesses and criminals, to continue facilitating the movement of money that in turn destabilizes economies on a regular basis by taking finances away from the state and to other jurisdictions. As a result, some of the economies within this global finance network suffer mini collapse due to freeriding speculation (Seabrook and Wigan, 2014).

The pathologies of the fiscal state under clientelist regimes thus offers an important lens through which one could understand the political economy of campaign financing. Characterized by intentionally weakened institutional mechanisms, cash economy and ease in illicit flow of money within and from outside, campaign financing becomes dirty. This does not only have short and long term effects on an economy but also completely warps representation since the resulting leaders are likely to be those deeply entangled in the financial web.

Methodology

As mentioned in the introduction, the dearth of hard data on election financing complicates extent to which an endeavour to understand financing of the 2013 General Election can go. Nonetheless, this should not completely stop such attempts since the complacency can only worsen the already murky terrain in which elections are financed in Kenya. As a matter of fact, it is the aim of this chapter to flag the anomaly that future elections can be conducted in the context of an opaque financial environment. Nonetheless, this chapter employs a number of approaches to navigate the context of election financing in Kenya.

First, we conducted eight interviews with: 1 current MP, 1 former MP, a political party strategist, 2 constitutional law professors, 1 legal representative and 2 former employees of a political party. Although these are people who either are or have been in positions where their insights reflect accurate picture of the context of campaign financing, due to the sensitivity of this matter, all the interviewees instructed anonymity. In these interviews, this chapter aimed at understanding both personal experiences of these politicians and a broader picture of how the politicians see their colleagues navigate election campaign financing. Second, this

chapter has collected existing secondary data largely from the print media related to election financing. The data relied upon here covered such issues as fundraisers, known cost of campaigns such as helicopters, branding, advertising and audited accounts as reported by some of the political parties. It has then analysed and triangulated such data to provide a picture of the estimated cost of the election.

Data Analysis

Generally, the data analysis from the sources described in the methodology section suggests that the 2013 General Election was not only extremely expensive but the acquisition and appropriation of the finances involved was also largely unregulated.

a) Interviews with current and former politicians

For purposes of clarity, the discussion in this section is divided into two themes that emerged from the interviews conducted: the type of politician and the source of campaign money. Dissecting the type of the politician offers readers an understanding of how financial or network predisposition of these politicians influence their campaign funding sources, expenditure patterns and calculus. Analysis on sources of funding is useful here in generally mapping all the possible options available to politicians for funding as enabled by the prevailing fiscal sociology.

The Type of Politician

Many assume that the Kenyan politician is a wealthy person with limitless funds. This however may not necessarily be always true. The respondents interviewed for this chapter identified several different types of politicians. However, one issue they all share is a reluctance to use their personal money for campaign finance. Despite this reluctance, respondents saw politicians as divided into two main groups: one, those seeking careers in politics and two, those who are entering politics for other reasons including protection of business interests and self-actualization. However, these lines are not necessarily clear, politicians may actually be a combination of several of these at different points in time.

Within the former group, those seeking political careers there are: first, the new politician who has no family money and has limited resources and who basically uses his/her own money to begin a political career. It is very rare that this kind of politician is successful on the first attempt. More often than not, after campaigns end, whether this candidate wins or not, they

may end up declaring bankruptcy. Second, the politician who may be new but who enjoys support – this could be family support, community support or even party support. This type of politician can be quite successful depending on whether s/he is able to gather enough financial and political support. Third is the politician running for re-election. This politician may not be as popular and also not have adequate money to fund campaign. This politician typically has to sell assets to finance their campaign. Fourth, there is the moneyed politician running for re-election. This politician will most likely not use his own money but will use his networks and management team to collect resources. Usually as a result of the network access and political support this politician will likely be successful.

Within the latter group, those seeking political careers include: first, the politician seeking to protect their financial interests. This usually includes those with business interests and who seek to keep their businesses going while also staying in politics. Second, the politician seeking to protect their power bases for other reasons. These reasons may not be the same but generally describes politicians with a lot of money, potentially illicitly gained and who feel the need to continue to protect their financial base by maintaining some influence in politics. Third, there is the politician seeking to launder money from criminal activity. Some respondents mentioned criminal activities such as drug dealing as well as trading in small arms, sale of counterfeit gold (fake) and counterfeit money termed 'washwash'.[172] Fourth, the politician who stands up for elections to take votes away or weaken another politician by swinging the vote, or splitting it. They may even be standing in order to build contacts or to try to get bought out.

Source of Campaign Money

Worldwide, corruption, bribery, vote buying and election related financial malpractices have necessitated calls for electoral reforms to address the anomalies (Bratton, 1998). Generally, there are three different sources of money for political parties. These are: internal finances such as members' dues and membership fees; private donations; and state/public funding. The latter are the subsidies provided by the state to parties, candidates for campaigns in the form of direct payments, campaign reimbursements, and in other cases free media time (Bratton, 1998:20). Following the 2010 Constitution and the Election Campaign Finance Act, the most common funding type used is party membership dues, local fund raising, and small individual

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172   *Claims made by a former employee of a political party interviewed by the author in Nairobi in April, 2015 to understand the secrets of election financing, such claims were echoed by the Legal Representative interviewed for the research around the same time.*

donations by supporters. Other acceptable contributions include; donations by corporate interest groups, lobbyist and political entrepreneurs. Foreign donations and contribution by founders of political parties are the most prominent sources of campaign money in Kenya.[173] However interviews conducted were very clear that politicians received money from Kenyans in the diaspora and corporations. There were also numerous reports of money received both in cash and in kind from foreign sources such as other developing states.[174]

Interviews done for this research disclosed that in the 2013 election, financing was both legally and illegally raised. Financing in the form of cash or cheques was given in five main ways. First, MPESA paybill accounts were set up for small local and individual donations. These ranged from 100 to 50,000 Kenya shillings.[175] This MPESA account was in some cases also linked to Paypal for payments from Kenyans in the diaspora. However, it is important to note that there was no control over who donated. Though an efficient system should be capable of tracking campaign funds raised through this means, there is no evidence that electoral authorities charged with this responsibility tracked the funds to determine legitimacy. In addition, the existing provision that one can use a phone line for 30 days without registration means that it is easy to make MPESA transfers without there being a tracking system. In addition, it is nearly impossible to ascertain if the money sent from abroad using this system is legally earned.

Second, for veteran and well supported politicians, the bulk of finances came from close friends exploiting their networks to collect money. This system requires a well-organized structure with a central account. Here, the loophole for cash payments is the additional difficulty of either the politician or the administrative staff keeping cash without logging it in. Time pressure during campaign period also means that cash swiftly changes hands between campaign teams and service providers without proper documentation and receipts. Third, friends could also make huge personal donations directly. This can either be in cash, cheques, transfers or in kind. The source determines the nature of the payment. If financial structures put in place are efficient, huge cash payments should essentially be easy to track by the revenue authority as well as the anti-money laundering and anti-corruption units.

Fourth, for new candidates or those who were not well supported, personal assets are their most likely source of campaign funds. As a result of funding own campaign, an incredible amount of pressure on these candidates, to not only win, but also to try to prevent bankruptcy which may arise if they do not succeed. In addition, less wealthy incumbent Members of Parliament take out housing mortgages through parliament that has a low interest rate and

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173   *Observations of a party strategist interviewed.*

174   *Claim made by a former MP interviewed in April 2015 in Nairobi for this chapter*

175   *Observation by a former MP interviewed in April 2015 in Nairobi by author of this chapter.*

then build their equity in the property. More often than not, the property is then sold off before the next cycle of elections usually at a profit due to the current housing boom, the cash is then used to finance campaigns. The fifth source of finances identified by the politicians is theft of taxes: public resources. Section 68 of the Elections Act contains a prohibition on the use of public resources for the purpose of campaigning. Section 43 of the Act also prohibits public officers from campaigning or initiating new development projects for the purpose of supporting a candidate or political party. Domestically, some respondents stated that there exists slush funds in government that are given their own vote in the budget before elections and for which there is no reasonable task. This money is often misappropriated by politicians who are already in government trying to secure finances for the next elections.[176]

On public funds however, there was effort of oversight by relevant agencies. On 7 February, 2013the High Court ordered[177] that the planned release of KShs. 10 billion to the Constituency Development Fund should not go ahead until further order, as disbursements from that fund are heavily influenced by Members of Parliament and their nominees at constituency level. The court opined that releasing the fund at this time would make it susceptible to abuse for campaign purposes. On 8 February the Ethics and Anti-Corruption Commission also expressed concern that this fund could be abused. On the same day the Head of the Civil Service announced that no more major government tenders would be initiated before the election, and on 11 February he issued a circular warning civil servants including District Commissioners, District Officers, Chiefs and Assistant Chiefs not to engage in politics or they would be disciplined. Paradoxically, the Head of the Civil Service was himself accused by CORD of plotting with provincial administrators to rig the election. That allegation was investigated by the police and later dismissed by the Director of Public Prosecutions. These developments helped heighten understanding of the prohibitions in the Elections Act on the use of public resources in the campaign. These matters were monitored by constitutional commission, the Commission for Administrative Justice, which at an early stage of the campaign persuaded the Prime Minister's Office to stop using its official website for campaign purposes.

The sixth source of campaign funds mentioned by the interviewees is the use of resources from corporations, blurring the principle of separation of business and state.[178] Although not

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176   A recent incident in which a Principal Secretary (PS) wrote to Members of Parliament warning them, among other things, against soliciting for unaccounted money from the Ministry and the subsequent vendetta during parliamentary vetting process of the PS suggest this reality.

177   This was done following an application in court by The Institute for Social Accountability (TISA)

178   The traditionally recognized separations are: separation of power and church and state. This third separation has not been explored enough and continues to undermine democratic processes in a myriad of ways, campaign

clearly discussed by many respondents, the use of business ownership to assist in financing campaigns featured. However, what became clearer is that this silent source of support provides not just finance but services and unwritten support to those politicians that have business interests. An owner of a local radio station may have extra access or even cheaper advertising rates while in other cases free legal services and advice may also be granted.[179] One respondent pointed out that corporations get a tax break in Kenya if they donate up to 1 million Kenya shillings to ensure openness and transparency but the same respondent also stated that not many corporates gave money in order to take advantage of this provision.[180] The corporations that seem to give money were split into two types: first, the company predominantly belonging to the political candidate themselves or a person of the same ethnicity as the political candidate; and second, the company belonging to individuals who although of either a different ethnic or racial group or even other nationalities seem to have some kind of legal/business problems that they would like to have resolved after elections through political action which included both illegal and legal actions.[181] These wealthy businesspeople find business more important than ethnicity and as a result, they may actually donate different amounts across parties and candidates to spread risks, ignoring identities of the parties and candidates. In this scenario, often the candidate that the businessperson hope can facilitate tenders receive sizeable campaign donations.[182]

Although there was some interaction with domestic corporate lobbying, many registered limited interactions usually where posters or t-shirts were provided directly. Mention was made of transfers from places like Dubai, where Kenyans have bank accounts, for financing goods or services in kind but without direct transfers into the political campaign accounts.[183] However when discussing whether support coming from businesses was perceived as corporate or ethnic/individual donations, respondents felt that this was more in terms of ethnic support rather than corporate based support. Where the money actually comes from a legitimate or illegitimate source and is simply being funnelled through companies or representative. The respondents seemed aware of the on-going illegality, however, none mentioned refusing funding because it was from an illegitimate source. In addition, respondents pointed out that international corporations have slush funds which are untraceable and most company representatives fly in with cash, hand it over then leave.[184] This complicates traceability.

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financing as well as other government functions like procurement and political appointments.

179   *Interview of a Legal representative in April 2015 in Nairobi.*

180   *Claim made by a political party strategist interviewed for this chapter in April 2015 in Nairobi.*

181   *Ibid.*

182   *Interview of former employee of a political party in April 2015 in Nairobi.*

183   *Ibid*

184   *Ibid*

Finally, there was also finance from individuals, institutions and states that were hedging their bets possibly by funding some or all candidates for a particular seat. Their payments are predominantly 'cash in boxes' where payment is used for distribution to electorate that will be bribed for their votes.[185] It was pointed out that predominantly emerging states including Heads of State of other African states as well as big businessmen will give huge amounts of money in order to secure future favours as well as government tenders should the candidate succeed. However, since the devolution of the government under the new constitution one respondent stated that businesspeople at county and national level brought 'bags of money' to politicians not in order to gain favours but in gratitude for tenders already won before elections. The 'bag donations' also often target upsetting the vote by undermining a popular politician but who is not within inner business networks.[186]

b) Secondary Sources

In attempts to estimate the cost of the election, this section does two things. First, it examines data availed by some of the political parties after the election as stipulated by the Registrar of Political Parties (RPP). Second, it uses information from other sources, mainly newspapers, to estimate what the actual cost of the election might have been.

Political Parties Self-Reported Figures

Article 29 of the Political Parties Act 2011 requires political parties to publish their financial details within ninety days of the end of its financial year in at least two newspapers with wide circulation. An obvious incentive for compliance is the Political Parties Fund (PPF) set up in article 23 of the same Act. A number of political parties published their financial accounts in 2013.[187] The National Alliance (TNA) reported a total income of Ksh. 344 million contributed by party members (Ksh. 59M), party officials (Ksh. 20M), nomination fees (Ksh.114 M) and well-wishers (Ksh.151M). All the money was spent on operations and staff. The United Republican Party (URP) raised Ksh. 76 million all raised by party members and spent it on operations, voting system, campaign secretariat, campaign materials, meetings and party nomination materials. The Jubilee Coalition therefore, according to the reported data had a campaign kitty worth Ksh. 420M.

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185   Interview of a party strategist.

186   Interview of former employee of a political party

187   All the information in this section is obtained from a blog which writes on Banking, Finance, Technology and Investment http://bankelele.co.ke/2013/10/election-finance-in-kenya-2013.html

The Orange Democratic Movement (ODM) had a kitty of Ksh. 222M raised from nomination fees and through PPF. The party spent the money on campaigns (Ksh. 129M), conferences (Ksh. 54M), administration (Ksh.39M) and on branch coordination (Ksh.14M). FORD-Kenya's financial muscle totalled to Ksh. 19.6 million, all raised by party members. The party spent the kitty on campaigns, administration and recruitment drives. Narc-Kenya raised Ksh.25.1M and spent 14.4M on campaigns. Amani Coalition on the other hand raised Ksh. 14M, with 8M contributed by PPF and 6M by others. The Alliance Party raised Ksh. 6.4M through election fee spending 0.93M on campaigns. The Democratic Party's kitty had Ksh. 8.7M all from PPF, spent Ksh. 7.3M on campaigns and Ksh. 1.4M on other expenses. The graph below summarizes the financial information published by the political parties.

Source: from political parties self reported published accounts 2013
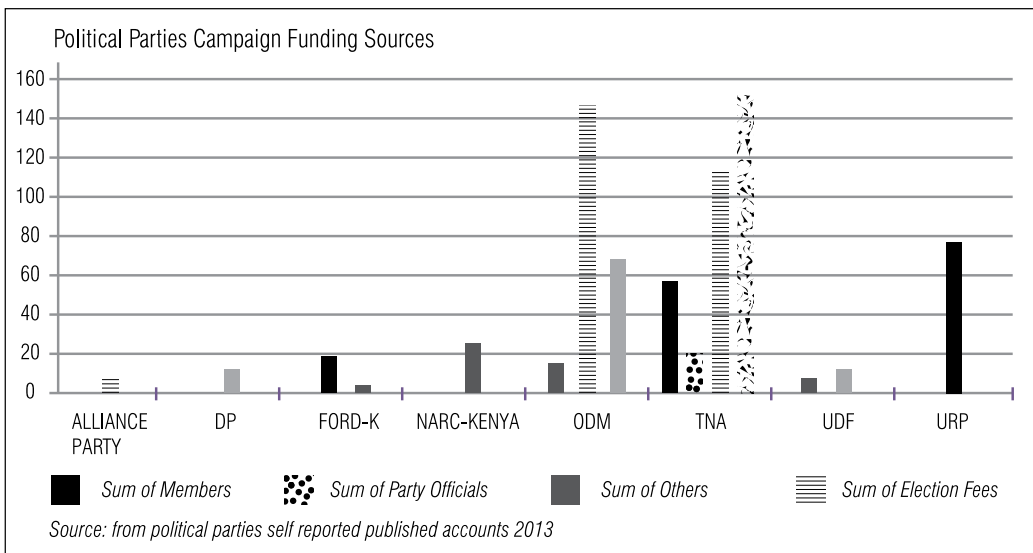
Graph generated by author from the data discussed above

c) The 2013 Campaign Expenditure: Some Indicators

Election campaigns have increasingly become very expensive. For Kenya's 2013 general elections, economists had predicted a serious presidential election to cost Ksh. 12 billion.[188] Although this figure looks huge, an analysis of some of the costs of campaign and the

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188   *The Daily Nation's research article on the cost of election is quoted estimating this figure. Based on available data and information from campaign insiders, The Star also put its estimated that the Jubilee Coalition would put Ksh. 10 billion into the campaign. See also http://www.the-star.co.ke/news/article-101699/uhuru-spend-sh10-billion-campaign and http://www.nation.co.ke/News/politics/Ruto+dinner+raises+Sh41m/-/1064/1497590/-/14wcs76z/-/index.html*

available data on how most of the political parties or coalitions ran their campaign makes it plausible that the 2013 election may have been this expensive.[189]

1. Planes and Helicopters

For a campaign to adequately penetrate the country within a short time of official campaigns, road transport is insufficient. Most campaigns thus resorted to helicopters and fixed wing planes as a means of transport. The Jubilee Coalition had six helicopters and four fixed wing planes, the other dominant coalition, CORD had four helicopters and two fixed wing planes. Amani Coalition on the other hand had five helicopters and one fixed wing plane.[190] The Eagle Coalition had one helicopter.

One of the players in Kenya's aviation industry where most of these campaigns hired planes charges Ksh. 147,900 per hour for a helicopter and Ksh. 191, 400 for a five seater fixed wing plane. These costs exclude Value Added Tax (VAT); a plane must be hired for at least a minimum of two hours. Most of the campaigns leased helicopters and fixed wing planes especially one month to the election-day. Matter-of-factly, the Jubilee Coalition hired three branded helicopters from 5 January to the week of elections.[191] The overall estimation by the aviation company is that the four leading coalitions spent a total of Ksh. 10M daily on hiring of helicopters. Assuming that all these coalitions hired helicopters from 5 January to the week of elections, then based on the mentioned rates, about Ksh. 600 million was spent on choppers and planes alone for that duration, excluding VAT. This figure maybe a lower estimate, using the rates above and assuming that each of the senior coalition partners owns a helicopter, the estimated amount nearly doubles. In fact, given that some sources observed that the total number of planes at the disposal of the four main coalitions increased to 20, this figure may have been even higher. It is also important to note that before the formalization of coalitions in December 2012, a number of individual parties were already using planes.

2. Vehicles

The 2013 campaigns saw a massive use of branded SUVs by nearly all the political parties. The CORD coalition is reported by the print media to have had 135 four wheel drive vehicles. Although concrete data is unavailable, the CORD campaign had a noticeable number of road-

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189   See for instance The Business Daily's analysis here http://www.businessdailyafrica.com/The-money-factor-in-race-for-Kenya-top-job/-/1248928/1707256/-/w0w571/-/index.html

190   This information is widely available from mainstream newspapers in Kenya. For this chapter the information has been obtained from 'The money factor in race for Kenya's top job' the Nation Media Groups publication The Business Daily.   Seehttp://www.businessdailyafrica.com/The-money-factor-in-race-for-Kenya-top-job/-/1248928/1707256/-/w0w571/-/index.html

191   Ibid.

show vehicles traversing the country. The Jubilee coalition had 47 Land Rovers, hundreds of four wheel drive vehicles, 1,450 roadshow vehicles, five for each of the 290 constituencies and three audio vans.[192] The Eagle coalition had ten four wheel drive vehicles and two advertising trucks. The Amani coalition is said to have had several vehicles for all but North Eastern Province where the campaign preferred choppers. Although comparatively very modest, Narc Kenya campaign also deployed vehicles.[193]

3. Other Campaign Expenses

Apart from the planes and vehicles, which typically would consume a huge portion of the campaign budgets, other expenses include advertising—print, electronic, radio and billboards, branding of planes and vehicles, fuel costs, merchandise etc. A number of these campaigns also invested heavily in staff with expertise—think-tanks, strategists etc. Across the main political parties, these adverts increased steadily as the election neared.[194] According to The Business Daily, 1 minute of prime time TV advertisement costs Ksh. 318,600, a 45 second radio advert costs Ksh. 45,000. The cost of a full page advertisement in the print media is Ksh. 615,000. At the end of 2012, the Jubilee coalitions was leading in terms of media spending at Ksh. 40.66 million, CORD had spent Ksh. 23.29 million, Eagle's expenditure was at 4.58 million, Amani had spent Ksh. 1.47 million while the rest of the parties combined had spent Ksh. 10 million.[195] Considering that most of these coalitions were formed late in December 2012, it is likely that the advertising expenditure increased significantly into the two months as campaigns intensified.

Modern campaigns also do need investment in campaign strategists, pollsters and think-tanks. Both CORD and Jubilee campaigns had an estimated 120 campaign staff with an array of expertise ranging from economics, political science, law, and communication. Whereas such human resource for campaigns is costly, it is almost impossible to establish such costs as these experts are usually brought in on secretive personal terms.

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192   The figure of over 1,000 vehicles is also consistent with the Business Daily estimate.

193   Ibid

194   For this chapter the information has been obtained from 'The money factor in race for Kenya's top job' the Nation Media Groups publication, The Business Daily.

195   The Business Daily provides these figures from a research carried out by Ipsos Synovate Kenya.
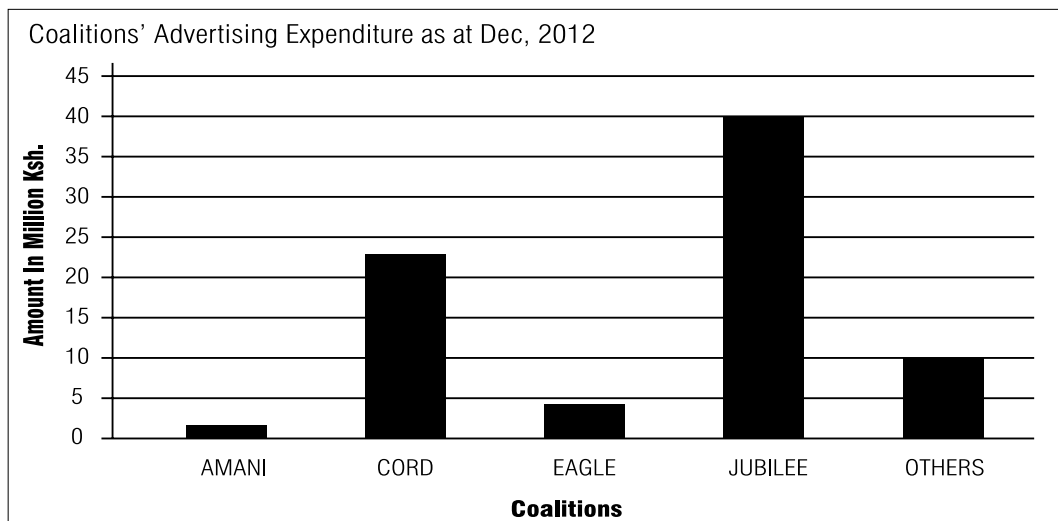
Source: Graph generated from figures provided by The Business Daily

Do the Figures Add Up? Some Analysis

Generally, across all the political parties, these figures are intuitively very low considering the campaign expenditure witnessed during the election. If one considers the fact that approximately 54 percent (Ksh. 41M) was raised by URP on 7 September 2012 during a fundraiser, it raises doubts as to whether apart from that single event, all other efforts of the party raised just Ksh.35 M. Clearly, even with the modest estimates, for the dominant coalitions, the published figures represent just a fraction of the financial war-chest these campaigns mounted. If one assumes that both the senior coalition partners in Jubilee each owned a helicopter, then working with four out of the six helicopters, eight hours a day for the last two months of the campaign puts its helicopter cost at Ksh. 283,968,000. This represents about 68 percent of the sum of the published financial accounts for the two coalition partners. Making the same assumptions with CORD coalition puts its estimated cost on helicopters at Ksh. 141,984,000, representing 63 percent of ODM's published accounts. It does not seem likely that the parties spent over two-thirds of their campaign kitty just on choppers and planes, rather, it suggests that a significant chunk of the actual election campaign money was not disclosed.

Funding and its Effect on the Domestic, Regional and Global Economy

There is a general false belief that the money used in election is from the wealthy politician and therefore does not affect the economy. On the converse, studies show that the money

in the possession of the rich once used in political campaigns is not able to gain value (AGRODEP, 2012, 29). Elections have cyclical and structural effects on the economy, money used in conducting elections usually has detrimental effects on the economy (Collier etal., 2009; Chauvet and Collier, 2009). One only imagines that this gets worse when illicit money can easily permeate regulation nets and flood the economy during election campaigns.

Sadly, very little research, at the national, regional or international level on the effect of campaign money on the Kenyan economy exists. As a result of devastating economic effects of 2007-2008 Post Election Violence and the global economic crunch of 2009, Kenya's economy slipped into a recession as the key sectors that form the backbone of the economy such as agriculture and tourism were adversely affected (Lenza et al., 2010). The money spend during the campaign trails is argued to have also contributed greatly to the Kenya shilling substantial depreciated against the US dollar and other currencies, having been fairly stable for a considerable period of time[196].

In addition, there is seemingly an inflation rate adjustment as well as an adjustment in the value of the USD before and after elections either in anticipation or as some of the respondents interviewed for this research claim, in order to facilitate inflows and outflows of wealth from foreign bank accounts held by wealthy politicians and their supporters. Some of those interviewed openly stated that the USD value was adjusted before elections to allow increased shillings for voter buying before elections. The rates were thereafter elections readjusted to allow for purchase of more USD that was now being returned to bank accounts in foreign jurisdictions. Discussions with businesspeople revealed that they now include this as part of their strategy taking advantage of this anomaly in the exchange rates to increase their USD holdings. Although the politicians held that the inflation is normal, traders traditionally stop importing during this period in anticipation of possible electoral violence.[197]

The anomalous economy exploited by political forces during campaigns is evident in three features of the existing fiscal state. First, the lack of separation of powers between business and government where businesspeople are also parliamentarians, civil servants and ministers. This convolutes mechanisms of regulation of money. The nexus between politics and business, aided by the nature of the fiscal state in Kenya creates an industrial complex which completely derides norms of representative democracy realizable through credible elections. Second, as a result of previous economic and political instability, many Kenyan politicians and businesspeople legally and illegally hold foreign accounts often in secret jurisdictions or tax havens which they use to round-trip money back into Kenya in order to take

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196   *Electioneering and the Economy document*

197   *Party strategist interviewed for this chapter*

advantage of tax breaks for foreign direct investment by utilizing the existing global wealth chains.[198] Although these are not unique problems, legislation and policy has failed to address them. With the recent release of information on Swiss leaks and luxeleaks exposing names of Kenyans allegedly have stashed huge sums in foreign accounts, there will be need for a multi-agency cooperation to prevent such money from subverting democratic processes.[199] Third, there have been numerous allegations of the misuse, by influential businesspeople, of business related transfers. Such dealings by local businesspeople allow foreign money transfer as well as transfer of shareholding within companies and assets to pay for support. These business people also use their popularity or networks to secure votes for a politician in exchange for future government tenders.[200]

Observations, Conclusion and Recommendations

This chapter sought to explore campaign financing during the 2013 General Elections in Kenya, a herculean task in the absence of concrete data. Yet, even without concrete data, the critical place of campaign financing in the concept of representative democracy and elections demand that such an endeavor be undertaken. In addition, the picture that the 2013 election campaigns painted is that of massive resources. With this reality, this chapter has attempted to dissect three areas in order to understand the context in which the 2013 General Elections in Kenya was financed. First, it has discussed the constitutional framework guiding election financing before and after the country's new constitution in 2010. Second, using fiscal sociology as its theoretical basis, it has attempted to understand the malfeasance of the fiscal state in Kenya and its attendant impacts both on the economy and election financing. Finally, the chapter has collected some primary and secondary data, which although not sufficient, can provide insights on election financing in Kenya. The chapter thus draws a number of closing observations, conclusions and recommendations.

First, the discussion throughout the chapter suggests limitations to the development of the state due to lack of legitimacy of the fiscal state. When this fact is brought to bear on elections, particularly the absence of stringent financial regulation mechanisms, one observes possible disenfranchisement, unfortunately even under a new constitution that held hope that political leadership would move away from the more ethnocentric based policies to more issue based politics. Paradoxically, the laws in place are well drafted but the linkage to mechanisms for

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198   *The observation was made by a Constitutional Law professor interviewed by the author.*

199   *Seehttp://www.businessdailyafrica.com/742-Kenyans-in-list-of-those-with-cash-in-Swiss-banks/-/539546/2618720/-/i3xgd4/-/index.html*

200   *Ibid.*

enforcement in place in government seems to be missing. Despite this apparently robust legal framework, Kenya had certain specific characteristics, developed through decades of misrule that are not yet addressed. The permeable fiscal state in Kenya facilitates illicit flows within the country and from external sources thereby contaminating campaign financing.

From the foregoing discussion, the chapter draws three main conclusions. First, although evidence suggest a very expensive election, political parties did not declare the actual cost neither were agencies put in place capable of establishing this. Intuitive analysis of the available figures reveals a stark discrepancy between figures declared by a section of the political parties and the approximated cost of campaign activities. Second, campaign financing in Kenya clearly involves both legal and illegal sources of funds. The interviews conducted for this chapter reveal a shadowy industrial complex within which politicians acquire campaign funds. That figures declared by political parties after the election are unpersuasive only serves to corroborate this belief. Campaign financing under a weak or complicit fiscal state is a result of an industrial complex which benefits both politicians and the bureaucracy. As such, the regulatory mechanisms within the legislature, executive and judiciary are ineffective, this implies undue advantage to beneficiaries of the complicit fiscal state in political competition, circumventing tenets of democracy. Finally, even though the shadowy industrial complex within which elections are financed in Kenya impacts negatively on the economy, the nature of Kenya's fiscal state appears to aid complacency. A number of recommendations anchored on multiagency efforts in enforcement of already existing laws are therefore suggested:

Some Recommendations

1. Regular, voluntary wealth declaration of all those seeking political office.
2. Certificates of tax compliance must be part of the requirements of all candidates showing a full KRA audit with linkages to their PIN numbers as well as those of their entire extended families.
3. The Central Bank of Kenya must constantly monitor international financial institutions and banks that transfer money into the country from foreign accounts.
4. Audits by the electoral management and other relevant agencies need to include both candidates as well as political parties.
5. All support to political parties and candidates must be clearly marked as either paid for or gifts.
6. There should be no anonymity in accounts: there must be full disclosure by political parties and candidates.
7. Private wealth of those getting to elective offices should be bestowed to a neutral fund manager (trustee) during their time in office. Alternatively, there should be blind trusts where all business interests are placed in a trust with no control from the politician/business owner.
8. Newly elected politicians need to register their positions and economic interests within a stipulated duration.
9. The civil society needs to establish a joint monitoring group well before the election year.

4

Vultures, Spoilers and Spectators: Influencing Campaigns from the Periphery

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Chapter 12

From Watchdogs to Hostages of Peace: The Kenyan Media and the 2013 General Elections - *Denis Galava*

Introduction

On the back of the controversial 2007 presidential election and the subsequent post-election violence in which much of Kenya's media were implicated by the society–both directly and indirectly – a new narrative emerged that subsequently seemed to have redefined the role of the media in political coverage ahead of the 2013 general elections. Located broadly within what Johan Galtung's described as 'peace journalism', this emergent journalism attempted to delete conflict, broadly defined, from especially political stories, in a deliberate attempt to institutionalize a new (apolitical) ethos in election coverage. This was unprecedented in many ways. First, the media became a direct mobilizer for peace. Newspapers and TV news anchors preached peace, communicated public service announcements, and reinforced harmony and ethnic cohesion, advising people to respect each other's opinions throughout in their coverage. Second, this was the first election in Kenya where all presidential candidates participated in public debates on national television and all were made to swear to keep peace. Third, everyone preached peace at rallies across the country—from politicians to religious leaders, civil society organizations and citizens. These efforts became an economy of their own, taking the shape of a peace industry as trains, vehicles and buildings were painted with slogans exhorting tolerance, and the media mobilized government officials and other opinion leaders to urge Kenyans to keep the peace. Conspicuous in this peace juggernaut was the absence of questions on link of peace to political reforms, justice for victims of postelection violence and accountability.

This essay investigates the fundamental drivers of this 'peace narrative' in the local media before and after the 2013 elections. It locates the narrative within the broader political, social and economic dynamics preceding the 2013 election coverage. Because media development

in Kenya is irrevocably tied to broader political and economic factors (Nyamnjoh 2005; Ogola, 2011), the essay explores how these factors were in fact embedded in and fundamental to this 'peace narrative' to understand why the media acted this way. I am also interested in organizational factors within newsrooms that were fundamental to the institutionalization of the peace narrative. I, therefore, examine the process of newsgathering and gatekeeping at the Daily Nation and The Standard, the newspapers under this study, to establish why some stories were used and others not.

In the period leading to the elections, there was a strong identification of the business sector with peace journalism. Even the presidential debates, organized by the media and the private sector, became a platform for peace journalism. The overlaps between the private sector, media and political actors, through shared business interests (Ogola, 2009, 2011; Makokha, 2010; Herman and Chomsky, 1988), mean that the three are strongly linked. It can be argued, a priori, that peace journalism as promoted by the private sector served specific political interests. The key question to ask here is the extent to which there was self-awareness of this fact on the part of all the actors, particularly the media, and whether this was a partisan promotion of a section of the political interests in Kenya or a promotion of the common good.

This study hopes to contribute to the existing body of knowledge on newspaper framing of conflicts by applying Galtung's peace journalism concept on the reporting of Kenya's 2013 election. It seeks to establish whether the coverage followed Galtung's (1998; 2000; 2002a) characterization of peace journalism as advocacy and interpretative reporting that goes beyond narrating facts, and explain why this was the case. Notably, much of the existing research on the media and conflict in Kenya has focussed on the role of radio, Internet and mobile phone technology in promoting peace or escalating violence. Not much effort has been dedicated to analyzing the press coverage. Scholars like Mbeke (2008), Ogola (2009), Makokha (2010), Long et al. (2013), Oluoch and Ohaga (2014), have attempted to analyze the role played by the media in general but still give minimal attention to the press. Moreover, much of the research on peace journalism in Kenya focusses on text alone and this can be reductive for context is ignored. I am not aware of any such research that draws on interviews with the key gatekeepers – editors in the newsrooms who decided what to cover and what not to, and how to cover it; and the reporters who actually filed the stories throughout the campaigns.

Contextualizing Peace Journalism

Peace journalism is associated with the Norwegian scholar Johan Galtung who conceptualized it as a framework for journalists covering wars and conflicts to contribute to nonviolent

settlement of conflicts (Galtung and Ruge, 1965; Galtung 1975; 1998; 2000 and 2002a. He observed that the way the media report conflicts determines how society responds to them and therefore advocated that journalists should take an advocacy and interpretative approach that foregrounds peace messages; defuses ethnic and religious tension and promotes co-existence (Lynch and McGoldrick, 2000, 2001). Galtung (1969; 2002a and b) contrasted this approach with traditional reporting, which he termed as war journalism because of the focus on the outcome – winners and losers – in a conflict. Several studies have attempted to put Galtung's theory into practice (Wolfsfeld, 1997; Lynch 2000, 2002; Lynch and McGoldrick, 2000; Kempf 2002, 2003).

McGoldrick and Lynch (2005) observe that journalists engage in peace journalism when they 'make choices—about what stories to cover, and how to cover them—which create opportunities for the society at large to consider and to value non-violent, developmental responses to conflict' (McGoldrick and Lynch, 2005: 5). Most of the work on peace journalism is prescriptive, outlining its benefits and how it can be implemented (Galtung, 2002b; McGoldrick and Lynch, 2005; Kempf, 2002). Many scholars researching peace journalism take as their starting point the assumption that news coverage of conflict is adversarial, sensational, focusses on winning in a zero-sum game and is geared towards boosting newspaper sales and television ratings. The suggestion that journalists actively take part in conflict resolution challenges the journalistic canon of objectivity that calls for truthful, accurate, fair and balanced reporting. Knightley (1975), Iggers (1998) and Carruthers (2000) make a moral case for advocacy journalism, urging journalists to identify causes and seek solutions to conflicts. Iggers (1998) and Carruthers (2000) throw the gauntlet to critics of peace journalism, arguing that factual reporting is a chimera, for media coverage is influenced by factors such as patriotism, politics, ethnicity, censorship, gender, advertising and propaganda which prevent objective reporting. Hammond (2002) observes that in certain situations, the classic definition of objectivity can mean neutrality, and neutrality can mean supporting all manner of injustices.

While acknowledging the merits of peace journalism, Wolfsfeld (1997) and Hanitzsch (2004, 2007) argue that it professes nothing new beyond repeating the hallmarks of good journalism and that asking journalists to suppress bad news and privilege positive news or to be emotionally attached to the events they are covering opens room for manipulation. A journalist, David Lyon (2007), observes that peace journalism could compromise the integrity of journalists as impartial reporters. The task of journalists, he argues, is, 'always to seek to

find out what is going on, not carrying any other baggage. If there is conflict resolution we report on it in context. We do not engage in it' (2007: 4).

Framing Peace

Theoretically, peace journalism is supported by framing theory, which explains how the media present news to influence public perception (Herman and Chomsky, 1988; Entman 1993; Neuman et al., 1992; McCombs, 1994; Scheufele, 1999). Tuchman (1978) observes that the mass media actively set the frames for readers and viewers to interpret and discuss public events. 'To frame', according to Entman, 'is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment ,recommendation for the item described' (1993: 52). For Tankard et al. a media frame is 'the central organising idea for news content that supplies a context and suggests what the issue is through the use of selection, emphasis, exclusion and elaboration.' (1991: 3) Others observe that news packaging is not an innocent, objective exercise because journalists play down or stress aspects of a news event to increase or reduce its salience (Herman and Chomsky, 1988; Neuman et al., 1992). Sources also have a big influence on how journalists report news (Herman and Chomsky, 1988; McQuail, 1991 and Coleman et al., 2009).

In the news production process editors make decisions about what stories to publish or not to (Shoemaker and Vos, 2009). Although different editors may make different (gatekeeping) decisions, research suggests that assessments of newsworthiness are broadly consistent and result in comparable judgements about what should pass through the gate (Shoemaker et al., 2001). The implication of the 'gatekeeping' role, described by some as the prime 'marker of occupational jurisdiction in journalism' (Mitchelstein and Boczkowski 2009: 572), is that journalists define social 'reality' and also shape the way the public perceives that 'reality' (White, 1950).

In carrying out their gatekeeping role, journalists are mostly guided by professional ethics. News values[201] also play an important part in determining what should be allowed through the gate. Peace journalism is itself a form of gatekeeping as it requires the suppression of information which, even though journalistically sound (accurate, balanced, objective, correctly attributed and so on), has the potential to fuel conflict.

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[201]   *News values are factors that influence media's news selection criteria. Galtung and Ruge (1965) identify twelve such values.*

Methodology

Content analysis and interviews are the two main research strategies adopted in this study. The unit of analysis is the individual story – news, editorials, opinion articles and letters to the editor. Content analysis is used because it is appropriate for analyzing a large number of texts (Gerbner, 1969; Deacon, 2002) and the statistics derived from such quantification 'are used to make broader inferences about processes and politics of representation' (Deacon et al., 2002: 116). Although content analysis is used widely, it has certain limitations including not being able to provide answers to 'why' questions. Consequently the study applied interviews, to overcome this limitation. Through content analysis, this study sought to assess to what extent Daily Nation and The Standard employed peace/war journalism frames in their coverage of the 2013 elections and hence the first question: How did the Kenya media frame the 2013 general elections? Are there any differences in the newspapers' framing?

Kenya has seven daily and seven weekly newspapers, independently owned. The two independent newspapers, Daily Nation and The Standard, were chosen because they are the most popular and have a higher circulation and readership than the others. Kenyan newspapers play an important role in shaping not only public opinion but also that of other media in the country (Ogola, 2009: 62). Herman and Chomsky (1988) argue that the media are tiered and those at the top set the agenda. In Kenya, Daily Nation and The Standard occupy the top tier.

This study covered three weeks between 23 February 2013 and 15 March 2013, representing the peak of the 2013 general election campaigns. Given the tensions in the country (Elder et al., 2014) this period provides a good object for this study on how the media framed the election. A sample of 214 articles – 120 news, 16 editorials, 50 letters to the editor and 28 opinions—were used. The researcher deliberately chose to study more news stories than the other categories because news stories comprised the bulk of the newspapers' reporting of the campaigns and provide a better yardstick for assessing messaging, tonality and bias in coverage (Herman and Chomsky, 1988; Bougalt 1995; Waserman and Maweu 2014). Letters to the editor and opinion articles, some of which are contributed by readers, were also included because as gatekeepers, editors ultimately decide what is published. Their choice may reflect a certain bias, in this case, their preference for peace or war journalism frames as well as act as a barometer for the discourses dominant in the public.

Table 3.3: Stories per Newspaper

Category	No. of stories
News	60
Editorial	8
Opinion	14
Letters to the editor	25
Total	N=107

The coding was based on Johan Galtung's (1986; 1998b) war/peace journalism classification. Galtung identified 13 indicators of war journalism and 13 indicators of peace journalism. The categories were simplified into two: approach-based criteria and language-based criteria by Lee and Maslog (2005). The Approach-based criteria includes (a)reactivity, (b) visibility of effects of war, (c) elite orientation, (d) differences, (e) focus on here and now, (f) good and bad dichotomy, (g) party involvement, (h) partisanship, (i) winning orientation, and (j) continuity of reports. The Language-based criteria is made up of: (a) demonizing, (b) victimizing, and (c) emotive. Based on these categories, questions were set to help the coder decide which frame: 'war', 'neutral' or 'peace' journalism, was present in a particular category. Every time an indicator was identified, a score of 1 was recorded on the coding scheme. For example, for visibility of war effects, if a story focused on 'casualties, death toll, damage to property' and ignored 'emotional trauma, damage to society,' a score of 1 was recorded on the war journalism section. But if a story focused on the latter, or on both aspects, a score of 1 was recorded on the part of peace journalism. In the end the scores were tallied. If the total war journalism indicators were more than the peace journalism indicators, the story was classified as war journalism, and vice versa. When the scores for both war and peace journalism indicators were equal, the story was recorded as neutral. Due to the small number of samples involved, coding was conducted by the researcher and no inter-coder reliability test was conducted.

Interview

The study involved 35 qualitative, semi-structured interviews with journalists, media executives and media owners to answer the second research question: Why did peace journalism evolve and what have been its implications for media and coverage of elections?

The respondents were selected based on their role in the coverage of the election, either as gatekeepers, policymakers or both. By understanding how reporters were briefed and debriefed, their interaction with the politicians and other sources, together with how the stories were used, we get unique insights into the tensions that shaped the coverage of the elections. The peace journalism campaign was launched in 2012 by the private sector lobby

KEPSA and the Media Owners Association, which comprises proprietors and chief executives of media houses. The two groups were joined later by the provincial administration. Speaking to individual sin KEPSA and MOA revealed their motivations for supporting the campaign and the intrigues that led to its cooption into the official government narrative. I assured respondents of anonymity so that they could comment freely on coverage of the election.

The Findings: Paradox of Peace Journalism

The Daily Nation and The Standard overwhelmingly used peace journalism frames in reporting the 2013 general elections (see Figure 1). Out of the 214 stories analyzed, 55 percent used peace journalism frames, 30 percent used war journalism frames and 15 percent employed neutral frames. This finding deviates from Galtung's argument that journalists use war frames when reporting in polarised/conflict environments (Galtung, 2000; 2006; Lynch, 2000).
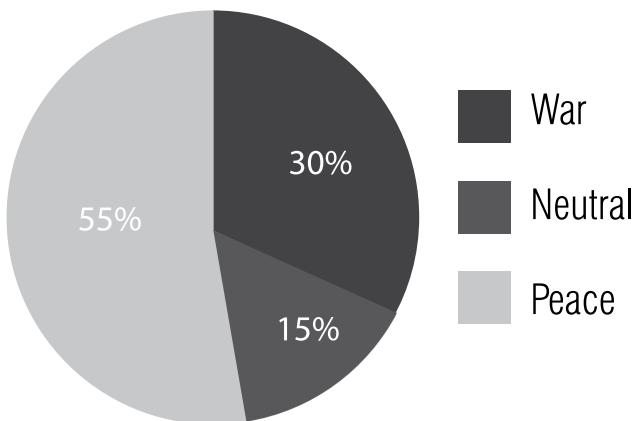
Figure 1: Framing for war/peace journalism in the 2013 elections

Prominence of peace/war journalism indicators

The most salient indicators of war journalism were a focus on here-and-now (51 percent), elite orientation (48 percent) and visibility of war (38 percent) (Figure 2). The stories focussed more on the elites – politicians, the electoral commission officials, civil society activists, and business leaders – as actors and sources of information, while ignoring ordinary citizens. Such reporting is usually more prevalent during election campaigns when coverage is often about what the politician(s) said while soliciting votes. Through a here-and-now perspective, the stories reduced the elections into a battle to capture the State without providing background information to or interrogating the claims made by the politicians. For instance, the stories involving the front-runners, Uhuru Kenyatta of Jubilee Coalition and Raila Odinga (CORD

Coalition) only reported about their political rallies and did not try to hold them to account over their public service records. Also, although Kenyatta and his deputy were running despite facing charges of crimes against humanity at the International Criminal Court (ICC), out of the 83 stories that talked about their campaigns only six (two each for letters to the editor, opinion and news) questioned the merit of people facing such serious criminal charges contesting for the highest political office in the country. The electoral commission also enjoyed the same treatment, with prominence being given to what the commission was saying, and not the challenges that had marred the vote counting. This suggests that the media avoided reporting contentious issues and gave prominence to the official narrative by politicians.The war journalism stories also emphasized the visible effects of the political tensions like families being evicted or abandoning their homes, houses and property destroyed, campaign rallies being disrupted, people injured or killed in violent attacks and the police arresting protestors, among others, but ignored the invisible effects of the conflict like the trauma resulting from violence during the campaigns.

The most prominent indicators for peace journalism were avoidance of demonizing language (70 percent), avoidance of emotive language (69 percent), non-partisanship (68 percent) and avoidance of victimizing language (68 percent). That the journalists avoided taking sides (non-partisanship) implies that to a large extent they presented facts without siding with any party. This finding was especially interesting because during the 2013 election campaigns, the media were accused of bias. It would, however, be misleading to assert that the stories were utterly devoid of bias because even with a story appearing to be 'neutral'[202], it could still be biased. Bias can, for instance, be expressed through choice of sources (Scheufele, 1999).
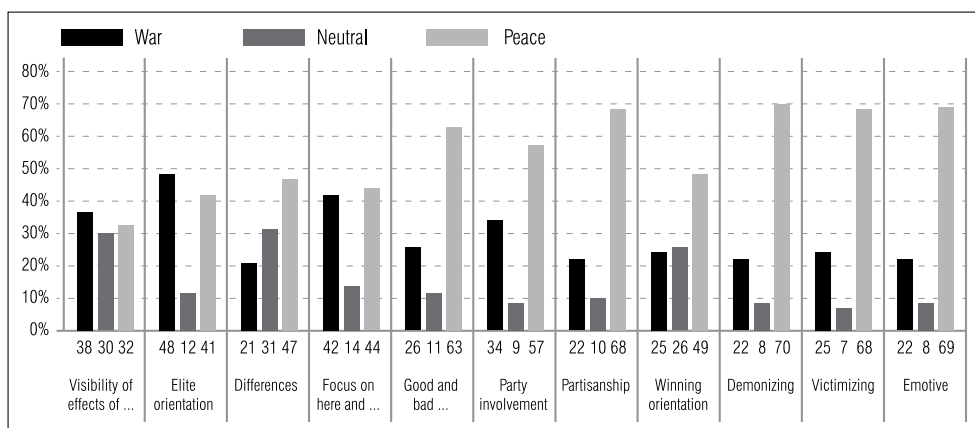

Figure 2: Overall prominence of war/peace journalism indicators

202   A reporter presenting both sides of the story without appearing to support either of the sides

No difference in the two newspapers framing

Overall, there was no significant difference in the Daily Nation's and The Standard's framing of the election. The Daily Nation had 54 percent peace journalism-framed stories, 1 percent more than The Standard which had 53 percent. The Daily Nation had 35 percent war framed stories and The Standard 31 percent, while The Standard had more neutral stories (19 percent) compared to Nation (14 percent). This is not surprising considering the fact that the newspapers used the same sources for the stories.

Difference in framing between the two newspapers by indicators

The most pronounced difference in coverage was in the 'focus on here-and-now' where 56 percent of the stories in the Daily Nation and 34 percent in The Standard were framed as war journalism. The newspapers had identical framing (19 percent each) for visibility of war – that is, focus on skirmishes, disruption of campaigns, forced evictions and damage to property. The Standard had more stories focussed on elites (52 percent) than the Daily Nation (44 percent). This means both newspapers equally focussed on the elites as actors and sources of information. Generally, there was little difference in the salience of the various indicators in terms of peace journalism framing in the two papers.

Both newspapers did not divide the actors into bad and good, with 68 percent of the Daily Nation stories and 60 percent in The Standard taking a peace perspective. This approach was replicated on party involvement, with 60 percent stories in The Standard and 54 percent in the Daily Nation had 38 framed as peace journalism. The most significant result was on partisanship, where most of the stories in both newspapers (72 percent in the Daily Nation and 66 percent in The Standard) did not favour any party in the election contest. This is instructive because the newspapers had been accused by the dominant coalitions, Jubilee and CORD, of taking sides. One explanation for this could be that the newspapers did not rank the contestants or avoided passing judgment on the contest. By not calling the election in favour of any coalition, the newspapers might have lowered the stakes by not introducing a new faultline for contestation, but in so doing this might have fallen foul of the politicians in either camp who believed they were winning but the newspapers were not declaring it because they were supporting the rival camp. Therefore, one would guess, to the coalitions, failure by the newspapers to anticipate the winner was invariably construed as endorsing the rival party.

Was the strong peace journalism framing a dividend of the peace campaigns that dominated the 2013 elections or genuine interventions by journalists to promote a new approach to reporting? A closer examination of the salient indicators for peace journalism shows that the reporting was not proactive – or what Galtung refers to as interventionist (1998; 2000). The five prominent frames for peace journalism – avoidance of demonizing language (70 percent), avoidance of emotive language (69 percent), nonpartisan approach (68 percent), avoidance of victimizing language (68) and avoidance of the good and bad dichotomy (63 percent), although important in Galtung's (1986, 1998a) framework for peace journalism, are mere extensions of the objectivity credo: reporting the facts as they are, which in reality is difficult to attain. Whereas these are important indicators of fairer and accurate framing of stories, they do not provide evidence of journalists seeking creative solutions to the conflict (Galtung 1986; 1998). For example, objectivity simply demands that journalists speak to all parties while reporting a story. While this speaks to the need for balance and fair play – a significant step forward in the peace journalism matrix – it does not take the story significantly beyond reporting the facts (Lee and Maslog, 2005: 324).

Therefore, the pattern of salient indicators supporting the peace journalism frame falls short of Galtung's characterisation of peace journalism as an advocacy and interpretative approach 'that creates opportunities for society at large to consider and to value nonviolent responses to conflict' (Lynch and McGoldrick, 2005: 5). That the prominent war frames in both newspapers were a focus on here-and-now (51 percent), elite orientation (48 percent) and visibility of war effects (38 percent) suggests that journalists did not ask questions, cultivate new sources, contextualize stories and challenge dominant narratives. They merely refracted events as they happened without engaging with the actors or privileging the voice of the ordinary people. In other words the reporting was based on a platform of peace but factors promoting that peace were neglected. The minimal focus on ordinary people means that journalists did not establish whether the narratives spun by the elite reflected the reality on the ground (Shinar 2007). Moreover, by excluding the ordinary people and downplaying backgrounds and contexts, the coverage obscured longstanding structural inequalities and other historical injustices. However, this does not mean that the grievances were forgotten (Elder et al., 2014) because any attempts at peace journalism— such as stressing national cohesion and economic stability without discussing the causes of ethnic suspicion and the post-election violence — only ended up reifying war journalism frames. Galtung (2000, 2002a) has referred to this state as negative peace – absence of war/fighting but a polarized environment boiling with unresolved grievances that could explode any time. Therefore, the framing of the 2013

elections was what Shaw, Lynch and Hackett refer to as accidental peace journalism: 'news patterns that resemble those of peace journalism, but that are contingent by-products of routine news imperatives in specific situations' (Shaw et al., 2011: 11). In other words, it was a consequence of the environment – the pervasive peace campaigns and political and commercial interests of the business and ruling elite – and not a proactive attempt by the media to contribute to lasting peace.

From Watchdogs to Hostages of Peace

The analysis of the interview findings with journalists and media owners suggests that the coverage of the 2013 general election was informed by the memory the 2007/8 post-election violence and the fear of repeating the same mistakes:

> 'Post-election violence was very scarring and it was absolutely inevitable that our coverage of 2013 would be tempered by that experience. Being part of the political landscape, we examined ourselves and asked questions. Did we have any contributions to that? Did we even unwittingly influence things in any way? Could we have handled it differently?' (Retired Editor 2015).

> 'The media had a shared agenda with Kenyans to save this country from disintegration and we provided a platform to achieve that goal through balanced reporting. That was basic journalism, not peace journalism' (Managing Editor 2015).

From the above responses it is evident that the media opted to 'keep the peace' by steering clear of hate-speech, 'irresponsible' campaigns and scaremongering characteristic of previous elections (Long et al, 2013). This was in response to the various debates around the role of the media in the 2007-8 post-election violence. For instance, Cheeseman (2008) and Murunga (2011) observe that the post-election violence was as a result of historical and economic inequalities and the clashes were bound to happen. On the other hand, Ogola (2011) and Makokha (2010) argue that the dominant narrative seemed to be one that broadly indicted the media and effectively engendered self-censorship. Consequently journalists became overly cautious in their coverage, focusing on the prevention of violence to such an extent that they censored themselves while reporting news. Incidents and irregularities were often softened in the media due to fear of strong reaction from the public and fear of being labelled as inflammatory, while editors were forced to carry weak political stories and mute criticism in order not to offend the politicians and their supporters. The pressure to appease both sides of the coalition by treating victim and perpetrator equally had a corrosive effect on the credibility of the media as opinion leaders. However some editors defended the equal

treatment of CORD and Jubilee stories as a heightened sense of responsibility to the public rather than self-censorship, while others pointed out that it was a business imperative for they could not afford to alienate any camp: *'We could not afford not to be a business. We had papers to sell and the country was split into this was a business decision, not bowing to political pressure' (Managing Editor 2015).*

To some editors, self-censorship was a tactical decision: *'This is how we managed to survive the one party system…. You have to be here to publish tomorrow, so you have to strike a balance between the government and your obligation to the reader' (Managing Editor 2015).* Such a position suggests that the pressures to keep peace turned journalists into hostages of peace; worried more about maintaining the status quo and self-preservation than exposing factors that threatened it.

By extension, this censorship was also driven by the desire to respond to the public pressure to preach peace. Shoemaker and Reese (2006) argue that the media does not have exclusive power to shape content; rather this is shared with many other players in the society – in the case of the 2013 elections – the public. Could the fear of getting it wrong and the guilt of 2007 have blinded the journalists from other realities around the election?

The decision to maintain peace was also informed by guidelines put in place a year before the elections. The guidelines, signed by more than 15 media houses and institutions, demanded that the media reject content that could fuel conflict and violence. And just before the polls, the Media Owners' Association (MOA) signed a 'gentlemen's agreement' among themselves pledging to avoid content that could incite ethnic tensions and not airing political statements live. It is unclear whether the agreement was motivated by MOA's patriotism or self-preservation. *'This called for some tough decisions, like delaying live broadcasts… This was not abdicating our responsibility. We recognised that we were very influential and that we had to weigh our decisions, stories and timing so that we do not fuel any fires' (Chief Sub-Editor 2015).*

Whereas delaying live broadcasts was cast as precaution to allow for verification of statements and to dissuade politicians from using live broadcasts to propagate hate messages, it disrupted gatekeeping and undermined accurate reporting by compelling editors to make moral judgements about what was good and what was bad. Traditionally editors use news values to decide which story to publish and which one to kill but peace journalism required the suppression of information which, even though journalistically sound had the potential to fuel conflict. There was also a bit of the 'big brother' mentality where the Nation took intellectual leadership to draft editorials and send them to other media houses to run—with minor changes to conform to the house style. The Standard editors cited this as one of the most depressing

cases of executive (and external) interference they faced in the lead up to the 2013 elections. Traditionally the editorial is the voice of the paper and there cannot be a graver dereliction of duty for an editor than to allow a rival to dictate what to say. Yet because the corporates and their executives had a shared goal for stability they subordinated their independence to peace journalism and its shenanigans. This inevitably opened up the gatekeeping process to executive manipulation. As one editor put it: *'There were days when I felt like telling the CEO to come and run the newsroom. He was on phone every minute, directing what to cover or not. At times we took his word, at time we ignored but it made my work very difficult' (Managing Editor 2015).*

For example, on 2 March 2013, two days before the general elections, a leading mobile telephony company and the electoral commission held a dry run for electronic transmission of results for the media. However the system collapsed within two minutes of going live but the incident was not reported: *'I did not write the story because I knew it would not run. I did not even call the news desk, we had been briefed to avoid stories that could bring trouble and look for news that stressed national unity in line with the peace journalism campaign.' (Political Reporter, 2015).*

> 'The company's CEO called the chairman of Media Owners Association within our earshot and told him what had happened. A few minutes later I got a call from the managing editor summoning me to his office. I briefed him and he told me not to write anything about the dry run' (Political Reporter, 2015).

Editors interviewed said the story was not used in the national interest, without unpacking exactly what was the national interest in this case, if not publishing the story. It appears that the editors had tactically redefined national interest into a euphemism for stories they could not publish for political and business reasons. While the publication would have caused anxiety among the public, the fact that the CEO of the mobile telephony company called the media executives in the presence of journalists was not only meant to intimidate them but also shows how big advertisers leveraged their positions to avoid negative news. If this was the case then the peace narrative was instrumentalized to provide a cover for commercial interests that drove media landscape.

Two other instances illustrate how the gate-keeping process in the newsroom was subverted: *'Two days before Uhuru and Ruto announced their coalition, I got an exclusive tip and clips on the meeting between the two. I called my editor at night and he was as excited as me. I wrote the story very early in the morning and submitted it, knowing we had a big Page One (splash)*

story. I was thunderstruck the following day to find the story used as a brief on the inside pages. I was furious. My source was furious. When I confronted the editor he told me the boss had changed his splash at night. He was in fact more upset than me. That day I lost faith in our news processes and also learnt the editor's word was never final!' (Political Reporter, 2015).

Another editor recalled how his team posted a story at midnight claiming, wrongly, that Coalition for Reform and Democracy presidential candidate Raila Odinga had conceded defeat. Raila had called a press conference at 11pm but cancelled it. He was trailing Uhuru by over a million votes, and there was speculation he was either going to concede defeat or demand a recount before the official results were announced. But instead of waiting for the news, the journalist decided to make it up instead: *'It's fortunate not many people were awake at that time, we would have been in real trouble. When I demanded an explanation, the line editor on duty said it was inevitable that Odinga had lost the election. I suspended him that night, but the damage had already be done' (Managing Editor, 2015).*

Others also cited how local and international non-governmental organizations literally camped in the newsrooms advocating peace journalism: *'Since 2008 not a week passed without this or that group inviting journalists for training on conflict reporting. Some have even given us budgets for training and wanted us to start awards for peace journalism' (Chief Sub Editor, 2015).*

One political reporter recalled that three months to election they would hop from one hotel to another collecting allowances from workshops on conflict reporting. This suggests that peace journalism became an economy of its own and journalists were attracted more by its monetary promise than normative values, raising questions about the quality of the training and to an extent the intentions of the organizers.

Peace journalism was also driven by the close relationship between the media owners and the State: *'We committed to unite Kenyans. As elders and investors we kept reminding the editors that Kenyans had spoken and they wanted peace. I am very proud that we delivered and no effort was spared to keep the country safe' (Media Owner, 2015).*

In mid-2012, the media owners and representatives of the Kenya Private Sector Alliance met in Nairobi and developed a roadmap for national reconciliation and stability. Among the decisions reached was a commitment that newspapers, TV and radio stations would reach

out and give voice to respected public figures. Referred to referentially as Peace Elders, their primary role was to urge Kenyans to keep peace and also mediate any conflicts. The Elders were also to act as a bridge between the private sector and the government to roll out a national peace campaign. The team comprised of entrepreneurs, religious leaders and retired public service elite. Most of them had very good relationships with politicians and senior bureaucrats and eventually they got the Cabinet and Parliament to approve the national peace campaigns. A former permanent secretary who was in charge of the project said: *'I was summoned to the State House and found four wazees (elders) with the president. He told me to listen to them and work with them. We had a very long discussion in my office. We had the same fears and aspirations for Kenya, so it was very easy to agree on the way forward' (Senior Civil Servant, 2015).* This statement is important because it explains how the personal business interests of the owners of capital converged with State interests for stability under the guise of peace journalism.

In the words of a chief executive of a media house: *'The duty of the media was to ensure no repeat of chaos by reporting only stories that privileged national cohesion. The peace and stability witnessed in the last election was because of the wise leadership we provided. We agreed that the most important stories had to be run by me. I couldn't trust the journalists to see the big picture for peace. In fact we, as the media owners, are very happy that our efforts paid fruit' (CEO, 2015).*

In many ways, the chief executive echoes the consciousness of the four wazees at State House. It is a mindset borne out of the years that historian Atieno-Odhiambo described as having been dominated by 'the ideology order' (Atieno-Odhiambo, 1987). In those years, during the reign of Jomo Kenyatta and Daniel arap Moi, ideas that run contrary to the interests of the state were labelled as 'dissent' and 'sedition' and their perpetrators were detained without trial or forced to flee into exile. This state of affairs ensured that there was never any alternative thought to that of the state, a perfect unopposed single-party state (Ogola, 2011: 80). Similarly during the 2013 elections any ideas that challenged the dominant narrative were seen as 'unpatriotic' and meant to 'incite the public to violence' (Chief Sub-Editor, 2015). This was predicated on the assumption that the post-election violence had traumatized Kenyans and therefore the media had to soothe these wounds by stressing positive news and avoiding topics such as reform, accountability by political leaders and justice, issues that were deemed likely to open up old wounds. In essence, therefore, for media owners keeping the peace meant supporting the status quo, which, while it undermined the platform for reforms it strengthened their economic base by ensuring that there was no alternative

narrative that could destabilize the centre and thus spark chaos and anarchy as was the case in 2007. The chief executive quoted above was happy because the peace dividend meant no business losses from political unrest.

Indeed, the claim by media owners that peace journalism delivered economic growth is not without basis. A study by the University of Nairobi political scientist Karuti Kanyinga (interview, 2015) found that this was the first time the economy grew in an election year since the return to multi-party politics in 1992. The economy has been contracting during the election period every five years, largely due to the anxiety and inter-ethnic violence that accompany elections in Kenya. However, in 2013 it grew by 4.7 percent (up from 4.5 percent in 2012) compared to 2007/8 when it plunged to 1.6 percent from 7 percent in the previous year. In 1992 it contracted to -0.3 percent from 1.5 percent in 1991 due to inter-ethnic violence and election related uncertainties. However, it would be presumptuous to attribute the growth wholly to the peace journalism, though comparatively it was the only new factor in all these cases. Economic growth or decline is an aggregate of many factors, some of which take long to manifest.

Beyond the Semantics of Peace and War Journalism

The foregoing illustrate that by appearing to pander to the guilty mentality over the post-election violence and by tip-toeing past the noose of the ICC, the media allowed 'Extra-Media level' (Shoemaker and Reese, 1996) factors to influence decision-making. They became hugely impotent and in not giving priority to contentious issues – such as reform, justice for post-election victims, land allocation and other historical injustices—provided no opportunity for debating how to resolve them peacefully. In essence, this was the single largest wave of surrender of editorial independence and discretion of the journalists to play their normative role of holding the government to account and providing accurate and 'truthful' reporting that people needed to make informed choices (Herman and Chomsky, 1988; Curran, 2000; Nyamnjoh, 2005; Ogola, 2011; Long et al., 2013).

Of course, peace journalism was the right thing to do to save the country given the trauma of the post-election violence (Long et al., 2013). However what the proponents gained in timing they lost in the execution. Indeed as indicated in the interviews above, the corporatization of the coverage – with chief executives and media owners meeting and agreeing on a one-size fits all strategy – nipped the journalistic impulse and foreclosed other options for coverage. First, it imposed uniformity and undermined opportunities for greater diversity in coverage thereby limiting opportunities for journalists to seek and apply creative approaches to advancing

national cohesion and also reporting contentious issues. Also lost was the opportunity for Kenyans to critically engage with one another on the dialectics of peace: What peace; for Who; Why? Such debates would have been healthy because while Kenyans agreed on the need for peace, the question of what that 'peace' entailed was never settled. Perhaps to one person 'peace' meant surrender or blacking out bitter memories, but to another 'peace' meant being granted concessions. The fact that these options were not available implies that Kenyans ended up with a negative peace (absence of war) borne out of uniformity and not persuasion.

Secondly, the corporatization of peace journalism resulted in a loss of brand differentiation for the Daily Nation and The Standard. As evidenced by the content analysis the newspapers had almost identical scores on all indicators for peace and war journalism, used the same sources and adopted the same tone on many issues. This is problematic not least because it illustrates how the peace juggernaut collapsed gatekeeping at the two newspapers but also underscores the perception that the agenda was set from outside the newsroom.

This essay argues that the 'peace journalism' that circumscribed reporting of the 2013 elections in Kenya was a deliberate ploy by the business and political elite to "set the bounds of debate" (Herman and Chomsky 1988) and to foreclose any attempts to engage critically and interrogate both contentious and controversial issues that may have engendered conflict and violence (Long et al 2013). The omission was calculated to fulfil the media's 'societal purpose' that Herman and Chomsky describe as to "defend the economic, social and political interests of privileged groups that dominate the domestic society and the state" (1988: 298). Kenyan media owners are also owners of capital (Makokha 2010; Ogola 2011) and the spectre of political violence threatened their investments in banking, tourism, real estate, health and education sectors, hence the need to work together to secure those interests through 'peace journalism'.

Chapter 13

A Discordant Symphony: Civil Society and Kenya's 2013 General Elections - *Michael Oloo*

Introduction

The popular understanding of civil society is both historical and contemporary. The concept, whether used in its classical or in the modern conception evokes parallels in its role alongside the state. The modern idea of civil society was influenced by political theorists, Thomas Paine and George Hegel, who developed the notion of civil society as a domain parallel to, but separate from the state (Carothers, 1999).

The concept of civil society has been broadly defined by various scholars such as VeneKlasen (1994), Walzer (1992) and Diamond (1994). VeneKlasen's definition summarizes this broad array of conceptions: 'Civil society is a sphere of social interaction between the household (family) and the state which is manifested in the norms of community cooperative structures of voluntary association and networks of public communication… it is the full range of informal and formal organization through which citizens pursue common interests' (VeneKlasen, 1994).

In its associative context, serves to amplify the collective voices of citizens. In doing so, civil society not only provide a voice but also power for the voiceless. This emergent contemporary civil society paradigm grants credence to voice and power granted to the citizens in an environment of a resurgent state.

Michael Walzer defines civil society as the space of un-coerced human association and also the set of relational networks that fill this space.

> *It* is a space of un-coerced human association for two major reasons. Foremost, institutions of *civil society* have no jurisdiction over individuals that those individuals cannot avoid. Mostly, resignation or withdrawal is enough to put individuals out of a position in which they must abide by the institution's rules. Any individual can initiate

and carry through this exit from an institution's jurisdiction; they do not first need to secure the permission of the institution or any other body. Secondly, the institutions of *civil society* lack the power to coerce individuals to follow their rules. The voluntary nature of the *civil society* distinguishes it from the state, which is characterized by its coercive powers (Walzer, 1992: 89).

While this chapter appreciates the contending definitions of civil society and recognizes the lack of fundamental disagreement on what civil society entails, I use the concept civil society fairly loosely to include the broad array of the associative and organized spaces outside the state. For our purpose, civil societies must be distinguished from other intermediary organizations, such as, interest groups, lobbyists, religious and ethnic organizations. More importantly I am more concerned with civil society that focuses on democratic and political processes.

In Africa, the 1990s brought about renewed interest in civil society, as democratization and democratic consolidation not only opened up space for civil society but also provided a wider political environment for its activities. Civil society emerged as an important political, cultural and social player to cover increasing gaps in political processes and delivery of social services. Most of this space was largely attributed to political and economic reforms in the state structure including structural adjustments and political liberalization in the continent.

The Role of Civil Society Organizations in the Electoral Process

Civil society is an essential contributing component of any democracy. Understanding the role of civil society in electoral processes must be contextualized within the broader institutional context. In this sense, civil society is part of a jigsaw that includes the state, political parties, electoral authorities, judicial institutions among others. The division of work among the various institutions is thus an organizational imperative to the extent that a clear delineation of their respective roles and responsibilities facilitates the achievement of higher goals of the electoral process. However, the reality is that no institution in modern times is capable of discharging its assigned duties autonomously without the help and cooperation of a number of other institutions who have some interest in achieving common goals.

The role civil society plays in democratic process is better contextualized in the diversity of civil society organizations. Strengthening electoral democracy is one important area in this diversity. In a democratic process, civil society is ideally a partner to the state in guaranteeing free and fair electoral process. In this partnership though, it must maintain independence

from the state that will grant it the moral authority to hold the state accountable. As Shamsul Huda, the Chief Bangladesh Election Commissioner notes 'a civil society that dedicates itself to the task of strengthening electoral democracy must however, keep its distance from both the government and profit-seeking private enterprises'. Broadly, the role of civil society in electoral processes should primarily focus on several key parameters that would guarantee a free and democratic process. These include but are not limited to, electoral authorities or bodies in charge of conducting elections, the media, political parties, incumbency and funding of elections. These parameters are discussed in more details below.

First, civil society should focus on the institution that is in charge of elections. It must seek to ensure this institution however established under the law exerts confidence not only among the citizens and voters, but also the competing political parties. The electoral body should meet a threshold that inspires confidence in the electoral process. This includes putting in place structures for the holding free and fair elections devoid of electoral malpractices. More importantly, free and fair elections begins with voter registration and ensuring that the voter register and/or roll updated and made available to voters prior to the elections. Finally the electoral body must ensure that electoral laws are in place and guarantee level playing field for all competitors as well as prevent and severely punish electoral malpractices. Civil society has a role in ensuring that the electoral body is held accountable on these parameters.

Second, the political parties are an important instrument of political participation in elections. Free and fair elections begin with political party nominations; this process needs to be democratic to guarantee democratic elections. The political parties must thus put aside each political party interests and work to put in place a more credible electoral framework that will work in the best interests of the country. This role is better mediated and superintended by civil society.

Third, the role of the media is very important not only in informing the public but also forming public opinion on electoral process. A free and independent press will guarantee unbiased voter education; dissemination of information relating to any electoral reforms that have taken place. It will more importantly act as a watch dog of all the electoral arrangements and processes, and informing the relevant stakeholders about any suspicious activities and maneuvers of the electoral principles and systems. Civil society must thus seek to push for guaranteeing of media freedom and access to information.

Fourth, civil society needs to monitor misuse of state resources in elections. In order for the elections to be seen as free and fair, the state must, refrain from misusing the state resources such as the state radio, television and vehicles during the campaigning. Monitoring funding

however goes beyond just state funding. It is also important for civil society to focus on illicit and illegal funding of electoral processes by both individuals and political. This will prevent the political process from being captured by interest that may perpetuate corruption. Studies have shown that most political corruption cases have a link to financing of elections. In Kenya for example, in 2007, the Coalition for Accountable Political Financing (CAPF) established a direct link between political financing and corruption, an issue that still needs concerted efforts (CAPF, 2007).

Finally, civil society plays the role of voter education both on the electoral process as well the rights and obligations the voter. This ensures that no voter is in any way disenfranchised and that they meaningfully participate in the electoral process.

These parameters underscore civil society's critical role in ensuring that the democratic process is progressively consolidated. As Gilley, notes, 'it has become widely understood that a healthy democracy requires more than elections. This is why most democracy promotion and assistance focuses instead on other activities such as supporting civil society to strengthening effective legislation processes,' (Gilley, 2010: 2). Democracy must thus be understood in its electoral and non-electoral aspects, these aspects are mutually dependent on one another: The purpose of this mutual dependence is to ensure fairness, legitimacy and compliance. Civil society must also follow up on government accountability, transparency and the rule of law in the post-electoral process. This is often achieved by linking electoral commitments to delivery public services and development agenda.

By tying free and fair elections to good governance we are effectively saying that it is not just about holding elections, it is also about what happens between elections; and by linking what happens in between elections to the electoral process civil society effectively builds a cycle of accountability at all stages, that is, during elections and in the post electoral period. This effectively enables acquisition and retention of state power by legitimate consent from the citizens based on leadership accountability.

A vibrant civil society therefore provides an alternative avenue for aggregation and articulation of popular will and demands in between elections and outside of political parties. These activities thus form part of public political participation; that is opening of social and political spaces for ordinary people to participate in decision-making processes and their own development. For example the National Taxpayers Association's constituency monitoring committees on devolved funds in Kenya by use of Citizens' Report Cards (CRCs) which have effectively linked monitoring management of Constituency development fund to electoral process.

The 2013 Elections in Context

The 2013 elections were held against a backdrop of fear of a repeat of violence that was witnessed in 2007/2008. It was also taking place in an entirely new constitutional and governance framework and with the reality of polarization arising from perceived ethnic prejudice of 'us against them' based on largely ethnic coalitions; the elections generated significant interest regionally and internationally. Imperatively too, the elections were a defining moment in Kenya's history as it marked the beginning of system seen as a significant departure from the past. More importantly the elections were a legitimacy test on Kenya's elections and governance framework. Gibson et al. , allude to this thus, 'Kenya was poised to demonstrate to the world that it had or had not sufficiently progressed to meet the overriding objective of electing legitimately a president and nearly two thousand more national and county leaders while avoiding a repeat of the ethnic based post-election violence that followed the December 2007 elections,' (Gibson et al., 2009).

These elections were unique in many ways., First, it was the first election under the new constitution promulgated in August 2010, which introduced major changes to the political system. The new system created devolved structure of government with 47 counties with their attendant county assemblies. It also introduced a bicameral parliament, affirmative action for under-represented groups including women, youth and the disabled, and various electoral reforms among other reforms. Second, with a new Independent Elections and Boundaries Commission, wide reforms were anticipated in the electoral process. Top on the list was the digitization of the process through the introduction of electronic voter registration and identification system that promised to not only modernize but also make the elections more efficient, transparent free and fair by eliminating loopholes that came with the manual voting system. It is against the backdrop of these changes that all the players in the electoral system including civil society were expected to redefine their roles.

Civil Society in the 2013 General Elections in Kenya

While the 2013 elections were a very important event in the history of civil society in Kenya, it is vital to go a little further beyond the elections to understand the role of civil society in these elections. Over the years, civil society and more specifically non-governmental organizations (NGOs) have taken up different roles in different regimes in Kenya. During the Jomo Kenyatta regime, the NGOs and the voluntary sector, with the encouragement of the state, took on largely a developmental role (1964-1978) (Matanga, 2000: 10). However, during the Moi regime, from 1978, many NGOs and civil society movements took on an

added role of oppositional political activism, and overall political advocacy. This changing role in the engagement of these organizations, it can be argued, was due to the excessive authoritarianism and personalization of power by the Moi regime (Matanga, 2000: 6).

Political authoritarianism and personalization of power by the Moi regime provided a basis for civil society involvement in democratic and electoral processes. The clamor for democratization that characterized Kenya's political history in late 1980s and the 1990s epitomized the role of civil society in elections. Most of the CSOs in this time such as the Law Society of Kenya, National Constitution Executive Council (NCEC) and church organization such as the National Council of Churches (NCCK), The Episcopal Conference among others were largely driven by the unifying reform agenda against an oppressive non democratic regime epitomized in the mlolongo (queue) elections of 1988.

The post 1992 elections saw a proliferation of civil society organizations mainly in the democracy and governance sector, some of which were formed as think tanks around emerging opposition political parties. As Matanga notes their involvement in political and electoral processes were informed by three main factors, level of resources (well resourced), area of operation (urban-based), and nature of leadership (led by anti-establishment) (Matanga, 2000: 7).

This face of civil society organizations was reflected in their proactive role in influencing and determining the electoral agenda outside the mainstream political parties. So much so that, the agenda for the clamor for constitutional reforms before the 1997 elections was for the most part driven by civil society. The focus of the leadership of civil society was to coalesce with the opposition political parties to level the electoral playing field that was greatly in favor of the KANU regime. Most of this leadership was composed of a resurgent anti-establishment urban based, 'reformists' political activists. To further bulwark the CSOs agenda, the international donor community having fallen out with the KANU regime, provided ready funding to civil society in a bid to reform the state power structure. This process led to the opening up of the political process through the minimum reforms agreed by the Inter-Parties Parliamentary Group (IPPG).

Even though KANU won the elections in 1997, civil society and opposition parties had effectively laid the ground for more free and fair future elections. At the same time, civil society maintained the pressure on the state to overhaul the constitution of Kenya which was seen as an impediment to democracy and equitable development. It therefore did not

come as a surprise that the 2002 elections that brought the NARC regime to power marked an important watershed in Kenya's electoral process and for civil society. For the electoral process, unlike before, the elections were widely accepted as free and fair. In addition, the Electoral Commission was for the first time viewed as truly independent. These two combined to ensure that confidence in the state and the government was at an all-time high including among civil society and the donors.

Analysts have argued that the silver lining came with potential risks to the civil society. First, a number of the individual leaders, including then opposition politicians who had become synonymous with civil society activism either went into politics and won elections, took up cabinet appointments or were systematically coopted into the new regime. Second, with donor confidence in the government at an all-time high, most donors preferred to work with the government and government agencies that were perceived as the shorter route to reforms than the longer civil society route. Indeed, the emergent lingua in the donor community for civil society was coalition building and partnership with the government and government agencies. While this new paradigm in civil society engagement with the state was viewed as progressive and potentially more effective, it need not be forgotten that civil society is a watchdog to the state and an alternative citizen voice. This cardinal position and role of civil society requires that it maintains a safe operating independence from the state if it is to retain the moral authority and confidence to hold the state accountable. The rapprochement between the state and civil - society intended or otherwise - would later substantially weaken civil society's ability to critically engage the state including in the electoral process.

The State being naturally conservative, it was not long before the reality that the conservative and the corruptible bureaucracy would not change by merely changing the individuals in charge was sunk home. Pessimistic as it sounds, with a dented civil society and a resurgent conservative state falling back into traditional corruption it will take much longer for civil society to regain its influence over the state. The 2007 elections and the subsequent post-election violence reiterated the reality that the underlying anti-democratic forces were still intact. This reality reemphasized the important role of civil society in electoral processes.

Assessing the Key Interventions of Civil Society in the 2013 Elections in Kenya

With the new political legal and institutional frameworks it was naturally anticipated that civil society would have an expanded role both in the traditional functions and new context. Against the backdrop of a violent post-elections period in 2007/2008, in 2013, civil society

was primed to play an important role in Kenya's electoral process by managing voter education campaigns, awareness raising programmes and peace promotion events, as well as an active involvement in Election Observation. The pre-election activities as well as the activities during and after the elections were largely a multi stakeholder initiatives that involved religious institutions/leaders, non-governmental organizations as well public as bodies, not only to create awareness on the electoral process but also promote peace through peace committees. There was also a concerted effort by religious leaders to have the presidential contestants commit to a peaceful process to avoid a repeat of the 2007 elections. The role of the civil society in these elections is therefore here broadly discussed under legal and constitutional reforms, civic education, peace messaging election observation and post-election legal redress.

a) *Legal and Constitutional Reforms*

In the period that preceded the NARC regime, the role of the civil society in electoral process remained unchallenged. Indeed, the electoral as well the attendant constitutional reforms that have significantly transformed our electoral process is significantly credited to the work of civil society. Working under the umbrella of Parliamentary Initiatives Network (PIN), which brings together several CSO with varied specialties, the contribution of the Institute of Education in Democracy (IED), the Centre for Governance and Development (CGD), the International Commission of Jurist (ICJ), Transparency International, Institute of Economic Affairs (IEA) among other key CSOs saw the enactment of key election related legislation. These laws include the Election Offenses Act 1998 (revised in 2009), Elections Act and its subsequent amendments in 2011 (repealed the National Assembly and Presidential Elections Act), Political Parties Act 2007 and the subsequent amendments in 2011. The Act primarily dealt with registration and management of political parties that for a long time were managed under the Societies Act. It is important to note that the work done by PIN, in collaboration with parliament, to fast-track several election related legislations after promulgation of the new constitution intensified in preparation for the 2013 election. In addition, because Article 22 and 258 of the new constitution redefined the place for public interest litigation in Kenya,[203] several CSOs took up this new frontier to advance a number of electoral related issues of public interest. Kituo Cha Sheria for example successfully petitioned IEBC over rights of prisoners to vote.[204] Similar public interest litigation cases were brought by CSOs on integrity of candidates indicted by the ICC and on interpretation of Two-Thirds Gender rule as the 2013

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203   *See KPTJ's 'A Guide to Public Interest Litigation in Kenya' on http://kptj.africog.org/wp-content/uploads/2015/03/ PIL-24032015.pdf*

204   *See Kenya Law Reforms website*

election approached. The key challenge here, however, still remains the control of political financing that has had a significant negative impact on Kenyan electoral processes.

Several local and international organizations also worked directly with IEBC and other institutions in preparation for the 2013 General Elections. The Electoral Institute for Sustainable Democracy in Africa (EISA) trained IEBC commissioners and other officials prior to the elections.[205] The International Foundation for Electoral Systems (IFES) provided IEBC with technical support on administration of elections including advice on technology.[206] The civil society had also agreed with IEBC on regular comprehensive briefing sessions about preparation towards the election. However, IEBC gradually rendered the liaison with CSOs meaningless by declining to engage faithfully on concerns raised by the CSOs.[207] Kenyans for Peace with Truth and Justice (KPTJ) consequently released an open letter to the IEBC on 1 March, 2015 listing a range of areas of concern in preparations for the election.[208] The National Democratic Institute collaborated with local CSOs in its work with political parties to build consensus around national issues through Political Parties Liaison Committees (PPLC), enhance citizen engagement with parties, and political dispute resolution internally or through the judiciary.[209] In terms of pushing for specific legislations in the interest of women after promulgation of the new constitution and other electoral related reforms, the National Women's Steering Committee (NWSC), an umbrella organization for women's rights issues did a notable work.

These efforts have nonetheless faced numerous challenges particularly the constant attempt by parliament to water down the Acts. For example in the run-up to the 2013 elections parliament introduced amendments to the Political Parties Act that significantly reduced the threshold on political party discipline and party hopping.

b) Civic Education

Broadly the aim of civic education is to teach voters and citizens about their rights and responsibilities as part of a democratic society and for them to have a more accountable government. It is also important to conceive of public education, as an essential tool for

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205   *Interview with EISA Kenya Executive Director and EISA staff*

206   *IEBC CEO Isaak Hassan in an interview mentions technical support offered by IFES to the Commission and its predecessor http://www.ifes.org/news/iebc-chairman-reflects-kenyas-2013-general-elections-and-future*

207   *See ACHPR's briefing paper on Kenya via http://www.ifes.org/news/iebc-chairman-reflects-kenyas-2013-general-elections-and-future*

208   *See http://africog.org/new/wp-content/uploads/Press%20Release-KPTJ%20Open%20Letter-%20Issues%20of%20Concern%20Related%20to%20the%20March%204%20Election.pdf*

209   *See NDI's website on https://www.ndi.org/kenya*

citizen empowerment and a fundamental ingredient for a stronger democracy (Grindle, 2004). The civic education agenda in 2013 elections was largely driven by civil society and the IEBC. Several national and grassroots organizations were involved in in electoral processes, they include Institute for Education in Democracy (IED), Uraia Trust, Catholic Justice and Peace Commission (CJPC), Amkeni (which worked with over 50 grassroots civil society organizations). Notably, as FBO with immense grassroots reach, the impact of CJPC's work on civic education, peace-building and election observation has been lauded by different actors.[210]

In the months leading up to the 4 March general election, the IED implemented a project under its civic and voter education project on Promoting Civil and Voter Registration and the Secrecy of the Ballot among Marginalized Communities in Kenya. This project, funded by the Australian Government through AusAID, aimed to extend democratic citizenship to some of the most marginalized regions in Kenya. The IED recruited and trained 250 Voluntary Civic Educators (CVEs) with the intention that they would reach 25,000 citizens in their communities over a period of one month. CVEs were expected to conduct two sessions per week in their communities, targeting marginalized groups, with a strong focus on protecting voter rights and promoting citizens' responsibilities (http://iedafrica.org). It specifically engaged with members of community-based organizations to enhance their capacity at the grassroots level to promote equal and active citizenship and to utilize connections from existing programmes. Although a key component of the training focused on the new positions in the election, legal frame-work, and voting processes and procedures, a strong emphasis was placed on identifying communities' needs.[211]

Uraia Trust's 'Uchaguzi Bora Initiative' (UBI) that began six months before the election also contributed immensely to the civic education programs. The program was ran in collaboration with 57 implementing partners nationally, over 300 civic educators and media strategists. The initiative directly reached slightly over 3 million citizens with an estimated 20 million reached through various multimedia platforms. Through UBI, Uraia also disseminated over 100,000 civic education and training materials (Uraia, 2013). In addition, through this initiative, Uraia staff were involved in election observation.

There were also other initiatives by the civil society to promote voter participation in a peaceful election. Useful to this process is voter education messaging and access to information. To

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210   *An IEBC official interviewed for this chapter on the role of CSOs praised the role CJPC did. Another interview with Beatrice Odera, CJPC's National Executive Secretary.*

211   *See (http://iedafrica.org)*

support this effort, International Republican Institute (IRI) teamed up with Uraia Trust, a local civil society organization in Kenya, to publish The Citizen Handbook, which informed citizens on their rights as enshrined in Kenya's constitution. The handbook formed the basis of a civic education outreach to nearly 50,000 citizens in more than half of Kenya's 47 counties (www.iri. org). The process was also supported by an online civic education module targeting primary and secondary schools. This latter approach is important for its forward-looking platform for post 2013 elections period. This is more so because by leveraging on technology and targeting future voters, civic education effectively moves away from the traditional election driven civic education programme to a more institutionalized civic education programme which has a greater likelihood of developing a civic political culture.

The other important initiative was the Amkeni Wakenya programme which worked with more than 50 civil society organizations in 2013 and reached over 340 000 people. (www. amkeniwakenya.org). The use of community radios by the programme was particularly important because of the wide reach of radio as a means of accessing information. It is also important to give credit to CSOs for originally conceptualizing the idea of the presidential debates even though the media later on took it up on their own. It also worth noting here the election observation work done through Women Situation Room (WSR) funded by UN Women and UNDP which focused on observing the election with particular attention to regions prone to violence. WSR trained over 500 women and youth observers who reported potential incidents of violence.[212]

It is however important to point out that while this contribution played an important role of mobilizing informed participation by voters, civic education needs to move beyond a one off event during elections to a sustained process that seeks to build a civic culture. It is only through this that democratic practice and culture will be entrenched in Kenya's electoral process. This argument is discussed further at a later stage in this chapter.

c) Peace Messaging

The magnitude of the 2007/2008 post-election violence in Kenya, significantly challenged the 'prevailing assumption that democracy and peace are, ideally mutually reinforcing with elections serving as the connecting cord between them' (Omotola, S. 2010: 57). The trend towards violence surrounding elections in the third wave of democratization in sub-Saharan

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212 *See http://www.un.org/africarenewal/magazine/april-2015/women%E2%80%99s-situation-room-africa%E2%80%99s-unique-approach-reducing-electoral-violence*

Africa surprised many who 'assumed incorrectly that most countries were heading down a one way path to democracy and development' (Mueller, 2008: 205). This seeming resurgence of electoral violence necessitated a peace messaging intervention to prevent the possibility of recurrence in the 2013 Kenya elections.

There were several initiatives that primarily focused on peace messaging and campaigns. Most of the peace campaigns were modeled around national CSOs working in partnerships with grassroots FBOs, Women organizations, schools and youth organizations. Organizations such as PeaceNet, Faith based organizations community level CBOs helped mobilize communities to foster early warning and response as well as long term conflict mitigation interventions. The International Rescue Center (IRC) in collaboration with seven Kenyan organizations ran the Peace Initiative Kenya (PIK), a program which focused on four conflict prone regions: Nyanza, Rift Valley, Nairobi and the coast. The program trained more than 40,000 peace advocates while also focusing on Gender Based Violence.[213] In the lead up to the March 2013 elections, messages promoting peace became a prevalent strategy of NGOs, the media and government agencies.

The organizers of the 2013 elections had no option but to prioritize peace messaging. The experience of the 2007 elections was still very fresh. However as some democracy campaigners in civil society sector have pointed out, peace messaging became a doubled edged sword.[214] It progressively became the cover with which justice, transparency, accountability and fairness were sacrificed. Indeed these latter ideals of democracy – 'justice, transparency, accountability and fairness – were sacrificed at the expense of peace messaging'.[215] In many occasions attempts at highlighting flaws in the electoral process were easily buried in the sustained and domineering peace campaign.

d) Election Observation

Election observation is an important ingredient of a democratic process. Civil society plays an important role at this stage of the elections process particularly in emerging democracies by bringing credibility and legitimacy to the election process and serves to deter overt acts of electoral fraud, especially during the polling (Bland, 2014). An independent civil society observer group thus supplements the media, as well as agents of political parties and candidates, to ensure transparency. The purpose is to gather information regarding an

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213   See http://www.rescue.org/blog/working-peace-and-equality-kenya

214   Kenyans for Peace with Truth & Justice (KPTJ) has for instance raised concerns with the cost of amplifying peace messages at the expense of seeking truth and justice out of electoral competition.

215   Ibid

electoral process necessary for making informed judgments on the conduct of process. While observation may not fundamentally change the process during elections, it serves to validate it or otherwise.

The IEBC facilitated the activities of international and national observer groups. Over 50 Kenyan citizen observer organizations were accredited by the IEBC, of which the largest and most long term was the Elections Observation Group (ELOG), a permanent coalition platform of eighteen civil society and faith based organizations began long-term observation in November 2012 with 442 observers in all constituencies. On the Election Day, ELOG deployed over 5,500 observers across the country, as well as 1,800 observers who carried out Parallel Vote Tabulation (PVT) [216]

The establishment of ELOG arose out of the need to avoid the challenges of the previous Kenya Domestic Observation Program (K-DOP). It leverages the strengths of the various members technical expertise, geographical coverage and varying constituencies to rapidly and accurate cover a wide range of locations in pre-election, during and post-election observation process.

In 2010, The National Democratic Institute (NDI) together with other partners including UNDP and DFID, CIDA among others, partnered with the Kenyan Election Observation Group (ELOG), to strengthen its ability to provide long-term, systematic domestic election monitoring. The strategy was to deploy 542 long-term observers to provide analysis and information about the electoral environment in the months before the elections in addition to individual ELOG member organizations conduct monitoring in specific thematic areas such as, women's participation; campaign finance legislation; politically motivated violence; and auditing and updating of the voter registry. In the 2013 elections, ELOG deployed about 1,500 trained, accredited, nonpartisan rapid response monitors to a statistically representative sample of polling stations to conduct Parallel Vote Tabulation (PVT) (www.elog.or.ke). It is important to note that PVT was a new addition to election observation and monitoring activities by civil society. It is an effective instrument in counter checking figures as released by the Electoral Commission and deterrence to possible manipulation of final results. However, as a domestic actor with the advantage of in-depth understanding of the context of the 2013 election, ELOG came under criticism for endorsing the election despite glaring failures in voter registration, vote counting, verification and tallying which heavily dented the credibility of the outcome.

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216   See www.elog.or.ke

e) Post-Election Redress

The election petition No. 4 of 2013 in the Supreme Court of Kenya by Gladwell Otieno and Zahid Rajan under the African Centre for Open Governance (Africog) which was also largely supported by a significant number of civil society organizations was an important intervention in seeking to use legal process to address the fundamental weaknesses in the 2013 elections process. Even though the case was eventually lost in court, it provided precedence on the use of legal redress in solving electoral disputes particularly under the new constitutional framework. The petition among other things identified voter registration, voter identification and electronic transmission of results as key contributors to the failure of the electoral process to guarantee a free and fair outcome. The petition raised issues with the failure of the Biometric Voter Registration as well as the Electronic Voter Identification and Electronic Transmission of Results which significantly contributed to the elections not being free and fair. In this context civil society played a significant role in seeking legal redress on the matter of the flawed nature of the elections and the electoral process. With the experience of the post-election violence it was necessary to demonstrate that institutions could be relied upon to resolve electoral disputes. Even though the process and outcome of the election petition remains contentious to date, it provided a good ground for institutional development to mitigate electoral violence.

Critique of the Role of the Civil Society in the 2013 Kenya Elections

In this section, the chapter presents the emergent argument that in spite of the important role played by civil society the sector perhaps could have done better to mitigate maladministration of the 2013 elections. This however does not imply that it is the civil society that should shoulder the blame. Two forward looking question which is important to the sector ahead of the 2017 cycle of elections is that how best can the sector work with the electoral management body to seal gaps in voter registration, civic education, procurement of technology and adherence to law by parties and candidates? Second, what are the best strategies to forge meaningful synergies between various CSO programs related to electoral assistance?

As cited in Gary Bland, (2014) various election observers passed a verdict of 'generally credible' ELOG found the electoral process 'generally credible' (ELOG, 2013: 65). The African Union Observer Mission likewise called the elections 'credible' (African Union, 2013: 9). Despite the shortcomings, the EU concluded that the 'integrity of the vote was protected' (EU, 2013: 1) while the Carter Center (20found 'enough guarantees to preserve the expression of the will of the Kenyan voters' (Carter Center, 2013: 1). Conversely, several civil society organizations including, International Centre for Policy and Conflict (ICPC), Inuka Kenya, Africog, Kenya

Human Rights Commission (KHRC) among others, took a strong position against concerns in the preparation for the election. These concerns should have been pushed further to prevent the flaws in the electoral process that would eventually raise serious doubts on veracity and authenticity of the electoral process.[217] It is therefore useful for the civil society to device strategies and strike crucial partnerships well in advance to deal with such concerns.

Worth noting also is the resultant split within the CSOs regarding the magnitude of the effect of the maladministration of the 2013 election and by extension effects of the same on the electoral outcome. Uraia (2013) for example observed that the split had on the one side a section of the civil society downplaying the aspects of maladministration and acquiescing to the outcome with the other side insisting on need to push for accountability of the electoral management body. As the report opines, a split within the civil society is likely to jeopardize the sector's efforts. The other related danger is the room it creates for underhand political forces deepening the split for partisan political objectives.

Challenges Faced by Civil Society in Kenya

The foregoing discussion presented some of the glaring weaknesses that negatively impacted on the primary watchdog role of civil society in the 2013 elections. However, it is important to contextualize these weaknesses within the broad challenges that civil society in Kenya has faced the past decade. The introductory section of this chapter alluded to the emergent challenges that the sector faced in the post-2002 elections in Kenya. The argument in this section is that the last decade has been one of re-organization and redefinition of the role of civil society in an attempt to recapture its lost glory of the prime years of the 1990s. The challenges that come with this process include; alignment with and subsequently against the state in the post 2002 elections and the attendant implications on funding both in terms of the amount as well as timing.

The alignment by the civil society with the state in the reform process led to a civil society that largely played second fiddle to the state in reform process. Part of the reason for this alignment can be attributed to a new donor funding framework that left civil society with no option but to work with the government. Most of the funding streams were organized around government led reform programs such as the Governance Justice and Order Sector (GJLOS), Public Financial Management Reforms (PFMR), Administrative Reforms, Electoral reforms, as well as sectoral support programmes, among others. It is upon these reform programmes that civil society funding would be aligned. In effect, civil society had to align

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217   *Interviews with key informants in the civil society*

themselves to government and government agencies. This had the effect of slowing down the process of civil society defining its own reform agenda to provide oversight and hold the state accountable as is the standard practice. It also significantly reduced the legroom for civil society independence. To many, civil society in Kenya had become conformist, weak and playing very limited watch dog role compared to its prime days of the 1990s and nowhere was this more a problem than in elections.

As pointed out earlier CSOs in Kenya are mainly funded by foreign donors. While the funding comes with the advantage that they can operate independently of the state, there are dangers lurking in the arrangement. Lack of sustainability, unpredictability of funding, inability to determine an independent work programme since CSOs work have to be aligned to donor priorities and timing are some of the challenges for the CSOs. Donor priorities keep changing and CSOs programs have to change with them to attract funding. These among other funding related problems have significantly affected CSOs work in elections. Bearing in mind that with no public funding, limited and poorly developed alternative domestic funding, the civil society in Kenya continues to depend on foreign donors except for a few membership organizations. This has made the sector vulnerable to accusations by the government that CSOs essentially promote the agenda of their donors. While this argument remains largely political it may have the effect of reducing the level of credibility of CSOs. The current attempt by the state to limit foreign funding for CSOs is largely founded on these fears. If successful, it may further limit the capacity of civil society to do its work if not cripple it at worst.

It is important to point out that activities around elections such as voter /civic education, election observation and monitoring cannot be restricted to the election time. While reflecting on the UBI program, Uraia Trust for example underscores the importance of starting civic education programs earlier enough so that these programs are not tied to ongoing political campaigns where they could be easily misunderstood (Uraia, 2013). Voter education particularly in emerging and evolving democracies require continuous citizen education and engagement. Over the last two decades, civic education has been dealt with by CSOs as single stand-alone events during the elections and end as soon as the election is over to await the next. This approach comes with inherent inadequacies making it mechanistic and with little impact on the electoral process. Civic education ideally should seek to change the political and civic culture which can only be achieved through a systemic long-term process rather than stand-alone electoral events. Without adequate, reliable and sustainable funding CSOs have to make do with the intermittent civic education events predicated on donor

funding priorities and timing. Unless this scenario changes the role of civil society on election will remained limited and constrained.

Election monitoring and observation on the other hand face similar problems. Monitoring must take into account the entire elections cycle that includes the inter-elections period. That way observation can take into account political party activities such as party elections and party nominations. Experience in Kenya has shown that it is at these stages of the electoral cycle that electoral malpractices are bred. Because of zoning of support base – mainly ethnic – by political parties, in most regions winning party nominations is the most important step in winning the main elections. If this stage is not properly monitored it will not matter what happens at the general elections, since the malpractice will have taken place and the general elections will only serve to legitimize it. In addition, election monitoring should also continuously oversight preparatory work such as access to identification documents, voter registration among others. These pre-election activities prepare the ground for free and fair elections or otherwise. In essence therefore it may be futile to just observe the actual elections when malpractices and electoral fraud was already committed well in advance. With the situation in Kenya where CSOs undertake election monitoring and observations as a one off event, it remains in doubt that this process can be effective.

Conclusion

Whereas we cannot understate the important role played by the civil society in the generic function of civic education, peace messaging and election observation, a lot more needs to be done so that civil society can sustainably play its role.

The question of defining and taking control of the agenda on civilian oversight of the electoral process must be prioritized by civil society. While we recognize that this is dependent on other factors such as funding, civil society in Kenya can learn from the experiences of Ghana and South Africa. In Ghana, the 2012 elections confirmed the emergence of civil society as a key factor in Ghanaian democratic development. Civil society organizations played constructive roles in raising the level of political discourse beforehand. The lesson here for Kenyan CSOs is that elections must not be treated as single events by a cycle that includes the period in between elections. This period is an important preparatory stage for ensuring free and fair elections. For instance, as flagged by other chapters in this publication, the civil society must design electoral reform programs around election financing, political parties, sharpening of broad electoral laws, implementation of the laws especially in the interest of minority groups.

Alternative funding too remains an important consideration that needs attention. While realistically in the foreseeable future, civil society will continue to depend on foreign donors, in the long-term CSOs will need to rethink the model of funding for their programming, shift to alternative sources including public trust funds that can fund activities of civil society. In South Africa, even though marginal, civil society has been able to secure public funding which grants them a bit of leeway on sustainability.

Peace messaging and peace building remain fundamental ingredients of elections in Kenya. The last two decades in Kenya have witnessed fairly divisive and violent elections. Numerous studies have shown that this violence is both political and ethnic. Politicians have consistently used ethnic tensions and divisions to mobilize support and create ethnic voting zones for their benefit. This is often at the expense of the citizens who have to endure rather predictable violence during elections. While new electoral laws seek to prevent and deter political incitement, the greater intervention should focus on institutionalization of peace building and political/civic culture. Civil society must take up this responsibility by refocusing civic education from being a mere electoral event to a long-term political culture and attitude change process that runs through the entire electoral cycle. Similarly, effective civic education and peace work will only be possible with a broad perspective of civil society that not only focuses on urban NGOs but also grassroots social movements.

In 2013 peace messaging was visible and consistently undertaken by civil society, the state, the media and other agencies. However, the priority seemed to be more on the need to avoid the specific experience of the 2007/2008 post-election violence rather than address the root cause of violence that go beyond the elections. The civil society needs to, in the long-term, focus on addressing problems such as inequitable distribution of resources, which can be achieved by ensuring that devolution succeeds and land problems. Institutionalization of free and fair elections needs greater attention than just peace messaging during elections. This long-term objective can be achieved through full implementation of Agenda item 4 of the Kenya National Dialogue and Reconciliation under the National Accord Reconciliation Agreement that ended the electoral dispute in February of 2008. The thrust of Agenda item 4 which was to examine and address constitutional, legal and institutional reforms, poverty and inequality, youth unemployment and land reforms, is a much more long-term solution to ethnic and electoral violence. The civil society should effectively take over the agenda from the politicians if it is to succeed in peace building. These causes of electoral violence were anticipated in the constitutional framework particularly the devolution of political administrative and financial management powers. The success of devolution is therefore an indispensable ingredient in

solving this bigger problem. The pursuit of enduring national peace and programing around it also will require self-reflection within the sector, which right now, as already pointed, seem to have partisan cracks.

Chapter 14

The Geopolitics of the ICC and 2013 General Elections in Kenya - *Abdullahi Boru*

Introduction

The disputed 2007 presidential election and the subsequent electoral violence in which at least 1000 people were killed, and another estimated 700,000 people were internally displaced, coupled with the International Criminal Court (ICC) cases against Uhuru Kenyatta and William Ruto, 'internationalized' Kenya's March 2013 elections.

After the 2007-2008, the line between what constituted a domestic political and foreign affairs was effectively blurred. For decades, Kenya has been held as a successful case of a transition to multiparty in post-Cold War in sub-Saharan Africa. However, a nuanced observation of Kenya's transition is that the 2007-2008 was not an aberration but rather a logical historical arc which Kenya has been on since the introduction of multi-party politics in 1991. Since 1991, every election has been preceded or accompanied by violence, especially in the Rift Valley- the epicentre of violence, the coastal area, and parts of the Nairobi slums.[218]

Kenya's 'success'—peaceful election, held some respectability in the Horn of Africa- a region beset with incessant conflict, because most of the regional countries were either mired in civil conflict, or had retained the one-party state e.g. Ethiopia, where development was given precedence over political and civil rights. Too many outsiders, and perhaps even some Kenyans, therefore, the 2007-2008 violence was antithetical to Kenya's internalized image. But the characterization of Kenya as an island of stability misses the complexity of cyclic electoral violence in Kenya. Admittedly, the 2007-2008 violence, and the accompanying level of destruction, compared to the previous elections were huge, but in the grand scheme of the event, there was little that was surprising about the 2007-2008 violence.

This chapter looks at the historical arc of the electoral violence, and argue that cyclic electoral

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218   *Since the introduction of multiparty politics in 1991, all subsequent elections except the 2002 have been preceded or accompanied by violence. Violence during electoral periods in Kenya has killed at least 4,433 people and displaced over 1.8 million since the introduction of the multi-party system in 1991.*

violence in Kenya is state engineered and deepened with the introduction of multiparty politics. In that regard, the 2007-2008 was not anomalous but an obvious conclusion of the electoral violence trajectory that Kenya has been on since 1990's. Politicians have also exploited the underlying structural issues and deepened ethnic fissures and create an environment of fear which eventually leads to violence. Some of the historical issues that have exploited include the land issues, which have been at the heart of almost all electoral violence. After establishing the context of the 2007-2008 violence, the chapter provides insight on how the ICC got involved in Kenya, offering with a theoretical proposal for understanding the behavior of the elite with ICC's involvement. This involves debunking the imperialist argument that has been used against the ICC. The next section addresses how what has clearly been a 'personal challenge' has metastasized into a state issue, and how this subsequently shaped Kenya's foreign policy especially towards the western countries, at least rhetorically. Additionally, I examine how Kenya whose Pan-African credentials were limited before the ICC cases, has used the cases to not only shore up its Pan Africanism posture but also deepen its connection with many African countries, especially in the East African region. Overall, the ICC cases have also catapulted Kenya into a league of heavyweight African countries. However, this chapter demonstrates that despite the bad blood between Kenya and western countries, and especially the United States, Kenya is still firmly in the western orbit, especially in the fight against terrorism in the Horn of Africa. Therefore, the argument that Kenya is 'Facing East' is a bit premature. However, it would be accurate to say the relations between Kenya and the western countries significantly changed especially during the early days of the Jubilee administration. This would have been impossible to contemplate without the ICC cases.

ICC and Domestic Politics in Kenya: A Theoretical Framework

The magnitude of the post-election violence in 2007 inevitably raised the question of justice for victims. And as will be discussed later, the failure to establish a local judicial mechanism to address the resultant injustices saw the ICC intervene in Kenya. The Rome Statute establishing the ICC arguably has a clearer framework to pursue individual criminal liability for those responsible for heinous crimes against humanity (Schabas, 2001). Given that the Kenyan case was a result of an election which is essentially a political process, these individuals bearing greatest responsibility were likely to be drawn from the political class of the time. Schabas further argues that the Rome Statute is also a creation of political propositions which touch the heart of state sovereignty. As such, the classical debate on the contradictions between state sovereignty and human rights inevitably emerges when the ICC intervenes in a state party. This debate is even more pronounced where a state party is fragmented as is the case of Kenya.

A theoretical proposal for understanding the instrumentalization of the ICC factor in Kenya's 2013 presidential elections must therefore attempt to address a number of observations during the presidential campaign. On the one hand, it must explain what would create perceptions of impartiality in international organizations created to pursue international criminal justice by one faction of domestic political elite while on the other hand another faction of the political elite in the same setting would support the organization's judicial process. To do this, this section will review two institutonalist theories of international organizations, realism and constructivism as they address the question of independence and impartiality of the ICC. It then discusses domestic behavior of Kenya's political class in shaping the country's foreign policy under the prism of realism or pragmatism drawing from an analysis of elite behavior as was after independence in Kenya.

According to Danner and Voeten (2010), realists view the international organizations like the ICC as exercising delegated authority from the state, creating a Principal-Agent relationship. Here, the Principal (state party) grants the court some discretion to pursue state party's goals while relying on the agent's expertise (and professionalism) in pursuing the goals. The dilemma for state parties here becomes the extent of delegation that can achieve the states' set goals—international criminal justice while minimizing losses associated with surrender of authority (sovereignty). The agent's dilemma in this context is the reasonable extent of independence and impartiality given the delegated authority. Specifically, realists contend that the functioning of international courts is dependent on the continued cooperation by powerful states and that these courts are heavily constrained when dealing with matters that are important to powerful states (Danner and Voeten, 2010; Gegout, 2013). Gegout observes that states, while acting legally have used the ICC for political motives thereby jeopardizing the principles of international criminal justice.

According to Danner and Voeten (2010), constructivists on the other hand dismiss rationalists as having a narrower conception of authority. Constructivists contend that creation of international justice systems does not necessarily meet functional demands by states but rather reflects an 'international justice cascade' in which non state actors demand some form of justice. They view NGOs and victims of injustice as the ultimate stakeholders in international justice and that international judges, through the decisions they make help shape how governments perceive their own interests and that these judges create new categories of definitions which states accept based on rational-legal authority vested in international institutions.

The stances taken by the political class in Kenya towards the ICC during the campaigns for the 2013 presidential elections could thus be explained by both the realist and the constructivist theoretical lenses. The trigger mechanism of ICC's intervention in Kenya—proprio motu

powers of the ICC prosecutor under Article 15 and the powers vested in the United Nations Security Council under Article 13 and 16 leave room for perceived or real manipulation of the ICC by powerful state actors pursuing different interests. For instance, the French government under Sarkozy is reported to have attempted to prevent the ICC from investigating crimes committed in Sudan in exchange for a peace agreement in Darfur (Gegout, 2013).

It is in this context that one needs to understand the faction of the political elite in Kenya that resisted the ICC. The faction of the political class opposed to the ICC were in essence challenging the extent of delegating authority (and therefore partial sovereignty) particularly in the context of a threat to personal or group's domestic political aspiration. This side of the political divide thus attempted to retreat into nationalist mobilization which moves foreign policy from the pragmatic middle to nationalistic right. In furtherance of the same foreign policy stance, it then created a leadership imagery around generational change which seeks to depart from the orbit of the west (imperialism) into a Pan-Africanist centred future. The political coalition built out of this nationalistic psyche because of the ICC threat coined as imperialist threat fits into Mboya (1963) observation that Kenya's history has always been the conglomeration of tribal alliances during a political struggle or siege.

The other faction of the elite from where there were voices supporting any mechanism including the ICC in pursuit of justice for the victims may be understood within the constructivist prism. This section created an image of belief in the 'international justice cascade' where international criminal justice organizations instituted by state parties gradually turn into powerful, independent actors not malleable to state constraints. By invoking sanctity of human rights in the ICC and sovereignty debate, this faction of the elite would easily be viewed as allies of western powers. That both factions of the political class were competing for the presidential position only exacerbated the bifurcated stance, considering this group as allies of the powerful states using the ICC to achieve a premeditated electoral outcome.

Undercurrents of Electoral Conflicts in Kenya

Election in Kenya is not a cause of violence; it is a trigger of longstanding latent issues that have been allowed to fester for a long period of time. Since the electorate invest a great of hope and fear in the electoral process; hope that if a politician from 'their community' ascends to power, their lot will improve; fear that if they lose, their fortune will decline, this makes elections, especially when deemed illegitimate to lead to eruption of violence. This mind-set has effectively reduced the election into a zero-sum game that politicians cynically exploit; by turning their individual loss into community's loss. As a result, politicians have conveniently

avoided tackling hard questions through innovative policy interventions. Instead they have become merchants of fear.

It is not just the electorate who invests tremendously in the electoral process, politicians too do. In a country that is fairly polarized, this mutually destructive loop creates antagonistic ethnic cleavages, leaving the country hugely divided from one election cycle to another. In fact, over the past few years, it has become incredibly difficult to distinguish between an election campaign cycle, and non-election campaign period. In most cases, over the past few years, the country has been on a perpetual campaign mode. Because the cost involved in winning/losing an election is prohibitive, politicians would never want to lose, and after winning they keep the electorate on a perpetual campaign footing between elections.

Between electoral cycles, systemic longstanding issues have remained constant, they are hardly addressed sustainably but they will always be used as a scarecrow while seeking votes. The two issues which have always triggered electoral conflict in Kenya are: the post-independent land question and a powerful presidency. These issues have dominated constitutional reforms debate up to 2010 when the country passed a new constitution.

a) *The Land Question*

Land is a central factor around which Kenya's politics revolves. In fact, the foundation of modern Kenya's state was anchored in land—African freedom fighters wanted to get back their land as a factor of production as well as a material and symbolic manifestation of their independence. In independent Kenya, land has also become the source of patronage with both Kenyatta and Moi using the land as either a stick or carrot in an attempt to win/discipline political leaders and communities.

The first President, Jomo Kenyatta, institutionalized the practice of using land as a source of political patronage. Kenyatta used the Office of the President to issue land 'grants' and settlement programmes to reward his supporters with plots of land, title deeds, and financing (Kanyinga, 2000).

By the end of the 1970s, the State had allocated about half of the former White Highlands to smallholder farmers in the form of settlement schemes or land-buying cooperatives. The regime distributed the remaining half of the Rift to high-ranking government officials while retaining large tracts as state-owned land (Boone, 2009). The allocation of land during Kenyatta's rule was highly skewed in favor of certain communities—notably the Kikuyu and other 'migrants' into the Rift Valley. Boone notes,

> The farming districts of Kenya's Rift Valley Province (Nakuru, Uasin Gishu, Trans Nzoia, Nandi) have been ravaged by waves of land related violence that have swept the region at election time since the return of multiparty in 1992…much of the world press reported these episodes and outbursts of ethnic violence involving militant supporters of rival political parties. A deeper look confirms that land politics in the Rift Valley has been deeply ethicized by all Kenya's governments, both colonial and post-colonial which have used their control over land allocation to engineer ethnically defined political constituencies that would bolster them against their rivals (Boone, 2009: 26).

The clamour for multiparty politics in Kenya has been characterized by land related ethnic violence. Such violence, although salient in the Rift Valley region, was widespread in many parts of the country (Allott, 1969). That land has been the sore thumb in Kenya's political fabric is undoubted, but instead of exploring alternative policy intervention, politicians have conveniently exploited grievances associated with land to whip up animosity amongst communities in order to settle political scores. Even when they set up several commissions of inquiry to explore solutions to the 'land question', successive governments have displayed lack of political will to implement the report of the commissions.

As a result, in this conspicuous absence of political good will, the land question in Kenya has been instrumentalized and deeply ethnicized. For instance, in 2007 the Orange Democratic Movement (ODM) made land their principal campaign platform and effectively winning support of the two regions where there is egregious land problem- the Rift Valley and Coastal communities. Historically, the land question is anchored in the Majimbo- devolution discourse[219] where the two independent political parties, KANU and Kenya Africa Democratic Union (KADU) differed over state's power arrangements. KANU, led by Jomo Kenyatta, preferred a centralized state arguing devolution will balkanize the young nation. KADU, which was largely composed of smaller ethnic groups, favoured a devolved system to guard against large ethnic group's domination (Human Rights Watch, 2008: 15).

KANU won the 1963 elections and three years later in 1966, KADU MPs defected to KANU effectively ending the devolution as Kenya became a one party centralized state (Anderson, 2005). However, with the re-introduction of multiparty politics in 1991, Majimbo debate was revived. Leaders from the Rift Valley and Coast provinces naturally became its advocates. But unlike independence era, Majimbo this time round was instrumentalized, and became a short

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219   *Majimbo is largely equated with devolution but has also been conveniently interpreted by the political elite as everyone should go back to their homeland.*

hand for eviction of 'non- indigenous' 'outsiders' who had moved into these areas in search of lands and jobs, and also 'will not vote for them in the ethnicized politics' (Human Rights Watch, 2008: 16).

Ethnicized politics is probably one of the most intractable features of Kenya's politics (Mafeje, 1971). While ethnicity per se is not a problem, in an unequal society where access to state offices is the difference between success and failure, the 'inside' community will try and build more wall to retain the levers of state power, and the 'outside' community will work hard in accessing the state power. This contest mostly pits the political elites against each other. Therefore, ethnicity becomes a reflexive and probably the most conveniently easy fall back (Oyugi, 2000). The political elites contest for state power, which they 'communalized', placed political ethnicity as the overarching fulcrum around which Kenya's post-independence state revolves (Allott, 1969; Bratton and Kimenyi, 2008; Klopp, 2012).

The above context set the stage for the ethnicization of politics in Kenya as other communities immediately began to decry the unequal distribution of resources, which favoured the Kikuyu community. Immediately, the excluded communities-real or imagined, begin advocating for a Majimbo system of government, in essence, based on ethnic arithmetic where individuals were to be allowed property ownership in their regions/localities and return land that had been acquired in other regions. It is at this point that Kenyatta enticed Moi-the main exponent of Majimbo-with the proposition of a Vice Presidency if he would allow the Kikuyu community to be resettled in the Rift Valley[220].

b) *Powerful Presidency*

Before Kenya passed a new constitution in 2010, state power was vested in the presidency with weak institutional checks and balances. As a result, this reduced the presidential contest, and by extension the entire political process, into a zero sum game; my loss is your gain Additionally, symbolically, once someone from a particular ethnic group ascends to the presidency, it is that communities' 'turn to eat'(Branch et al., 2010) because the president can without any oversight doll out the states' patronage to his community at the expense of the rest. Therefore, the presidency retained both material and symbolic value[221].

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220   *For more on land see Klopp (2012)*

221   *To consolidate his base after becoming the President, Moi rewarded his supporters, Particularly the Kalenjin through appointments to Political offices and with jobs in the Public service and the military. Rightly or wrongly, President Moi's opponents as not qualified or competent viewed these individuals given these.*

The Flawed 2007 Elections and ICC Intervention

The foregoing section on the undercurrents of electoral violence in Kenya expose a polity which has been in dire need of comprehensive institutional reforms. In the absence of the reforms, and where land is instrumentalized under a powerful neopatrimonial presidency, electoral competition inevitably attracts violence. Unsurprisingly, the fusion of state anxiety and historical grievances inaugurated institutionalized violence during the election cycles.[222] For instance, 'approximately 1,500 were killed and 300,000 were displaced in the 1991-3 election period' (CIPEV, 2008).

During the first multiparty politics in 1992, and the subsequent election in 1997, ethnic violence erupted in the Rift Valley- incumbent president's region, and the coast region. State sponsored violence targeting those communities who were likely to vote for the opposition became a phenomenon during these two election cycles.[223] The emergence of electoral violence was also accompanied diffusion of violence and proliferation of criminal gangs in Central, Coast, Nyanza and Nairobi regions, exacerbating the already tenuous situation.

The purveyors of violence led to the emergence of a 'shadow' state, the personalization of power, a zero-sum view of winning elections anchored in ethnicity, and the persistence of unreformed institutions. The shadow state wields unfettered influence which tends to advantage a section of the political elite, raising the stakes in elections. This was coupled with the hollowing out of institutions, and a hardening of the notion of winning at all costs, with ethnic polarization increasing and the nation becoming more violent and fragile (Mueller, 2011). The peaceful election in 2002 after two previous elections were marred with electoral violence created a false sense that Kenya has finally slayed the electoral violence monster. However, the peaceful election glossed over the underlying structural drivers of conflict, which have been left, to fester despite peaceful elections.

The period leading to the 2007 elections was no different; if anything the election was following one which had rejuvenated a nation's hope for reforms. Failure by the political elite to undertake reforms in general, and a botched constitutional referendum in particular led to a further elite fragmentation, heightening the stakes for the 2007 presidential contest. The electoral management body buckled under this pressure, leading to a flawed and disputed

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222   *President Moi did not accept the idea that through this he might lose the Presidency. Thus, it was in this period in the 1990s that violence became institutionalized during Presidential and Parliamentary elections. Under the amended Constitution, to win the Presidency, President Moi needed to win his Parliamentary seat, obtain a majority of the votes cast in the country, and receive 25 percent of the votes cast in five Provinces, Commission of Inquiry into Post-Election Violence, 15 October 2008: 25.*

223   *See research on this topic done by scholar Jacqueline Klopp*

electoral outcome. As a result, a post-election violence of an unprecedented magnitude followed—with an estimated 1,500 killed and hundreds of thousands internally displaced. In fact, some scholars argue that the post-election violence just fell short of a civil war (Oucho, 2010).

The ICC's Involvement

Kenya's disputed presidential elections in 2007-2008 had implications beyond the country—Kenya is the regional diplomatic and business hub, the nerve centre for relief and humanitarian operations in the region's conflict affected countries, the port of Mombasa serves as the transportation artery in the East and Central Africa region. These combined with the country's image as an 'island of peace' made external intervention inevitable.

When the elections results were announced then immediately disputed by the 'loser'[224], PNU led by the incumbent Kibaki was not keen to externalize what they considered as an 'internal' issue. To their mind, an external mediation signals a state failure, this increased their obduracy, not just about winning the election free and square, but also about accepting an external mediation. As such, several attempts at mediation were easily rebuffed, but with the domestic power balance split between the incumbent party wielding state power and the opposition wielding popular support in the streets, the country was increasingly getting ungovernable. Both sides ultimately accepted the appointment of former UN Secretary-General Kofi Annan as the AU Chief Mediator, under the auspices of the Panel of Eminent African Personalities that included Mkapa and Graça Machel.

The four principal points on the agenda of Annan's mediation team were: 1) immediate action to stop the violence, to restore fundamental rights and liberties and address the humanitarian crisis 2) promote reconciliation, healing and the restoration of calm 3) overcome the political crisis 4) addressing long-term issues and the root causes of the conflict, including the need for constitutional, legal and institutional reforms. As part of the negotiation process, Annan's team established three commissions to get to the bottom of the crisis, and also prevent such crisis from happening in the future. These three commissions were: The Independent Review Commission on the 2007 Elections (IREC), the Commission of Inquiry into Post-Election Violence (CIPEV) and the National Task Force on Police Reform.

CIPEV's mandate was to 'investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations

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224   *Quotation marks here recognize the contested winner or loser. The Kriegler Commisison of inquiry concluded that it was impossible to tell who won the 2007 elections.*

concerning these and other matters' (CIPEV, 2008: vii). At the end of its inquiry, the commission recommended establishment of a local tribunal, thus: 'To break the cycle of impunity which is at the heart of the post-election violence, the report recommends the creation of a special tribunal with the mandate to prosecute crimes committed as a result of post-election violence. The tribunal will have an international component in the form of the presence of non-Kenyans on the senior investigations and prosecution staff' (CIPEV, 2008: ix). However, in the event of failure, the commission recommended that the names of alleged perpetrators be forwarded to the special prosecutor of the International Criminal Court (ICC) in The Hague for further investigations and possible prosecution. Domestic political forces then oscillated between the local tribunal and ICC options but eventually the first option failed and the files of the alleged perpetrators was handed to the ICC.

After examining the evidence, the prosecutor '…notified the President of the ICC, by letter, of his intention to submit a request for the authorisation of an investigation into the situation in Kenya pursuant to Article 15(3) of the Rome Statute. It was the first time the prosecutor had brought a case proprio motu (on his own motion) under Article 15 of the Rome Statute. The ICC prosecutor would later indict six Kenyans, three politicians, two of whom harboured presidential ambitions, two public servants and a journalist. The succession politics of 2013 was thereafter heavily laden with the ICC factor throughout the political campaign and further amplified when the two accused politicians formed a joint presidential ticket while facing charges.

The Impact of the ICC Intervention on Domestic Politics

Even in seeking the deferral, the perennial fault line that characterized the coalition government was clearly visible. Of the six suspects, Uhuru Kenyatta, Major Hussein Ali, and Amb. Francis Muthaura were deemed to be from President Kibaki's Party of National Unity (PNU), and the remaining three William Ruto, Henry Kosgey, and Joshua Sang were deemed Odinga's Orange Democratic Movement (ODM) members.

With two of his high-ranking members, Odinga faced a dilemma on whether to support the court and not the senior party members. With the elections approaching he wanted to project himself as a reform candidate opposed to impunity; he therefore paid lip service to the necessity of the court. However, he was also cognizant of the fact that a robust support for the court could cost him significant votes, especially with the Kelenjin community, who not only supported him in the previous elections, but also have three suspects from their communities indicted. At political level, however, the absence of Kenyatta and Ruto on the ballot box was seen as an opportunity for Odinga to finally be elected president.

While he was vacillating, senior ODM members were unequivocal in their support of the ICC. This placed them in direction collision with the Kibaki's PNU members, who threw the entire state machinery at seeing the cases deferred for at least a year. The coalition government differences played out in public as well as in the parliament.

The 2013 Elections and the Counter-Intuitive Alliance

The debate on the national route to justice after the 2007-2008 post-election violence oscillated between 'Let's not be vague, Let's go to The Hague' to defiance. This narrative of defiance was dressed in nationalist language and pushed around with an evangelical flavor.

The two ethnic communities that have been at the centre of electoral violence in the Rift Valley are the Kikuyus and the Kalenjins. In the 2013 elections, the community's leaders William Ruto and Uhuru Kenyatta formed an alliance and contested for the presidency and the Deputy presidency. Kenyatta and Ruto's participation in the 2013 elections while raising serious ethical and legal dilemma- ICC suspects running for public offices which is against the spirit of Chapter Six of new the constitution, other argued, it nonetheless brought down the risk of violence considerably. The perennial conflict between the Kikuyu's and the Kalenjins cantered around land: to the Kalenjins, the Kikuyu's are non-indigenous people who have settled in the Rift Valley and taken over their land and economic opportunities.

Against such entrenched ethnic hostilities, Kenyatta (Kikuyu) and Ruto (Kalenjin) formed a political alliance. On the surface, their alliance seemed counter- intuitive, but in the grand scheme of political calculus it made sense- the Kalenjin and Kikuyus constitute the biggest voting bloc in Kenya. This coupled with the lowest common denominator- the ICC cases, made the alliance between these two ambitious politicians sensible.

ICC- Impunity vs Imperialism

As the campaigns intensified, the ICC debates evolved along two distinct lines — impunity and western imperialism. Those who support the ICC argue that the court's involvement in Kenya will break the back of the entrenched and pervasive culture of impunity (Annan, 2013; Sachdev, 2013), while those against the court argue that it's a tool of western imperialism in Africa[225].The neo-imperialist argument emerged in the run up for the 2013 elections. Critics warned the court's involvement in Kenya could unravel the on-going reconciliation effort, thus

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225   *http://rense.com/general94/internat.htm*

undermining peace (Paisley, 2012). Proponents of the court countered, the search for justice is not mutually exclusive from the search for stability and peace.

While the cases at the court were filed as individual cases, the Kenyan state continued to play a central role, even before the elections of Uhuru Kenyatta and William Ruto. In its attempt, at the minimum delay the cases, and ultimately make the cases dropped, the state left nothing to chance. This placed the court in direct contest with the Kenyan state. The Kibaki administration inaugurated the antagonistic relations with the court.

However, in fairness, the western countries conduct before the election was not helpful either. Their messaging left no room as far as their position about the court was concerned. For instance, Assistant Secretary of State Johnnie Carson's statement before the elections, 'choices have consequences' [226] and EU's 'essential contacts'[227] policy regarding the ICC indictee, an implicit attempt of changing the way Kenyan's will vote, not only hardened the Kenyatta and Ruto's commitment, but also energized their ethnic base. Something the Kenyatta and Ruto camp adroitly used to get elected.

Once elected, Uhuru Kenyatta's administration escalated their anti-western posture. In his inauguration speech, Kenyatta while on the whole conciliatory made clear his overarching policy would be an Afro-centric foreign policy- a short hand for doing away with the West centred foreign policy. True to his words, he has made more trips to African countries and non-western countries than traditional western countries in his first year in office.

Post-election, Kenyatta and Ruto employed all means to counter the court. First, at the court, at least rhetorically, their lawyers maintained that their clients would cooperate with the court (Reuters, 2013), but at the state level, there has been little cooperation from the state with the court, despite the ICC Chief Prosecutor Fatou Bensouda's incessant complains about lack of cooperation by the Kenyatta government- wide scale key witness interference, which she said imperil the cases[228] Secondly, the administration while claiming they are cooperating with court, simultaneously kept on using multilateral institutions- African Union and the UN seeking deferment. Individually, both Kenyatta and Ruto continued to demonize the court as a 'toy of declining imperial powers'[229]

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226   http://www.voanews.com/content/us-official-says-kenya-elections-have-consequences/1599063.html

227   http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf

228   https://www.youtube.com/watch?v=fqsXNawUx20 and http://citizennews.co.ke/news/2012/local/item/15902-bensouda%E2%80%99s-request-for-financial-statements-declined

229   http://allafrica.com/stories/201310130080.html

Kenya's 'Changing' Foreign Policy

Clearly the International Criminal Courts involvement in Kenya after the 2007 election tremendously impacted the 2013 elections. It impacted not only on the ethnic alliance formation but also on foreign policy—although as this chapter demonstrates, this is more in rhetoric than reality. The winning coalition's campaign mobilization of its ethnic support base using Pan-Africanist rhetoric contradicts the reality of post-election engagement with the West. On the one hand, this suggests that the campaign period anti-west and anti-ICC foreign policy stance was a convenient strategy for mobilizing support and on the other hand underscores just how the ICC factor was central to the election. Four areas: AU withdrawal threat and The UN deferment, the Facing East debate, Counter-terrorism Funding and Trade, Economic and Humanitarian Assistance elucidate the reality the new regime's foreign policy.

AU Withdrawal Threat and the UN deferment

In September 2013, five months into the new regime's tenure, the AU requested the ICC to refer the Kenyatta and Ruto cases to the local Kenyan courts. The AU noted that Kenya's 2010 constitution 'allows for a national mechanism to investigate and prosecute the cases', adding that the Kenyan judiciary is reformed and is sufficient to handle the cases. In October 2013, when the ICC declined the AU's request, the AU held an emergency summit to discuss a motion by Kenya that called for mass withdrawal from the ICC by African countries. 'The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims', Kenyatta said in his remarks at the summit. He added, 'It stopped being the home of justice the day it became the toy of declining imperial powers' Despite intense lobbying from Kenya and other African leaders, the proposal failed. Despite the failure, the utility of this event is not so much its material consequences, but its inherent symbolic implication.

Two Kenyans accused by the ICC, on the surface have little in common, whose two communities have consistently fought each other during almost every electoral cycle, closed ranks- bringing their community along, and now their 'personal challenge', is a continental challenge. This is a demonstration of the remarkable commitment. Additionally, the event is commentary on the emergence of a 'new' Africa, Africa that is not going to be patronized by the West, which dovetails with the Africa is raising rhetoric.

Following the September 2013 attack by Al Shabaab in Kenya's upscale shopping mall, the AU sent a separate deferral notice to the UN. The rationale for sending the letter was Kenya is under attack from terrorist, the two leaders should be recused from attending the court, to attend to their national duties as elected leaders. The resolution in the U.N. Security Council,

which requires nine votes and an absence of vetoes to pass, drew only seven of the 15 members in its favor, while the remaining eight — including France, the United States and Britain — abstained.

According to the Ministry of Foreign Affairs foreign policy framework 2009 'Kenya's foreign policy is guided and driven by a vision of 'a peaceful and prosperous Kenya effectively contributing to the realization of a stable continent and better international understanding'. Further, the document argues, 'Kenya's foreign policy is anchored on five interlinked pillars of diplomacy: economic; peace; environmental; cultural and 'diaspora'. But in practice, the ICC took precedent over the official government policy. Despite his conciliatory tone on his inauguration,' 'To the nations of the world – we acknowledge that in this age of globalization, all of us are interdependent. Our economies are interconnected, as indeed are our people. I pledge to continue cultivating the relationships we have had with our traditional partners and I say to all developing and developed nations who desire a deeper and more mutually beneficial relationship with Kenya: we are ready for partnerships, we are open for business and we invite you to invest in our country'.

After the failure to get the deferral, the conciliatory pragmatism was replaced with recalcitrance. President Kenyatta set out the tenor of the new approach during the AU's extra-ordinary summit held in October 2013. The president went back to the old theme of global justice double standard-; here it is worth to quote the president in detail, he said, 'First, those world powers were hesitant to a process that might make them accountable for such spectacularly criminal international adventures as the wars in Iraq, Syria, Libya, Afghanistan and other places, and such hideous enterprises as renditions and torture. Such states did not, therefore, consider such warnings as applicable to pacific and friendly parties. Secondly, it was the understanding of good-faith subscribers that the ICC would administer and secure justice in a fair, impartial and independent manner and, as an international court, bring accountability to situations and perpetrators everywhere in the world.

The President rehashed African countries overarching standard talking point in opposing the ICC process—sovereignty, that is, African sovereignty means nothing to the ICC and its patrons. They also dovetail altogether too conveniently with Mr. Carson's warnings given to Kenyans just before the last elections: choices have consequences. The USA, Britain, EU, and certain eminent persons in global affairs led this chorus. 'It was a threat made to Kenyans against electing my Government. My Government's decisive election must be seen as a categorical rebuke by the people of Kenya of those who wished to interfere with our internal affairs and infringe our sovereignty'.

More than anything, the speech made it crystal clear, the relations between the court, and by extension the western countries and Kenya was never going to be the same again. The Foreign Secretary Amina Muhammed continued the same theme when in a BBC interview programme 'Hard Talk with Zainab Badawi' she said, the Kenyan case at the ICC has no merit, and therefore, the three should not stand trial.[230]

The confrontational approach towards the West was accompanied by mandatory mention of the East- the short hand of China. In many ways, the ICC cases changed, albeit rhetorically, the Kenya's foreign policy towards the western countries.

Facing East?

Over the past decade, Africa has registered remarkable economic progress. All economic data indicate that Africa's economy is on an upward trend. According to the African Development Bank, in 2010, Africa had a middle class of about 313 million people, or 34 percent of the population. Seven of the world's 10 fastest-growing economies are in Africa. Seventy percent of the continent's people live in countries that posted average growth rates in excess of 4 percent over the past decade.

Alongside these remarkable economic numbers, Africa is urbanizing rapidly. The percentage of people living in urban areas in Africa jumped from 32 percent in 1990 to 40 percent in 2010 and is expected to rise to 47 percent by 2025, according to UN-Habitat. But, China, and not the West that has been at the forefront of taking advantage of the economic opportunities offered by Africa. Abdullahi Boru Halakhe observes

> China understands the continent's economic promise and is keen to be at the forefront of this renaissance. Last week during his visit, Li unveiled at least $12 billion in extra aid for Africa. It includes $10 billion in loans and $2 billion for the China-Africa Development Fund, which facilitates Chinese private investment in Africa. This commitment brings total Chinese credit to Africa to $30 billion, with an additional $5 billion in development assistance (Halakhe, 2014b).

During his maiden Africa visit, the Chinese Premier Li Keqiang visited Kenya to sign a raft of deals. One such deal was a $3.8 billion agreement to construct a 1,800-mile standard gauge railway that will link Kenya, to the East African countries of Uganda, Rwanda and South

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Sudan. According to data from the Emerging Markets Private Equity Association Private equity investment in sub-Saharan Africa reached a five-year high of $1.6bn in 2013 (Sulaiman, 2014).

Chinese model of asking too few questions when it comes to domestic affairs, as well as when signing deals has a certain preference from African countries. 'Many African countries prefer the Chinese policy of non-interference in domestic affairs, especially on human rights, has a particular appeal among African leaders and contrasts sharply with Western nations' rights-based rhetoric. China's benign but inherently problematic approach enjoys broad support not only from the political elite, which loathes accountability, but also from the public, which is seeing the immediate, tangible benefits of infrastructure development' (Sulaiman, 2014). Despite recalcitrant, mostly in public, the Kenya and western countries and especially United States, relations still remains on a solid footing.

Counter-terrorism Funding

Despite antagonistic relations between Kenya and Western countries, Kenya continues to play a key role in the war on terror in the Horn of Africa especially targeting Al-Shabaab in Somalia. Similar to the role Pakistan plays against the Taliban in Afghanistan, Kenya is the centre of gravity in the fight against the Al-Shabaab.

However, unlike the Pakistan, Kenya's decision to be a frontline state in the fight against Al-Shabaab in Kenya carries little political cost to Kenya. However, this uncritical embrace of the counterterrorism project coupled with sending the Kenya Defence Forces into Somalia in October 2011 has exposed the country's domestic security underbelly – its inability to police its ever-porous border, as evidenced by increased incidence of insecurity.

Kenya is one of the largest recipients of US security assistance in Africa. According to a 2013 report by the Congressional Research Service, an independent public policy research arm of the United States Congress, 'Aid in the past decade has increasingly focused on improving Kenya's capabilities to control its land and sea borders and to counter terrorism. In addition to U.S. assistance, Kenyan purchases through the Foreign Military Sales (FMS) program are sizable by regional standards, and have included fighter aircraft, helicopters, and Air Force computer systems' (Blanchard, 2013).

Additionally, 'Kenya receives aid through a regional State Department programme, the Partnership for Regional East African Counterterrorism (PREACT), with related counterterrorism funding totaling over $10 million in FY2012. Kenya is a major African recipient of Department of

Defense (DOD) "train and equip" aid, totalling almost $80 million to date, as authorized under Section 1206 of the FY2006 National Defense Authorization Act (NDAA), as amended, and Section 1207(n) of the FY2012 NDAA, as amended, the latter applying to its role in AMISOM' (Blanchard, 2013).

Kenya is one of the top five global recipients of State Department Anti-Terrorism Assistance (ATA) funding, which supports border and coastal security and law enforcement programs. ATA funds support counterterrorism training for the Kenyan Police, and have averaged $8 million annually in recent years' (Blanchard, 2013).

However, the consequence of Kenya's involvement in Somalia is hard to ignore: the most significant one was when 24 September 2013 when Al-Shabaab attacked a high-end Westgate shopping mall popular with western expatriates, a symbol of the conspicuous consumption of the new Africa. This was a message to Kenya; you take the port of Kismayo, our economic lifeline, and we shall hit your source of economic pride. This attack was preceded and followed by a series grenade attacks. Since KDF entered Somalia, there have been over 80 attacks involving grenades or improvised explosive devices.

Following the deterioration of Kenya's security, the same western countries that have been providing counter-terrorism funding issued travel advisories. This has hurt the tourism industry- a billion dollars industry, which is 10 percent of the GDP. Further, close to 5000 workers have lost their jobs in the industry[231]. But according to Kenya's government, the travel advisories were issued in bad faith: to remind Kenya that election has consequences[232]. In a swift response, Kenya instituted a series of response to the advisories in order to tame the sector downward spiral. More than that, the Kenyan government's reaction to the Travel Advisories demonstrated every statement and move is filtered through the ICC lens. The government claimed the advisories were 'economic sabotage' (Gridneff, 2014).

The western sabotage was a continuation of the election campaign, although post-election has evolved into an official policy default setting. While as a campaign mobilization tool it was effective in energizing the base, in policy terms, it could be harmful if not well calibrated.

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231   *http://www.makekenyabetter.com/2014/05/4000-workers-loses-their-jobs-after-tourists-evacuated-in-the-coastal-region/*

232   *http://www.standardmedia.co.ke/article/2000121587/president-tells-off-west-on-advisories*

Trade, Economic and Humanitarian Assistance

Recent economic figures indicate Kenya and the global West are closely linked. For instance, the EU is Kenya's major trading partner. According to data from Eurostat published in January 2013, 'trade with the EU represents 17.2% of Kenya's overall trade (second is China with 11.7%). In 2011, EU27 exports to Kenya amounted to 14.2% of Kenya's total imports (China = 15.4%), and 26% of Kenya's total exports went to the EU (China = 1%)'[233]

Figure 1 Kenya's trade with main partners 2011, % of total imports vs. total exports[234]

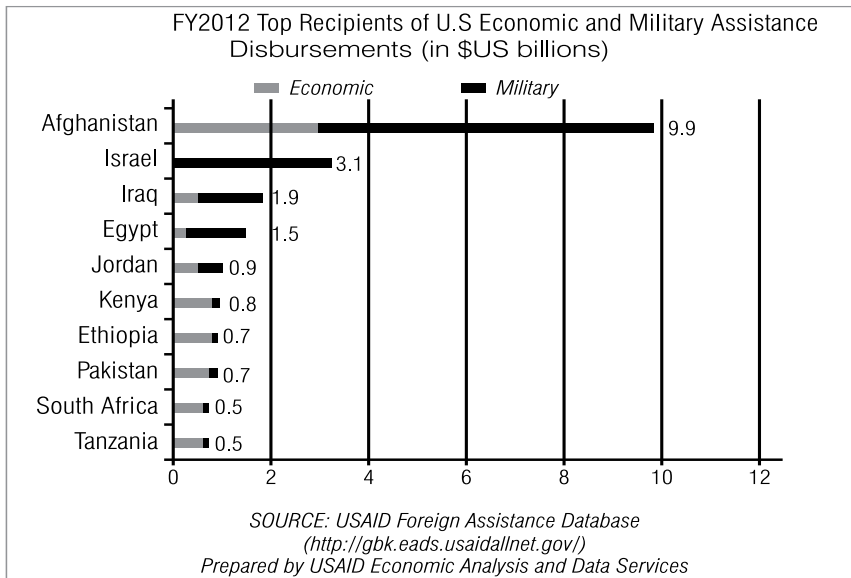Kenya's trade with main partners 2011 (% of Total Imports vs. Total Exports)
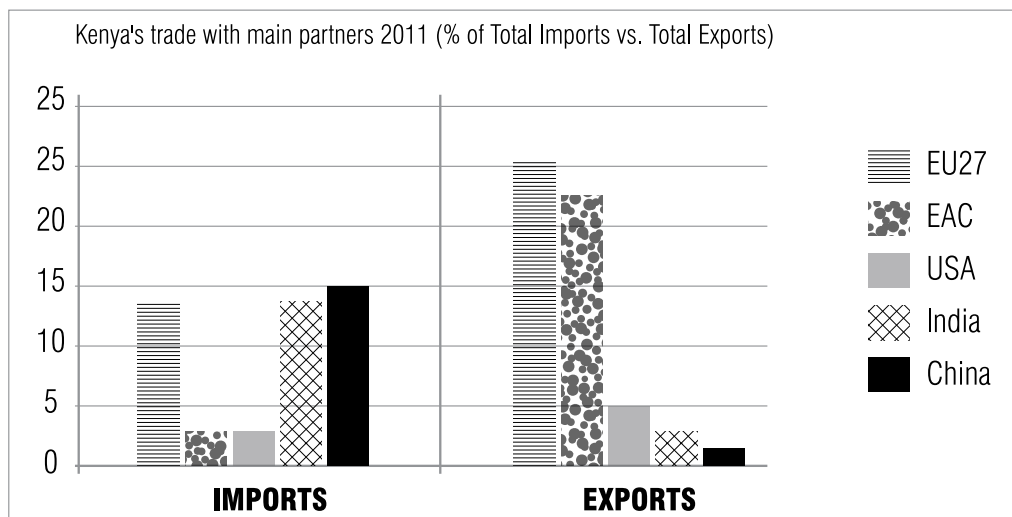
Source: European Delegation in Kenya

Overall, the Kenya engagement mobilized $3.5 million in USG funding, including $619,000 for cooperative agreements and grants and $2.88 million for operations Apart from Ethiopia and Egypt, Kenya has been the largest recipient of the US aid in sub-Saharan Africa.

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233   http://eeas.europa.eu/delegations/kenya/eu_kenya/trade_relation/index_en.htm
234   http://eeas.europa.eu/delegations/kenya/eu_kenya/trade_relation/index_en.htm

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FY2012 Top Recipients of U.S Economic and Military Assistance
Disbursements (in $US billions)

■ *Economic*   ■ *Military*

Afghanistan	9.9
Israel	3.1
Iraq	1.9
Egypt	1.5
Jordan	0.9
Kenya	0.8
Ethiopia	0.7
Pakistan	0.7
South Africa	0.5
Tanzania	0.5

0   2   4   6   8   10   12

SOURCE: USAID Foreign Assistance Database
(http://gbk.eads.usaidallnet.gov/)
Prepared by USAID Economic Analysis and Data Services

Conclusion

This chapter has looked at the involvement of the ICC in Kenya and how it shaped not just the presidential campaigns but also the post-election foreign policy stances taken by the winning coalition. It observes that the ICC involvement was a result of failure of the political class to establish a local mechanism to address injustices witnessed during the post-election violence of 2007/2008 in a historical context where violence has always characterized elections yet no meaningful action is taken. The chapter draws two concluding remarks. First, it argues that while the instrumentalization of the ICC in the presidential campaigns may have been for political expedience by both sides of the elites with different calculus, the Rome Statute creates room for perceived or real manipulation of the ICC especially by powerful states. Second, even though the 'Look East' foreign policy shift rhetoric is not backed by substantive change in Kenya's foreign policy at the present, there is no guarantee that things will stay the same way considering the growing influence of China, not just in Kenya but also across Africa. However, such shift will take long because of Kenya's chequered long history with the West—without the ICC it was inconceivable to see Kenya moving away from the West's orbit.

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New Constitution, Same Old Challenges:

Reflections on Kenya's 2013 General Elections

This book follows up on the publication *Tensions & Reversals in Democratic Transitions* published by Society for International Development and Institute for Development Studies after Kenya's 2007 Elections. It is a product of a series of consultative meetings by a group of civil society actors and academics convened by SID and Uraia Trust to capture the lessons learnt from Kenya's 2013 General Elections and interrogate the actors and factors involved. The book paints a picture of an electoral environment which, buoyed by far-reaching institutional reforms driven by the newly promulgated Constitution of Kenya 2010, raised high expectations among Kenyans that the 2013 elections would not only be peaceful but also a lot more credible than those held in 2007. In the end however, the manner in which the 2013 General Elections were conducted did not show evidence of any remarkable departure from what was experienced previously, despite the raft of legal and institutional reforms carried out. The book attempts to explain why things went the way they did and explores what needs to be done differently in future to ensure more free, fair and credible elections.